CELEBRATING THE OECD ANTI-BRIBERY CONVENTION AT 20, THE FCPA AT 40 & ADDRESSING THE CHALLENGES AHEAD

By Nancy Boswell & Scott C. Jansen*

The year 2017 marks an important milestone in United States and international law – the 40th anniversary of the Foreign Corrupt Practices Act (FCPA) and the 20th anniversary of the signing of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions. Together, these landmark legal reforms have and are reducing corruption in international business and development.

01 Celebrating the OECD & FCPA

02 Argentina's New Anti-Corruption Law

03 ABA Event with Boni de Moraes Soares

04 Anti-Corruption News You May Have Missed

05 Upcoming Events & Call for Articles
Marking these anniversaries, on November 8, 2017, the American University Washington College of Law Anti-Corruption Law Program, with the co-sponsorship of the ABA Section of International Law, the OECD and the Association of Women International Trade, celebrated accomplishments to date and assessed the challenges ahead. Following introductory remarks by Nancy Boswell, Director of the WCL Anti-Corruption Law Program, Kathryn Nickerson, Department of Commerce, and Shruti Shah, International Coalition for Integrity, moderated expert panels.

Ambassador Stuart Eizenstat, Domestic Policy Advisor to President Carter, described the arc of progress, starting from the Watergate scandal leading to the Ethics in Government Act of 1978 and other reforms, and the corporate admissions of foreign bribe payments as common business practice leading to the US adoption of the FCPA.

Subsequent concern that the law disadvantaged US companies competing with companies from countries lacking similar prohibitions and, in some cases, even permitting tax deductions for bribes, led the United States to press the OECD to help create a more level playing field. By the mid-1990’s, the time was ripe, according to Eizenstat, for the adoption of the OECD Anti-Bribery Convention and for the creation of the Working Group on Bribery (WGB) peer-review monitoring process. As a result of these legal reforms and vigorous US enforcement, most major exporting nations now have foreign bribery prohibitions and major multi-nationals have ethics and compliance programs.

On the key question of enforcement under the Trump Administration, John Cronan, Principal Deputy Assistant Attorney General at the US Department of Justice Criminal Division, noted that corruption disadvantages companies that play by the rules, threatens US national security, and fuels organized crime.

Therefore, according to Cronan, the US will continue to lead on enforcement, notably in prosecuting individuals, as under the April 2016 Pilot Program (and the Revised FCPA Corporate Enforcement Policy issued on November 29, 2017), rewarding corporations for voluntary self-disclosure. It will also foster enforcement by other countries, particularly more coordinated resolutions so companies do not ‘pay twice for the same conduct.’

Other panelists expressed support for negotiated settlements provided they are consistent across countries and transparent. The WGB is working to ensure such consistency, according to Brooks Hickman, Analyst in the OECD Anti-Corruption Division.

Speakers noted progress across the corporate community in adopting ethics and compliance programs and training. However, Heather Lowe, Legal Counsel and Director of Government Affairs at Global Financial Integrity, cautioned that the DOJ’s emphasis on prosecution of individuals, although a powerful deterrent, may also lessen pressure on companies. Panelists also questioned how prosecutors will assess the adequacy of corporate compliance programs in countries permitting such a defense.
The enforcement picture outside the US is decidedly mixed, according to Drago Kos, Chair of the WGB. He commended the US, UK, Brazil and several central European countries for taking action, including over 500 ongoing corruption/bribery criminal investigations in 21 countries, and the widespread adoption of corporate criminal liability laws, a groundbreaking change.

Nonetheless, he underscored the serious challenge presented by the 22 OECD members, who after almost two decades of monitoring, are still not enforcing their laws, and by the major exporters who are not Parties to the Convention or members of the WGB. His key message was that the WGB is considering urgently needed additional measures, including naming and shaming, to foster enforcement among all members and to engage non-members more actively.

Securing vigorous enforcement by all major exporters is a priority for the American business community as is attention to the demand side of corruption transactions, according to Eva Hampl, from the United States Council for International Business. DOJ is taking steps on the demand side according to Leo Tsao, Assistant Chief of the Fraud Section’s FCPA Unit. He noted charges against foreign public officials under money laundering, wire fraud, and other federal statutes and capacity-building and cooperation with foreign prosecutors in bringing cases.

