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Corruption Settlements, Coronavirus and the Road Paved with Good Intentions

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April 2, 2020 – In connection with the 2018 consolidated anti-corruption resolution with Petrobras, the Brazilian prosecutors as part of the settlement with Petrobras sought and obtained approval to allow payment of \$682 million from the settlement to benefit education and the environment in Brazil. On March 19, 2020, the Brazilian prosecutor general applied to the Brazilian Supreme Court to redirect the unspent portion of the settlement funds away from their original destination and instead to be used in the fight against the COVID-19 pandemic in Brazil. A potentially noble and worthwhile reallocation of resources to their highest and best use. After all, who can argue against using all available proceeds to fight this terrible pandemic? Or is it? Even forgetting the merit of the cause, what of the process and its implications? This raises again a question that has dogged anti-corruption enforcement for some time: where should the proceeds of government enforcement activity be placed and who should get to decide?

In the United States, fines and penalties collected by the DOJ to resolve FCPA actions are paid to the United States Treasury. This has not been without considerable criticism. Indeed, hardly a non-United States-based corporate defendant has failed to question whether the motive for U.S. enforcement is enriching the U.S. government at the expense of foreign companies. The press and literature outside the United States has taken up this mantle with some enthusiasm. Seizing on the back of the Sarbanes-Oxley Act, the U.S. has been accused of economic or prosecutorial imperialism and, using the FCPA as an example, been challenged as a threat to global harmony. [See, e.g., International Bribery: The Moral Imperialism Critique, 18 Minn. J. Int'l Law 155 (2009)].

Efforts to have the proceeds of corruption resolutions directed to specific places is neither without precedent or even success. In the United States, funds from forfeitures and civil resolutions can find a home outside the U.S. Treasury and unsuccessful efforts have even been made to seek compensation as victims of a crime [See Alcatel litigation] or based on NGO requests such as that of the Nigerian based Socio-Economic Rights & Accountability Project. Outside the United States, there have been resolutions tailored to provide funds to social causes, including resolutions in such a manner through, for example, the World Bank.

In Brazil, the law does not provide for the allocation of fines and penalties deriving from leniency agreements and other anti-corruption settlements. In practice, the Office of the Prosecutor and judges (responsible for ratifying such agreements) have the power to determine, directly or indirectly, the destination of such funds. The decision on the allocation of the budget is then diverted from the Executive and Legislative branches to unelected officials. The Petrobras settlement provides a stark example of this process in action. Under the terms of the various agreements, Petrobras agreed to pay 80% of the total criminal penalty to Brazilian authorities, as determined by a consent agreement to be signed with the Brazilian Federal Prosecution Office. Subsequently, the Car Wash Taskforce in the state of Paraná entered into an agreement with Petrobras under which 50% of the penalty would be allocated to public interest initiatives and the other 50% to compensate the company's minority shareholders. In an unusual arrangement, the agreement provided that such amounts would be directed to a special fund (endowment) to be managed by a foundation established by the Federal Prosecution Office, which would oversee their allocation. At the request of the Prosecutor General, the Supreme Court issued an injunction suspending the agreement on the grounds that it violated the separation of powers and usurped Congress's constitutional power to allocate public revenue. Following this decision, the Prosecutor General, the Speakers of the House and the Senate and the Attorney General reached an agreement (ratified by the Supreme Court) under which the funds would be paid to the Brazilian Treasury but earmarked for education and environmental protection. More recently, the Prosecutor General applied to the Supreme Court to reallocate the funds from the anti-corruption resolution with Petrobras to the fight against the COVID-19. On March 19, 2020, the Supreme Court approved this approach and redirected the unspent portion of the Petrobras settlement funds to the fight against the COVID-19 pandemic. Other judges quickly followed suit. For instance, a federal judge diverted \$ 2 million recovered by the Car Wash operation in plea bargain agreements to be allocated to the city of Rio de Janeiro in actions against the new coronavirus.

Without getting too far into the murky waters (other than to acknowledge that life is filled with complexity), the question we want to center on is a comparison, in the face of a pandemic, between a system which directs funds to the general treasury without strings (United States) and one which leaves apparent discretion in the hands of prosecutors under the oversight of judges (Brazil). In the United States, we are witnessing an unprecedented expenditure of more than \$2 trillion dollars (and counting) to buffer businesses and individuals against the economic strains of the coronavirus pandemic. This is taking shape through the usual messy democratic, political process attendant to a bicameral legislature and signature/veto oversight by a democratically elected president – all in the midst of an election cycle that includes nomination and election of a president. In Brazil, as regards the Petrobras funds, by contrast, the determination is being made outside of elected representatives and is in the hands of a prosecutor general appointed by the President under the oversight of Supreme Court Justices, who have life tenure and are appointed by the President and confirmed by the Senate.

In both cases, funds would appear to be headed to the right place: the fight against the coronavirus and protection of people related thereto. But is it inherently better for a process that is strictly controlled through elected representatives? Individual decision-making in this situation could lead to questions of democratic legitimacy and other potential problems that are not hard to imagine but also can be rather more targeted and efficient. Perhaps it is not a matter of better or worse, but what is more functional under the specific circumstances. We will need to see how these cases develop and how the funds end up allocated to have a better assessment – in hindsight as always.

This piece originally appeared in the FCPA Professor. You can read it [here](#).

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