

Austin II., met on March 18, with their counterparts in South Korea, the two governments said they would coordinate their approaches toward North Korea as the Biden administration conducts its policy review of North Korea. The U.S. said it has tried unsuccessfully to establish a diplomat channel to North Korea.¹³

Effective enforcement of the sanctions against North Korea also requires cooperation of the U.N. Security Council and its biggest trading partner, China, as well as Russia. Recently, the U.S. has had difficulty obtaining cooperation in the U.N. Security Council and from China and Russia on the North Korean sanctions.

VI. TRANSNATIONAL CORRUPTION AND INT'L ASSET FORFEITURE

United Nations Targets Corruption and Illicit Cross-Border Finance¹

By *Spencer A. Hill* & *Peter D. Hardy*²

U.N. Report Focus on Improving Accountability, Transparency and Good Governance

U.N. Report Focus on Improving Accountability, Transparency and Good Governance

On March 2, 2020 the United Nations released a Report on Financial Integrity For Sustainable Development (the “Report”). Although the Report is lengthy and wide-ranging, we will focus here on the portions of the Report which target the humanitarian toll of Illicit Financial Flows (IFFs) from money laundering, tax abuse, cross-border corruption, and transnational financial crime – all of which can drain resources from sustainable development, worsen inequality, fuel instability, undermine governance, and damage public trust. We also will focus on the portions of the Report which make recommendations designed to expand anti-money laundering (“AML”) compliance.

First, the Report makes evidence-based recommendations focused on accountability, designed to close international enforcement and compliance gaps. Those recommendations include: (i) all countries enacting legislation providing for the widest range of legal tools to pursue cross-border financial crime; (ii) the

international community developing an agreed-upon international standard for settlement of cross-border corruption cases, and (iii) businesses holding accountable all executives, staff, and board members who foster or tolerate IFFs in the name of the business.

Second, the Report makes other recommendations on several AML-related issues on which we have blogged: (i) each country creating a central registry of beneficial ownership information for legal entities; (ii) creating global standards for professionals, including lawyers, accountants, bankers and real estate agents; (iii) improving protections for human rights defenders, anti-corruption advocates, investigative journalists and whistleblowers; and (iv) promoting the exchange of information internationally among law enforcement officers and other authorities.

The Report clearly envisions that corporations can and should play a pivotal role in contributing resources in the fight against corruption, money laundering and cross-border financial crime. To start, Boards and management, particularly those of financial and professional service institutions, must engage in oversight to ensure that compensation, benefits, and employment itself are contingent upon financial integrity. Investors also should embrace financial integrity for sustainable development and be clear with the companies in which they invest that they expect effective anti-corruption policies and regulatory compliance. Integrity will be cultivated when organizational leadership hold board members, executives, and staff accountable if they foster or tolerate IFFs in the name of the business. Moreover, the Report observes that governments can foster financial integrity by imposing liability for failing to prevent bribery or corruption.

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¹³ *Id.*

¹ Reprinted from Ballard Spahr Money Laundering Watch, Apr. 1, 2021.

The FACTI Panel

The Report was issued specifically by the 74th President of the United Nations' General Assembly and the 75th President of the Economic and Social Council convened the High-Level Panel of International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda ("FACTI Panel"). The FACTI Panel consists of a diverse group of individuals from different backgrounds, experiences, and national and regional contexts. It is co-chaired by former Nigerian Prime Minister H. E. Ibrahim Assane Mayaki and H.E. Dalia Grybouskaiti, former President of Lithuania. The goal of the FACTI Panel is to contribute to efforts of Member States to implement the ambitious 2030 Agenda for Sustainable Development, which has focused on a global transformation to end poverty. The Report states that the world has seen a sharp increase in extreme poverty of seven percent, and estimates that another 176 million people will be plunged into extreme poverty due to the COVID-19 pandemic. But, according to the Report, the international financial system was ineffective even before the COVID-19 pandemic at directing investment of resources into sustainable development. The Report therefore sets forth its many recommendations for ameliorating poverty by improving financial accountability, transparency, good governance and integrity to reduce corruption, cross-border financial crimes, and tax evasion and avoidance.

The IFF Problem

There is no internationally agreed-upon definition of IFF. According to the Report, this is true, in part, because discussions about IFFs typically have focused exclusively on illegal activities such as bribery and money laundering, to the exclusion of tax avoidance. Aside from

the lack of a universal definition, IFFs are difficult to track and monitor because, by their nature, illicit flows are not transparently or systematically recorded. Nonetheless, the Report estimates the IFF problem is enormous, with estimates of global corruption alone as high as \$2 trillion annually.

The Report posits that financial integrity for sustainable development is the path to curbing the IFF problem and building a better future. But it can only be accomplished if the international community embraces systemic change to create an entire ecosystem based on values, policies, and instructions that have a unified aim. Creating such a value-based ecosystem, according to the Report, has three prongs and requires: (i) accountability—treating all people equal under the law and holding all responsible for their behavior; (ii) establishing a universal ecosystem of laws, norms, and standards, and (iii) transparency.