Similarly, the DOJ Kleptocracy Unit has successfully tracked down and seized proceeds of foreign corruption in the US, according to Dan Claman, the unit’s Principal Deputy Chief. Increased legal cooperation among OECD members is leading to more cases against foreign public officials and confiscation of their illicit gains. Nonetheless, Claman underscored that obstacles remain.

Among them is the lack of beneficial ownership transparency, which, according to Lowe, impedes law enforcement in tracking financial flows. She cited the Panama and Paradise Papers revelations of the role of anonymous companies in hiding terror finance and corruption and pointed to the ease of establishing anonymous companies in the US. Given the need for greater transparency of the true owner of bank accounts and legal entities, Lowe welcomed a good chance of congressional action on proposed US legislation requiring beneficial ownership transparency to law enforcement authorities. Fortunately, many other countries are taking action, including creating public registries for beneficial ownership information.

As to the way ahead, the panelists agreed on the need for continued US leadership and for G20 action on both the supply and demand side of bribery as well as on beneficial ownership transparency.

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ARGENTINA'S NEW ANTI-CORRUPTION LAW

By Roberto P. Bauzá*

In response to long-standing requirements and recommendations by the UN and the OECD, honoring certain commitments assumed by Argentina before the G-20 and following the latest international trends in anticorruption prevention and enforcement, in October 2016 the Argentine government sent to Congress a bill intended to establish criminal responsibility of corporations for acts of corruption (bribery and other related crimes). The bill was the subject of much political debate and underwent several amendments at successive rounds through the Chamber of Deputies and the Senate. Eventually, it was approved and became law on November 8, 2017.

Before the law was passed, only individuals were criminally responsible for corruption-related crimes in Argentina. Criminal corporate responsibility was limited to a few other crimes such as money laundering, financing of terrorism and some infringements to customs, foreign exchange and competition regimes.

In fact, Argentina was the last of all signatories of the OECD Convention on Combating Bribery of Foreign Public Officials to implement corporate responsibility for acts of bribery.

Originated in theories of economic analysis of the law, the explicit purpose of the legislation is to create strong and effective incentives for compliance in the private sector. Faced with the prospect of receiving heavy penalties themselves, corporations and other legal entities should cooperate in discouraging, preventing, detecting and sanctioning corrupt behavior of their employees, officers, agents and other related third parties.

The law follows in some aspects the Brazilian Clean Companies Act N°12,846, which together with the Chilean law, the UK Bribery Act, and the FCPA were expressly recognized as relevant precedents in the statement of purpose of the bill. The main features of the law are as follows:

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**SCOPE**

- The law establishes liability of private legal entities of Argentine or foreign ownership, (even if they are partially owned by the State) for the following crimes: (a) bribery and influence peddling (national or transnational), (b) negotiations incompatible with the exercise of public functions (i.e., in conflict of interest by the public official), (c) extortion, (d) illicit enrichment of public officials and (e) false financial statements and reports, when used to conceal bribery.

- Companies are responsible for criminal activity done directly or indirectly on their behalf, for their benefit or in their interest. The company will be exempt from liability only if the persons who committed the crime acted for their exclusive benefit and without generating any benefit to the company.

- In cases of transformation, merger, spin-off or any other corporate modification, the liability of the company is transmitted to the continuing or surviving entity.

Significantly, the definitive text excluded a clause of the original bill which broadly provided for liability upon acts by third parties (such as suppliers, contractors, and distributors). Therefore, the entity will only be liable for acts by third parties if they fit within the general attribution mechanism (i.e., acts that benefitted the entity or made expressly on its behalf).

**EXTINCTION OF THE CRIMINAL ACTION**

Criminal action against the company may only be extinguished by amnesty or the run of the statute of limitations. Termination of actions involving individuals (authors or participants in the criminal act), will not affect the validity of the action against the company.

**PENALTIES**

- In all cases, a fine shall be applied, ranging from 2 to 5 times the undue benefit obtained by the company as a result of the criminal activity. Judges will determine the specific penalty according to certain parameters such as amount of damage, involvement of high management, size and economic capacity of the company, violation of internal rules, self-denunciation by the company, collaboration with the authorities, and recidivism.

