

Transparency International
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Avoiding the Pitfalls: Don't get Shafted

Welcome & Role of TI

Mr. James M. Klotz *Chair and President of TI- Canada*

- Welcomes Jim Peterson who says combating corruption single greatest barrier in sustainable development- important cause near and dear to the mandate of Fasken Martineau DuMoulin.
- Brief overview of history of international and Canadian context, mission in Canada, the criminalization of bribery to foreign officials. Had been listening to CBC radio and reflecting on the need for more transparency, references the Jaffer case and a breaking case (brief made to RCMP re. Blackfire mining watch. Company was operating in Mexico where environmental protestors were active. The allegations are that Blackfire paid off local officials to make it easier to deal with protestors). Issues of transparency relevant at the local and global level.

Dr. Marketa Evans, *Extractive Sector Corporate Social Responsibility Counselor, Department of Foreign Affairs and International Trade*

- Provided a bit of her background and noted she used to be on Board of TI-Canada; had to step down with new position.
- Corruption, in general, plays against Canadian values and interests; framed it as an issue of social justice. In last job, a global development NGO, obvious that the poorest are often the most affected by issues of corruption. Today, interest is more in business side of corruption but business and social justice go hand-in-hand.
- **Introduced role and genesis of CSR Secretariat - announcement, standing committees and round tables across country.** Four pillars: host country governance capacity, promotion of voluntary CSR guidelines, CSR Centre for Excellence, Extractive sector CSR counselor.
- CSR Counselor: mandate and role- not silver bullet; needs to work with business, government and public service. It is a 3 year position, located in Toronto, reports to Minister of International Trade (arm's length relationship) and reports to Parliament every year. Mandate of the role - reviews CSR practices and advise stakeholders on implementation of the performance standards.
- Standards: IFC Performance standards, voluntary principles on security and human rights, OECD Guidelines for Multinationals and Global Reporting Initiative.
- Next few months: opening of office (opened this Monday), having conversations with anyone who is interested, creating review mechanism (focus on prevention problem solving, performance improvement). Provide benchmarks for existing mechanisms. International financial institutions have created and even evaluated some of their own mechanisms- explore these evaluative methods. Listening to what makes sense for the country. Expected: opening office, website, draft rules for procedures, public consultations, rules of procedure established, close work with CSR Centre for Excellence.

Mr. Joe Ringwald, *Member, Interim Executive Committee, Centre for Excellence in Corporate Social Responsibility*

- Centre for Excellence, created by DFAIT. Role of Centre is both education and information sharing. Can be understood by market as a first line of help, working to develop, disseminate best practices and create CSR networks. Right now the primary focus is on the extractive sector; intention is to eventually work with other industry sectors.
- This is a multi-stakeholder process. Aim is to provide information and tools to all society stakeholders. Although it is a diverse group driven by multi-stakeholder collaboration it is very important to enable and facilitate the uncomfortable discussions that must happen.
- Roundtable dialogues were intended to be a safe place - transparent and collaborative. Five multi-stakeholder consultations (Ottawa, Vancouver, Calgary, Toronto, Montreal). There are on-going discussions and opportunities for participation.
- Currently there is an Interim Executive Committee and the priority is to determine how to get off the ground. Focus: building governance structure in preparation for true executive committee (selection still to be determined, likely around 25 to ensure that all stakeholders are represented).
- Canadian Institute of Mining, Metallurgy and Petroleum (CIM) is current secretariat and host. They are the leading professional association (no lobbying). CIM was asked to be secretariat (for first 3 years).
- Development to date: 2009 - information gathering, research, and accumulating existing data. They are not reinventing the wheel but creating one stop shop online.
- Next steps revolve around determining: What role the centre should play? Key issues and how do we address them? How to ensure Centre remains unbiased? How do we fund the centre?