With the goal of improving financial integrity for sustainable development as its focus, the Report makes several ambitious recommendations. And if the recommendations are implemented, U.N. Member States stand to improve governance and preserve or recover large amounts of resources.

Accountability Recommendations – Seeking to Reduce Corruption and Money Laundering

The first recommendation the Report makes regarding accountability is that all countries enact legislation providing for the widest range of legal tools to pursue cross-border financial crime. Fighting cross-border financial crime necessitates that all concerned jurisdictions are cooperative and assistive with each other. One way of achieving such

cooperation is that concerned jurisdictions enact joint investigative bodies and devote adequate resources to investigation and enforcement. Certainly, the lack of consistent cross-border coordination amongst law enforcement and regulators historically has thwarted the prosecution of international financial crime. A prime example is the illegal wildlife trade, which thrives on the lack of a coordinated global response.

The Report observes that enacting legislation providing the widest range of tools to fight cross-border financial crime is necessary to maximize enforcement. These tools should include:

- Illicit enrichment laws—laws that prohibit significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income (however, and as we have blogged, the U.K. government has met limited success when issuing “Unexplained Wealth Orders” to seize assets obtained with unexplained funds);
- Non-conviction based confiscation systems—akin to civil asset forfeiture where the government need only show that the assets were derived from or connected to unlawful activity;
- Reasonable limits on immunity; and
- Implementing the broadest scope of money laundering offenses.

According to the Report, these tools, coupled with dedicated units and suitable mandates and standards, will help the pursuit of cross-border financial crime. And such tools are especially important when the countries of origin—where the financial crime originated—suffer from endemic corruption, are in conflict or ongoing transition, or

otherwise have limited capacity to pursue the crime.

The Report's second accountability recommendation is that the international community should develop an agreed-upon international standard for resolution of cross-border corruption cases. Non-trial or alternative resolutions such as settlements are increasingly being used to solve foreign bribery cases across the globe. If done properly, non-trial settlements can be an expedient and cost effective way to resolve a complex corruption case and obtain a substantial monetary settlement.

However, the Report states that one obstacle to effective pursuit of cross-border crime is the lack of transparency and proactive information sharing between jurisdictions. Another obstacle is insufficient sanctions for parties conducting corrupt transactions. Accordingly, effective international settlement standards should include strong safeguards, sufficient sanctions to serve as a deterrent, transparency, information sharing, and victim compensation to ensure that these standards serve both the interests of justice and the global fight against bribery. The Report states that effective settlement standards would ensure that public officials are prosecuted for their role in bribery and other corruption and financial crimes and deter other would-be wrongdoers.

The Report's third recommendation on accountability is that businesses should hold accountable all executives, staff, and board members who foster or tolerate IFFs in the name of the business. As the Report recognizes, the private sector also plays an essential role in the fight against cross-border financial crime. Positive organizational leadership therefore is essential to building a culture

of accountability and integrity in order to respect both the letter and spirit of the law.

AML Compliance Recommendations – Seeking to Improve Transparency

Throughout the Report, the FACTI Panel makes additional recommendations pertaining to important issues implicating AML concerns. We will describe the primary recommendations.

First, the Report urges each country to create a central registry of beneficial ownership for legal entities. Further, this registry should be public: “[t]he turning point is transparency to outsiders, not just law enforcement agencies. When the public can access and understand the data, it helps incentivise ethical business conduct, rebuild public trust and strengthen the social contract.” Of course, the U.S. just passed the Corporate Transparency Act (“CTA”), which requires the creation of a national database, maintained by the Financial Crimes Enforcement Network (“FinCEN”), of beneficial ownership information for domestic and foreign legal entities, as defined. The database will rest on reporting to FinCEN by the legal entities upon incorporation or registration in the U.S. However, the CTA does not apply to all legal entities, and the reporting information will not be public. To the contrary, the CTA requires data privacy protocols to be implemented to ensure that the information is only accessed properly by law enforcement, regulators, and financial institutions – with the consent of the legal entity customer – performing customer due diligence.

Second, the Report recommends that governments should develop global standards and guidelines for professionals, including lawyers, accountants, bankers and real estate agents. The Report refers to complicit professionals as “enablers,” and

states that most IFFs are enabled by professionals, who have not been held accountable for their activities due to gaps in enforcement and abuse of legal privilege. The Report argues that self-regulation “has proved to be insufficient and unreliable,” and cites prior recommendations by the Financial Action Task Force to fight professionals who assist their clients with laundering funds, such as by creating sham companies and assisting in the movement of illicit funds. In the U.S., the imposition of AML duties through legislation on attorneys is extremely controversial, although the American Bar Association issued an opinion in April 2020 reminding lawyers that they are responsible for conducting sufficient inquiry into the facts and circumstances of a matter a client or prospective client asks them to undertake if there is a “high probability” that the client is seeking to use the lawyer’s services to commit a crime. Further, real estate professionals in the U.S. have come under increasing scrutiny by law enforcement and regulators over the last several years in regards to money laundering risks, and it is possible that AML regulation covering the real estate industry will occur downstream.