- Additionally, penalties may include (upon judicial assessment): (a) suspension of the company’s activities for up to 10 years; (b) loss or suspension of any subsidies or other government-granted benefits; (c) exclusion from public contracts and calls for bids for up to 10 years; (d) termination of legal existence, but only in cases where the commission of crimes is the principal activity of the legal entity; and (e) publication of the judgment.

- Loss of title over goods and disgorgement of profits obtained from the illicit activity are also contemplated, in accordance with applicable provisions of the Argentine Criminal Code.
**EXEMPTION FROM RESPONSIBILITY**

Companies may be altogether exempt from responsibility and penalty provided these three elements are present:
- The company has spontaneously reported the criminal activity to the authorities;
- An adequate compliance program was in place before the crime was committed; and
- The company has returned the undue benefit obtained.

**COLLABORATION AGREEMENTS**

The entity being indicted may enter into a collaboration agreement with the prosecutor, and obtain a reduced penalty in exchange for relevant information and collaboration in the investigation. Terms of the collaboration agreement must, at a minimum, include payment of a reduced fine, disgorgement of profits, and loss of title over assets obtained from the illicit activities. Other terms may include performance of community service, disciplinary measures against involved individuals, payment of damages, and implementation of compliance programs (or improvement of existing ones).

**COMPLIANCE PROGRAMS**

- The law establishes general criteria and some specific contents that compliance programs must fulfill to qualify for penalty mitigation or exemption.
- An adequate compliance program will also, from now on, be a requirement for entering into public concession agreements and other contracts with the federal administration.
- Mandatory elements include a code of ethics or conduct, specific rules for interaction with the public sector, and periodic training sessions. In turn, some of the optional components are: periodical risk-analysis, internal communication channels to report irregularities, whistleblower protection mechanisms, internal investigation system, proper due diligence of third parties and during corporate reorganizations, constant monitoring and assessment, and an internal compliance officer or responsible person.

**RECIDIVISTS REGISTRY**

- The law mandates registration of sanctions within the National Recidivism Registry, which is a part of the National Ministry of Justice and Human Rights.
- A company shall be considered a repeat offender if it commits a new crime within three years from the issuance of a previous judgment.
EXTRATERRITORIAL EFFECTS OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

The law modifies Section 1 of the Argentine Criminal Code, by giving jurisdiction to Argentine courts over bribery of foreign public officials committed abroad by Argentine citizens or legal entities domiciled in Argentina. This amendment had been a specific recommendation by the OECD and it is relevant because, to date, this crime could only be prosecuted to the extent it was committed within the Argentine territory or had effects in it.

INCLUSION OF FINES FOR CERTAIN CORRUPTION-RELATED CRIMES

The law further modifies the Penal Code by including substantial fines (in addition to prison sentences) for several corruption-related crimes involving public officers or interposed persons.

STATUTE OF LIMITATIONS

The law sets the statute of limitation at six years for corruption crimes attributable to companies.

CONCLUSIONS

The law is a very important step for the full integration of Argentina in the international community, and accomplishes a milestone much awaited both domestically and abroad.

With a culture of compliance still in its infancy and largely limited to subsidiaries of multinational companies subject to the provisions of the FCPA or the UK Bribery Act, the law poses a substantial cultural challenge to the Argentine business community.

Additionally, being a criminal statute, it will require prosecutors and courts to become up to date with concepts largely unfamiliar to “ordinary” criminal enforcement, as well as developing uniform criteria for attribution of responsibility, collaboration agreements and sentencing.

Finally, to a large extent its overall effectiveness will also depend on other pieces of legislation that are still on the make (such as the Asset Forfeiture Law) or have not yet played a decisive role (as the individual plea bargaining or “Repentant Law”).
On December 7, 2017, the ABA CJS Global Anti-Corruption Committee hosted an event featuring Boni de Moraes Soares, a Brazilian federal prosecutor from the Advocacia Geral da União ("AGU"), which is akin to the U.S. Office of the Solicitor General. Mara Senn of the U.S. Department of Justice moderated the event, which was held at Miller & Chevalier Chartered. Mr. Soares began his presentation by providing an overview of Operation Car Wash. Through that lens, Mr. Soares explained how the same corrupt act may cause a natural or legal person to be subject to multiple types of liabilities in Brazil including criminal, administrative, and civil liability and described several laws that establish such liability.