Insp. Gordon Drayton, *OIC Sensitive Investigations and International Corruption, Royal Canadian Mounted Police*

- Considers the definition of corruption (occurs when officials in the public and private sectors improperly and unlawfully enrich themselves, or others, by misusing the power entrusted to them. This includes embezzlement of funds, theft of corporate or public property, influence peddling, bribery, extortion, and other corrupt practices). Raises questions around: How is corruption handled? What is a bribe? Consider a police officer who is offered a free coffee. What is the line? When in doubt ask: are actions legal? Am I being fair and honest? Does something feel wrong? How would this look in the newspaper? Would I like my

child, mother, friends to know what I've done? (Taken from Zero Tolerance Campaign)

- Enforcement of Corruption Laws: Municipalities - municipal policing, Provincial Government - provincial police or contract with RCMP, Federal Government-RCMP. Today there are many integrated groups, and as issues become increasingly complex they require additional expertise and support from various policing structures.
- Offenses: Related to Government Officials - bribery, breach of trust by public official. General Offences - breach of trust, forgery, and fraud. International Offences- Corruption of Foreign Public Officials Act (CFPOA). Territorial Jurisdiction and National Jurisdiction of the CFPOA is an issue.
- In Britain, there was an interesting case, where a company was fined £6,000,000 – with part of the fine paid towards the cost of the prosecution. Britain has great examples of how to deal with corruption and fraud in corporations.
- Confusing division between Facilitation Payments and Bribes (Canada will likely use US case law as a reference point). When the payment is a large amount it will be hard to say it is not a bribe.
- 2003 - UN adopted the Convention against Corruption. In 2007, Canada ratified the Convention with the RCMP teams formed in 2008. Investigations are complex and take a long time, especially when dealing with another country. The RCMP International Anti-Corruption Teams are asked when charges will be filed; however, Canadian privacy laws do not allow the RCMP to discuss cases. All that can be said is our International Anti-Corruption Teams investigators are working hard and are being very careful not to jeopardize investigations just to lay a charge.
- Three corruption policy centers in Canada: Department of Justice, Department of Foreign Affairs and International Trade, RCMP. Role DOJ: International Responsibilities, International Assistance and Regional Councils. Role of DFAIT- Review, process, report. RCMP - (federal international investigation) - the International Anti-Corruption Team is in the Financial Crime Directorate of the RCMP. The Director General of Financial Crime – is Assistant Commissioner Stephen White, who has an incredible wealth of knowledge on Financial Crime. The Financial Crime Directorate is made up of Integrated Market Enforcement Branch, Proceeds of Crime Branch and the Commercial Crime Branch. The International Anti-Corruption Units located in Calgary and Ottawa fall under the Commercial Crime Branch. The International Anti-Corruption Team mandate is investigation, prosecution, prevention and detection. During investigations the Teams can also use the resources of the other units.
- Prosecution: Attorney General of Alberta might take on this role in Alberta; the Public Prosecution Service Canada will prosecute the cases in Ontario. The RCMP investigates and put court briefs together for the prosecutor.
- Prevention is one of biggest roles but needs a lot of work. It compares to impaired driving, which in the past was acceptable; however, it is no longer acceptable by society; there has been a change in its perception. Now we have to do the same with corruption. The name has been changed from bribe to corruption which is

much harder sounding word than bribe - change in language is very important and will help to change the perception of bribing foreign officials.

- Detection: very reactive; busy section. Being proactive is difficult because the units tend to be so busy reacting to issues it is a challenge to find the time/resources to be more proactive.
- Protection of personal reporting corruption is important – Whistle Blower legislation and Privacy of Investigation help protect people that report corruption. People don't realize that during the investigation you are protected by privacy laws; however, at the end of investigation, if charges are laid the law requires much of the investigation to be disclosed to the defense. The Whistle Blower legislation adds protection of retribution from employers on the witnesses that come forward.
- Checking on Government: Ombudsman, Access to Information, Auditor General.
- Is Canada free of corruption? Would say that Canada doesn't tolerate corruption. Must stay vigilant and continue with investigations. Working well in UK and US; not sure how it will move forward in Canada. Referenced Canada's top scandals dating back to 1873. Through history a number of different events have been acted on. RCMP hear that they aren't doing anything but enforcement is out there and charges are regularly laid throughout Canada. People are thankful when enforcement is working and believe that Canadians want to see change. Can forward additional questions to either of the two teams located in Ottawa and Calgary.

