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National Security Concerns and the Interpretation of Treaties

Dear Mr. Bonucci,

We are pleased to forward the attached memo from Professor Susan Rose-Ackerman and Benjamin Billa of Yale Law School for your consideration and for the OECD Working Group on Bribery, in connection with the review of the termination by the UK, based on national security interests, of the investigation of foreign bribery allegations relating to the Al Yamamah arms procurement by Saudi Arabia. The memo discusses the way national security interests have been considered in connection with international treaties. This issue is relevant to the interpretation of the OECD Convention which includes no explicit national security exception.

This memo has been reviewed by, and its conclusions are endorsed by three distinguished international lawyers:

- Jeremy Carver, Head of International Law, Clifford Chance LLP, London;
- Professor Ugo Draetta, Catholic University Law School Milan, and former member of the OECD Working Group on Bribery; and
- Ko-Yung Tung, former Vice President and General Counsel of the World Bank, Senior Counsellor of Morrison Foerster in New York, and Visiting Lecturer at Yale Law School

Article 5 of the OECD Convention deals with enforcement. The article states that: "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." This language is broad in scope, and makes no reference to national security interests.

Paragraph 27 of the Official Commentary states that Article 5 “recognizes the fundamental nature of national regimes or prosecutorial discretion.” It goes on to recognize that such discretion “is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.”

This memo addresses two legal questions that are relevant to the interpretation of the OECD Convention. First, is there an implicit exception for national security under the OECD Convention? Second, how are national security exceptions handled in treaties that provide explicit exceptions? This memo does not deal with the factual issues, whether the circumstances of Al Yamamah provide an appropriate basis for asserting national security interests.

Implicit National Security Exception

An examination of the relevant legal materials indicates that there is no formal doctrine recognizing an implicit national security exception under international treaty law. In particular, with respect to the OECD Convention, there are three reasons to conclude that no implicit national security exception exists.

First, explicit security exceptions are commonly included in treaties; they vary from treaty to treaty; and they often vary in their application to different provisions within a given treaty. Thus, treaty writers seem to have no difficulty in drafting such terms, and they do so in a nuanced way that varies across treaties.

Second, an analysis of GATT disputes discussing the explicit security exception (Article XXI) of the GATT treaty demonstrates two things: GATT panels have rejected the notion of an inherent right to except to a treaty on national security grounds, separate from the explicit exception provisions of Article XXI, and they also accept the reviewability of exceptions made pursuant to Article XXI.

Third, other doctrines of exceptions to treaties that apply across all treaties exist and are codified in the Vienna Convention on the Law of Treaties and the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts. These do not include a national security exception and place specific limits on the exception doctrines they do include. These doctrines have been reviewed by courts and are not left to unilateral discretion.

Explicit National Security Exceptions in Treaties

Where treaties provide explicit national security exceptions they establish limits on the range of concerns that fall under the exception. In general, such clauses are not self-judging. Rather the reach of the exception varies from treaty to treaty. These differences depend upon the legal obligations provided in the treaty and the strength of informal enforcement mechanisms. Despite the variation across treaties, the national security exceptions in treaties point to some general principles. These principles include:

- a need to show that a threshold level of harm to national interests has been exceeded,
- a notice requirement,
- a giving reasons requirement,
- a narrow-tailoring requirement, and
- a means for review.

Implications for the OECD Convention

The memo's analysis indicates that a party to the OECD Convention cannot claim a national security exception simply by asserting that national security interests would be damaged by proceeding with a foreign bribery investigation or prosecution. It would be inappropriate to recognize an implicit national security exception without restrictions on the use of the exception, when treaties with explicit national security exceptions provide detailed restrictions on their use. That does not mean that all consideration of national security interests is foreclosed under the OECD Convention. Commentary 27 provides flexibility for the exercise of prosecutorial discretion, under which national security interests can be taken into account, provided that such discretion is exercised on the basis of professional motives and is not subject to improper influence by concerns of a political nature. Thus, although states retain discretion in initiating and pursuing prosecutions, it seems inconsistent with the purpose of the treaty and the wording of Article 5 for states to be able to assert a national security interest as a blanket and unreviewable exception to their enforcement strategy.

TI would welcome an opportunity discuss with you the conclusions of Professor Rose-Ackerman's memo.

Yours sincerely,



Fritz Heimann
TI Senior Adviser on Conventions

Cc: Professor Mark Pieth
Patrick Moulette