In particular, Mr. Soares differentiated between Brazil’s Anti-Corruption Law (commonly referred to as the Clean Companies Act) (Law No. 12,846/2013), which establishes strict administrative and civil corporate liability for acts of corruption against national and foreign public officials, with the Administrative Improbability Act (Law No. 8,429/1992), which creates civil and administrative penalties for corrupt acts that result in a detriment to Brazilian public entities or the “public administration.” The Administrative Improbability Act applies to public officials or to anyone who, even if not a public agent, induces or competes for the act of impropriety or benefits from the illicit enrichment, directly or indirectly. In addition, he explained that individuals may be held criminally liable under the Brazilian Criminal Code for a variety of corrupt acts, including passive and active corruption. Except in very limited circumstances (e.g. certain environmental law violations), corporations cannot be held criminally liable under Brazilian law.

The discussion of liability led to a conversation about the various entities in Brazil that are responsible for investigating and prosecuting corruption and related offenses, including the Federal Police (Policía

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Federal, the Public Ministry (Ministerio Público), the AGU, and the Ministry of Transparency, Supervision and Comptroller-General (Transparência e Controladoria-Geral da União). When asked about the coordination among the entities in the context of negotiating settlement agreements, Mr. Soares noted that the relevant entities have taken steps to improve coordination. However, he stated that it is prudent to consult the relevant laws to determine which entity is tasked with enforcement. In addition, he cautioned that finalizing a settlement with one agency does not necessarily preclude another agency from later pursuing the same person or company.

Following his presentation, Mr. Soares took questions — several of which were related to the impacts of increased international cooperation. Stemming from the DOJ’s recently-issued FCPA Corporate Enforcement Policy, as incorporated in the United States Attorneys’ Manual as Section 9-47.1, Mr. Soares was asked how attorneys should handle advising clients regarding self-disclosure in Brazil if a client is subject to jurisdiction in both the United States and Brazil and plans to self-disclose in the United States. Mr. Soares was frank in stating that, at least in the near future, he did not believe an option would exist where a company or individual could self-disclose in Brazil and gain the same sense of certainty that they will be subject to a one-track investigation, as, for example, may occur in the United States.

When asked about the process by which cooperating governments determine how to split penalties, Mr. Soares offered an overview of the arguments for both “victim” and “financial center” states receiving the lion share of the penalties. Ultimately, however, he stated that penalty splitting is determined on a case-by-case basis, rather than based on objective criteria.

As Operation Car Wash continues to lead to coordinated resolutions with Brazilian and U.S. authorities, events such as Mr. Soares’s presentation are increasingly important so that lawyers can better understand the similarities and differences in the two jurisdictions.
ANTI-CORRUPTION NEWS YOU MAY HAVE MISSED

CORRUPTION IN NIGERIA
A study by the United Nations Office on Drugs and Crime found that from June 2015 to May 2016, 32.3% of Nigerian adults were asked or required to pay bribes, and that bribe payers in Nigeria spent 28.2% of their monthly salary on bribes. This is the first comprehensive nationwide household survey on corruption to be conducted in Nigeria and in Africa at large.

MALAYSIA'S CORRUPTION PREVENTION
Corruption in Malaysia is decreasing compared to the rest of East Asia following the rise in the number of informants providing information to the Malaysian Anti-Corruption Commission (MACC). MACC’s deputy chief commissioner assured the public that their identities would be kept confidential and urged those who were still skeptical to use mobile apps or the portal to report any suspected corruption.

TUNISIAN LAW GIVES AMNESTY TO CORRUPT OFFICIALS
The Tunisian parliament passed a law granting amnesty to officials accused of involvement in administrative corruption. The law was revised to exclude amnesty for those who receive bribes. The law’s passage led to national protests and backlash from international media and human rights groups.