Mr. Brian Chilton, Of Counsel, DLA Piper LLP (US)

- Background: public sector prosecutor before working with most recent firms. Was working in tax law, that took into the Whitewater scandal with President Bill Clinton and you end up in a situation with Monica Lewinsky delivering pizzas- it can happen fast. If you really want to learn about corruption sit at the gates of Disney or Las Vegas and you will learn a lot!
- The Foreign Corrupt Practices Act (FCPA): illegal to bribe a foreign official (comes out of Watergate hearings). FCPA makes it illegal to give anything of value to foreign government officials. Imposes required record accounting/record keeping for companies listed on US stock exchange.
- There has been an explosion in the number of cases over the last couple of years, more in last 2 years than last 20. Law was on books for a long time, but enforcement really only in last 5 years. DOJ, eat what you kill approach and that is what funds the department. The amounts have become so large, they have no budget issues. Led by: Mark Mendelson & Lanny Breuer 120 companies remain under investigation (8 agents assigned). Companies coming in often enough that it remains very reactive (like Canada) but changing. US gone from reactive to more organized industry investigations: oil and gas more but moving toward mining, especially due to relationships with China.
- There is a DOJ focus on industries, example pharmaceuticals.
- Fines have increased: used to be a cost of doing business, not ever considered stealing, but because DOJ has been looking at corruption as a CRIME, the penalties are on the increase. 2005-2009 same amount of money in bribes

- identified but the penalty dramatically increased. Shift from corruption as a country club crime to a serious and punishable crime. These crimes are treated like all other criminal investigations, wiring people, trading information, sentencing, jail time. It is very important for Canada to send that same message to companies - that corruption is a serious crime and will be treated as such.
- Companies used to just write cheques, but now the DOJ wants to know the human faces taking responsibility for foreign transactions. Personal accountability accompanies standard fines. Previously, US had not prosecuted the government officials but that too is changing, 2 cases now for prosecution. Now, international issues can be looked at from a breadth of applicable laws. Also, agents are learning how to ask the questions that need to be asked.
 - Amount of international cooperation needed today is complex. Getting easier to get international cooperation than it was in previous years. Collaboration is becoming much more effective. Trials are also increasing, and accessing information in foreign countries also becoming easier.
 - Las Vegas Sting 2010: Only sharing what has been published in press because a client is involved. Most citizens and companies were not solely American. Incredible resources required to arrest 22 people (gun show- all carrying weapons- 6 agents for every arrest). One guy had a small FCPA violation and asked who else do you know? Who else don't you trust? Wired him and let him go talk to people (this is the type of strategy typically used on organized crime and drug enforcement- rarely would it have been used in white collar).
 - How did we get here? Brought on by a globalized world, transnational business, increased enforcement standards, and legal unpredictability. Companies face prospect of being delisted, independent auditors, voluntary (kind of) disclosure. These all contributed to increased prosecutions.
 - See no evil, hear no evil, speak no evil: willful blindness is enough to be prosecuted- particularly as a board member.
 - Nature's Sunshine Products: CEO/CFO aware of potential red flags, no evidence they knew, they were not even managing the specific employees. But because they failed to follow up on suspicions they were held responsible. Also consider, when you fail to have the necessary controls in place to monitor/control issues of corruption, one might be found criminally responsible.
 - Worldwide reach of US: precedence for many of these laws comes from old admiralty/colonial laws. Any ship under a sovereign's flag is responsible to that country's law. Jurisdiction not usually an issue, easy to address with today's communication technology-email (routers in US is enough). Email only has to address the legitimate parts of transactions (because the bribe is tied up in the transaction). Very broad jurisdiction, and the US is leading these issues.
 - Alcatel, Christian Sapsizian, Deputy VP for Latin America: Depositary shares/receipts traded on NYSE, enough for jurisdiction. Touched down in Miami and was apprehended.
 - Prosecution of BAE Systems: Complaints from corporations that countries are making it too difficult to do business (compared to France where you deduct bribes in taxes). UK felt went as far as could and contacted US for further action.