Third, the Report states that it is “critical to recognize the critical role played by civil society actors – including human rights defenders, investigative journalists and whistle-blowers – in promoting financial integrity for sustainable development. Accordingly, international standards of protections for such individuals should be developed and potentially adopted in a legally-binding international human rights instrument. The U.S. already has robust protections (and incentives) for whistleblowers, and the Anti-Money Laundering Act of 2020 (“AMLA”) just expanded significantly the options for whistleblowers alleging money laundering and Bank Secrecy Act (“BSA”) violations.

Finally, the Report champions the exchange of information internationally among law enforcement and other authorities. Specifically, the Report recommends that (i) an entity be designated to collect and disseminate data on asset recovery efforts and mutual legal assistance requests between governments, and (ii) an entity with universal membership be designated to regularly collect and disseminate aggregate data on the enforcement of money laundering standards, including beneficial ownership information. Although not as ambitious as this sweeping proposal, the U.S. has examined with increasing interest how to best share AML information between government and financial institutions. Indeed, the AMLA just amended the BSA to make clear that the very purpose of the BSA includes “[e]stablish[ing] appropriate frameworks for information sharing among financial institutions, their agents and service providers, their regulatory authorities, associations of financial institutions, the Department of the Treasury, and law enforcement authorities to identify, stop, and apprehend money launderers and those who finance terrorists.”

VII. MIGRATION SMUGGLING AND ECONOMIC INTEGRATION

Coast Guard Interdicts and Repatriates 17 Migrants to Cuba as Cuba Calls for U.S. to Meet its Migration Commitments

By Bruce Zagaris

On March 22, 2021, the U.S. Coast Guard Cutter Charles Sexton’s crew repatriated 17 Cuban migrants to Cuba. They had interdicted them on March 18,

approximately 54 miles south of Key West, and were brought aboard due to safety of life at sea issues.¹ Meanwhile, the Cuban Ministry of Foreign Affairs called for the U.S. to abide by its commitment to the Joint Declaration on migration signed by the two governments on January 12, 2017, to prevent the tragic incidents resulting from irregular migration.²

Interdictions and Arrests of Cuban Migrant Smugglers

On March 21, 2021, U.S. Homeland Security Investigations arrested three men allegedly part of a migrant smuggling ring in the Florida Keys as they watched the lowering of a boat by one of them down a ramp at a local marina in Key Largo.

HIS arrested Garcia, Fuentes, Manuel Fonseca, and Yudier Panaque. They all appeared before a judge in Key West on March 22.³

The U.S. law enforcement operation started on March 12, after an undercover agent with Garcia and Fonseca at Garcia’s house in Homestead.

The undercover agent allegedly learned that Garcia and Fonseca had engaged in “multiple smuggling trips in the past and used Panaque’s house in Key

Largo as a staging location and/or as a ‘stash house’ to hold migrants until their smuggling fees were paid.⁴

On March 21, when the co-conspirators were to embark from the Keys, HSI officials arrested the four defendants, each charged with knowingly and willfully conspiring to encourage and induce aliens to enter the U.S.

Shortly after the arrest at a marina in the Upper Keys area of Tavernier, agents executed a search warrant at a home in Homestead, where they arrested Yosniel Fuentes, another member of the alleged smuggling ring.⁵

Request by Cuban Ministry of Foreign Affairs for the U.S. to Meet its Migration Commitments

On March 11, the Cuban Ministry of Foreign Affairs released a statement. It observed that on March 2, 2021, an illegal departure occurred from Cuba through the northern coast of the province of Villa Clara. A group of persons from the U.S. organized the voyage in a go-fast boat for a human smuggling operation. The smugglers took Cuban nationals, including women and children, to Cay Sal Bank in the Bahamas. The Cuban Border Guard communicated in real-time the event to the U.S. Coast Guard.⁶

Subsequently, a second go-fast boat from the U.S., registered in Florida, allegedly collected the migrants to bring them to the U.S. On March 4, about three nautical miles from Cal Sal Bank, the boat

¹ U.S. Coast Guard, *Coast Guard repatriates 17 migrants to Cuba*, Mar. 22, 2021, <https://content.govdelivery.com/accounts/USDHSCG/bulletins/2c807f0>.

² Ministry of Foreign Affairs of Cuba, *Cuba Calls for the prevention of tragic incidents as a result of irregular migration*, Mar. 11, 2021, <http://www.minrex.gob.cu/en/cuba-calls-prevention-tragic-incidents-result-irregular-migration>.

³ David Goodhue, *Feds say they busted Cuban migrant smuggling ring operating out of the Keys*, MIAMI HERALD, Mar. 23, 2021.

⁴ *Id.*

⁵ *Id.*

⁶ Ministry of Foreign Affairs of Cuba, *supra*.