LONDON BUS TOUR EXPOSES MONEY LAUNDERING
Anti-corruption group ClampK created a London dirty money bus tour--“Kleptocracy Tours.” The tours label London "as the most corrupt place in the world." This year Transparency International identified $5.4 billion in London properties that were purchased by individuals with suspicious wealth. As part of the tours, activists deliver "Unexplained Wealth Order" letters to the properties owners, which technically can force those with mysterious wealth to explain where it originated.

PORTUGAL'S FORMER PRIME MINISTER CHARGED WITH CORRUPTION
Former Socialist Prime Minister José Sócrates was charged with a total of 31 crimes, including allegations of corruption, forgery, tax evasion, money laundering, and receiving bribes totalling 34 million euros. Sócrates resigned in the middle of his second four-year term in 2011 after requesting an international bailout during Portugal’s escalating debt crisis.

SLOVAK EX-MINISTERS SENTENCED IN CORRUPTION CASE
Former Construction and Development Ministers Marian Janusek and Igor Stefanov were convicted for rigging a $141.7 million procurement deal for legal and advertising services to ensure the Slovak National Party would win. The two men served in Prime Minister Robert Fico’s cabinet and received $35,000 fines along along with jail time.

WINTER 2018 NEWSLETTER
BAHAMAS LEGISLATION TO COMBAT CORRUPTION
Prime Minister Hubert A. Minnis is introducing more advanced anti-corruption legislation "inclusive of Asset Confiscation and Public Disclosure" along with an Integrity Commission Bill. The prime minister said the government will continue conducting forensic audits of government ministries, corporations, and departments to identify any illegal practices.

SON OF EQUATORIAL GUINEA'S PRESIDENT CONVICTED OF CORRUPTION
On October 27, 2017, Teodorin Obiang was given a three-year suspended jail sentence and a $35 million fine by a French court. Teodorin was convicted for embezzling tens of millions of euros from his government and laundering the proceeds in France. In 2012 the U.S. Department of Justice estimated that Teodorin spent $315 million around the world between 2004 and 2011 on car, property, and luxury items.

MEXICO GOVERNMENT "GRAVELY DEFICIENT" IN ITS ANTI-CORRUPTION PLAN
A Reuters report asserted that the Mexican government’s anti-corruption plan is "gravely deficient." International Action Financial Group, a group of international governments working together to combat money laundering, found that in 2014 around $58.5 billion was generated from crimes such as tax fraud and narco-trafficking.

VENEZUELA ARRESTS PRESIDENT OF STATE OIL COMPANY
Venezuela arrested the head of Bariven, a subsidiary of Venezuela's state oil company, PDVSA. Francisco Jimenez, the head of Bariven, was detained along with another executive, Joaquin Torres. About two dozen high-level executives were previously arrested, affecting PDVSA's top management.

ECUADOR'S VICE PRESIDENT JAILED FOR CORRUPTION
In December, Ecuador's Vice President Jorge Glas was sentenced to six years in prison for receiving bribes from Brazilian construction company Odebrecht in exchange for securing government contracts. Glas was accused of receiving $13.5 million from Odebrecht. Odebrecht admitted to paying $33.5 million in bribes in exchange for contracts in Ecuador.

ROMANIANS PROTEST WEAKENING ANTI-CORRUPTION POWERS
More than 7,000 Romanians gathered to protest governmental action that the protesters viewed as allowing high-level corruption to go unpunished. In February 2017, a decree was proposed that would have protected dozens of public officials from prosecution. Just two weeks later, after some of the largest street protests, it was rescinded.
UPCOMING EVENTS

2018 Annual Meeting of the Section of International Law in New York, April 17-21, 2018

The Anti-Corruption Committee is sponsoring the following programs during the Annual Meeting:

• Gaseoso, Oplata, and Bribes: How Corruption and Anti-Corruption Around the World are Evolving – April 18 at 11:45 to 1:15

• Enforcement without Borders: The Rise of Cross Border Anti-Corruption Investigations and Their Impact on Global Corruption – April 17 at 4:20 to 5:10

Additional information about the Annual Meeting may be found here: https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=281231667.

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 Jessica Tillipman at jtillipman@law.gwu.edu.

The deadline for the Spring 2018 Newsletter is March 23, 2018.
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