- DOJ working with people all over the world; UN stresses that countries often don't have the resources to deal with corruption, US will assist if information is handed over.
- Take away: That the progress talked about really just happened in the last 5 years, and that because of the significant resources Canada has directed to anti-corruption it will probably happen much faster here.

Discussion

- James Klotz suggests that the question/answer start with CSR and move into anti-corruption.

Going first to Joe Ringwald, what was the discussion of stakeholders moving forward (Center CSR Excellence)? Wondering about the conflicting positions...

Joe Ringwald: Suggested Andrea Baldwin better placed to address the question. Have to consider - what is the definition of CSR? Everyone has their own interpretation. Part of the challenge is how to move forward on one vision/statement.

Andrea Baldwin: what unites the group is that everyone wants to move forward (philosophically, morally, from business perspective) but there are still many divisions. By finding shared space/overlap, it is easier to make progress.

Joe Ringwald: More focused on unity, identifying a path forward and sharing information.

Question: CSR has a strong proactive position (referring back to Blackfire) and could potentially be understood as a bridge between anti-corruption and other forms of more traditional CSR. Maybe CSR could be an opportunity for companies to think about these things before they end up in a huge mess? In countries in transition, different groups take responsibility for different segments of social responsibility - is one way around this documenting what you do; is it used extensively, i.e., documenting violations in the interest of transparency and eventually accountability?

To Brian and Gord: (connected with question above) What would be the impact of sentencing? Gord, what are the implications in Canada? Can you responsibly break the law? Not like driving drunk.

Joe Ringwald: compares infractions to asking for a light from the prison guard, one week, and a cigarette the next. There is a natural escalation, and question ends up being how do you control that and where do you draw the line?

Brian Chilton: Want to comment on sentencing guidelines, which use principles of federal prosecution. They require companies to detect and grade managers detection of corruption. Question might be, is this a really bad guy or someone who did something stupid? This translates into a corruption culture. Identifying difference between individual responsibility and company responsibility. Formerly, people turned blind eye if was not something that directly affected them, but companies have changed these attitudes.

Question: \$400,000 for a first nations community (referencing a compensation amount), could signal quite a change for the realities of the population. How companies monitor or maybe take some kind of responsibility for the outcomes and seeing the entire process through?

Joe Ringwald: Amount (dollar) determined by cost of education and training for community members. Relationships with the eight nations connected with our project are very respectful and close. The company deals through economic development offices and there is a specific structure in place, for distribution of funds. In addition chiefs and elders are incredibly honourable and ethical. We have a 4 year relationship that is taken very seriously.

Marketa Evans: Just to clarify, do funds flow through economic development offices and they also rely on other forms of funding?

Joe Ringwald: Yes.

Question: That makes sense for an Aboriginal community here, but what about a foreign country? How accountable does an organization have to be for where those payments go?

Brian Chilton: That is the willful blindness that I referred to earlier. Have to have due diligence - that is the minimum. If there are red flags - obligations to follow up. There needs to be adequate compliance - all funds are distributed according to company policy. By virtue of having money involved. i.e., which are your assets, you have a serious responsibility for the money.

Question: CSR relates to C-300 John MacKay's private members' bill. Two years before the official CSR policy was introduced the members bill was in front of the house. At that time, the government of Canada bill was called too weak. Was the mandate widened?

Marketa Evans: It wouldn't be appropriate for me to comment on C-300. There are 5 parts to the review process and this is why the unpacking of the rules of procedure is so crucial - because there are so few specifics listed (it is only 2 pages). It didn't see a lot of daylight, in its preparation.

Question: Not much daylight? 5 parts review process? Please explain.

Marketa Evans: I encourage to check words on website for clarification. "Daylight" means no kind of automatic sanction. There's not a lot of difference between the two, and there was not a lot of debate between the two.

Question: Not a lot of case law on the books, so how do you figure out responsibility? Do you trust information from other countries, if they are already to vulnerable to bribes and corruption?

Gord Drayton: Like any evidence it has to be evaluated against a larger puzzle. That's all you can do.

Brian Chilton: Always had people from inside acting as whistle blowers in investigation - but you always weigh the information against a larger pool of data. This has been the case in practice of law for many, many years..

Question: Is there is a difference between Willful Blindness and simply not knowing how to do business in a foreign country? Isn't it the company's responsibility to find out how to do business, legally?

Comment: In Iraq, it costs \$3000 to get a driver's license. Should we be focusing on "bad guys" or focus on transparency and prevention?

James Klotz: Canada has a position. There are countries where you can't do business without bribes. So, you, as a Canadian, CANNOT do business with those countries - a real challenge for corporations.

Question: But "we" (Canada/US) had a hand in creating systems and structures that involve corruption (through invasion of Iraq/position on Afghanistan, for example). Doesn't that create a responsibility?

James Koltz: We, Canada, criminalized corruption. It is not a question, anymore.

Question for Brian on FCPA: If you take all tools for obtaining prosecutions and corruption, take away grand jury, voluntary disclosure, how would this affect the outcome of your department?

Brian Chilton: That is why, before tools, we only had 4 prosecutions. Our system comes out of American legislation in other areas and provides the structure to make prosecutions possible. We deputize accountants/boards who don't want to go to jail for mid level employee acts.

Question: Going back to the \$400,000 discretionary payment, what is the responsibility when the funds are paid out to a foreign country rather than an Aboriginal band in Canada? There are issues of sovereignty/rights that are beyond the world of business. But is there any vulnerability for corporations who pay funds to other countries, which might in the end be misused?

Brian Chilton: There are some dicier parts of the world. Be sure to always write the cheque to the government always. Never pay to government officials directly.

Joe Ringwald: Think about the blood diamond issue. You can trace the ancestry of any stone but this is not the case for oil and gold. Difficult to track such issues and at the end of the day, what right do we have to demand accountability from other countries/ bands?

James Klotz: Not sure that Canada agrees that just making cheque payable to government satisfies Canada's requirements- although not yet tested.

Brian Chilton: With the increasing seriousness of laws, today, most companies do realize even a small bribe can make company very vulnerable. There are tremendous generational shifts in attitudes to accountability.

Comment: There is a danger in listening to lawyers, because they only consider what is legal. There is also great corruption in humanitarian organizations, here in Canada. Have to consider the work and role of lawyers in these cases.

Brian Chilton: DOJ takes lawyers'/accountants' roles very seriously.

Question: Can Nonprofits be charged as well?

Gord Drayton: Yes, believes so.

Comment re: Falconbridge did not allow for facilitation payments. When they became accepted with the OECD Anti-bribery Convention, Falconbridge employees wanted to have this as an option, which would have meant a step backwards.

Comment: CSR is proactive complying with laws and meeting expectations of stakeholders. It is not just a lawyer, who takes this seriously, but anyone who cares about reputation. American approach: under sentencing guidelines, best hope was to be found non-compliant. In Canada it is a regulatory offence; you can be convicted and sent to jail, and lose million dollars a day, if you have gone over a line. If your defense is that if you did everything you possibly could, i.e., due diligence you are ok – the system is more fair. In the US, you could be punished, even after exercising due diligence.

Wrap-up James Klotz and thank you to presenters by Dr. Kernaghan Webb.