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Revisiting the Salt Lake City Olympic scandal: Would the outcome be different today?

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Abstract

Many international sport organizations face bribery scandals resulting from its event bidding process. The International Olympic Committee (IOC) faced this type of scandal with the 2002 Olympic Winter Games. Two members of the Salt Lake City Organizing Committee (SLOC) faced 15 criminal charges from providing more than US\$1.2 million in cash and gifts to entice IOC members to support its bid. Ultimately both SLOC members were acquitted of all charges. Can a new interpretation of the United States' anti-bribery law, the Foreign Corrupt Practices Act (FCPA), be effective in preventing similar sport scandals?

Keywords: *Sport marketing, Hospitality, Bribery, Law, Corruption*

Introduction

Since sport corruption has tainted the image of international sport organizations such as the International Olympic Committee (IOC) and the Fédération Internationale de Football Association (FIFA) many fans, administrators and scholars are searching for effective deterrents. One such measure is the use of anti-bribery laws. Anti-bribery law is constantly evolving, therefore the current law can be analyzed against an historical and infamous situation. Here, the United States law, the Foreign Corrupt Practices Act (FCPA), will be applied to the facts of the 2002 Salt Lake City Winter Olympic bidding scandal to gauge its current effectiveness against similar circumstances. The 2002 Olympic Winter Games are remembered for its bribery scandal during the bidding process. The Salt Lake City Organizing Committee (SLOC) was accused of providing more than US\$1.2 million in cash and gifts, such as: trips to Disneyland, a Rolex watch, shopping sprees, and college scholarships to entice IOC members to support its bid. As a result of this scandal, six members were expelled from the IOC and new bidding rules for future games were created.

SLOC members Thomas Welch and David Johnson diverted the revenues of the bid committee to give money and benefits to influence IOC member votes (Hamilton, 2010) to award Salt Lake City the winter games. Both Welch and Johnson were arrested but neither was convicted of any crime. This was a very surprising outcome to many sport fans that were familiar with the scandal but not the law. It was the replacement SLOC CEO and future US Presidential candidate Mitt Romney who said, "if it looks like, talks like, and quacks like a bribe" (Romney, 2004, p. 24) then it must be illegal. But this was not the case. Despite all of the gift-giving for IOC votes associated with this scandal, only three persons (David Simmons, John Kim, and Alfredo La Mont) were indicted on crimes and they were convicted on tax charges (Longman, 2000).

In 2014, a US federal court examined the FCPA, which was not used in the 2002 case, and its opinion may allow it to be used effectively in preventing corruption in sport. The holding broadened the definition of who needs to comply with a major law against bribery.

2002 Salt Lake City Olympic scandal

One of the most notorious episodes of sport corruption involves the SLOC bribery scandal. In response to the dishonorable affair, the United States Department of Justice brought 15 counts of criminal charges against two members (Welch and Johnson) of the SLOC. The members were charged with conspiracy, violations of

the Travel Act, mail fraud and wire fraud. The Travel Act prohibits unlawful activity, such as bribery, that is in violation of the laws of the state where it is committed (Welch, 2003). The Travel Act prohibits using an instrumentality of interstate or foreign commerce to commit a criminal act under U.S. state or federal law (Rupp and Fink, 2012). The Salt Lake case was based on Utah's commercial bribery statute. The implications of these cases are unclear because they involved non-profit organizations that were performing public or quasi-public functions (Rupp and Fink, 2012). The defense for Welch and Johnson argued that there cannot be a "crime without a victim" (Roberts, 2001, n.p.) and any public relations damage suffered by the IOC was "self-inflicted" (Roberts, 2001, n.p.) by this process. In other words, the defense was stating that these gifts did not harm any person or organization as defined by the statute.

However, the facts showed that money and gifts were given by SLOC and received by members of the IOC that include "princes and sports ministers, former athletes and former communists, Africans and Asians, Europeans and South Americans" (Fisher and Brubaker, 1999, n.p.). A total of 30 IOC members were accused of accepting gifts and services worth US\$600,000 from Salt Lake City before it won its bid to host the Winter Games (Hall, 1999) including free ski holidays, sleigh rides, shopping trips and massages (Jennings and Sambrook, 2000, p. 2).

Some of the gifts are extremely specific to the recipient. Salt Lake Olympic officials gave IOC members free credit cards when they were in town and took three IOC couples to the 1995 Super Bowl (Shepard, 1999). The daughter of Kim Un-Young of South Korea played two concerts for US\$5,000 with the Utah Symphony (Fisher and Brubaker, 1999), and the bidding committee provided US\$45,000 to Keystone Communications, a Utah company, to fund a job for Kim's son (Roughton, 1999). Sergio Santander of Chile received US\$10,000 for his campaign for mayor of Santiago (Fisher and Brubaker, 1999). The husband of Pirgo Haeggman of Finland was given a job with the Salt Lake City bid committee (Fisher and Brubaker, 1999).

The daughter of Agustin Arroyo of Ecuador was initially given a job with the Utah Department of Economic Development, then hired to answer phones for the Salt Lake City bid committee office, and ultimately had her tuition and expenses paid at a school in Texas (Fisher and Brubaker, 1999). The son of Bashir Attarabulsi of Libya was given the tuition and living expenses to attend Brigham Young University and then Salt Lake Community College (Fisher and Brubaker, 1999). Jean-Claude Ganga from the Republic of Congo was given US\$70,000 in cash supposedly to feed children in his country and demanded free medical care for himself (hepatitis) and his mother (two knee surgeries and ankle surgery) (Fisher and Brubaker, 1999). He received scholarships for his ten children, sports equipment, vacations and car parts (Jennings and Sambrook, 2000, p. 35). Three months after the

awarding of the Games, Ganga cleared almost US\$60,000 on a Utah real estate deal initiated by Bennie Smith, a member of the Salt Lake Organizing Committee (Fisher and Brubaker, 1999). The total value was US\$320,000 (Hamilton, 2010). Phil Coles of Australia was accused of accepting four expenses-paid trips to the United States (Roughton, 1999). Finally, nearly US\$400,000 was spent on payments for education and “athletic training” to thirteen people, six of whom appeared to be relatives of voting IOC members (Romney, 2004, p. 24).

Despite overwhelming evidence of vote-buying activity, the case failed to meet the criminal standards for those charges. The trial court said it was unclear whether the Utah commercial bribery law applied to inducements to IOC members in order to persuade them to vote in the bid process (Welch, 2003). Further, the court reasoned that it is absurd to believe the Utah legislature intended to criminalize gifts that would lead to the promotion of Utah on the world stage of hosting the Winter Games (Welch, 2003). The trial court dismissed all fifteen criminal charges against the defendants.

The United States appealed this decision. The defendants [Welch and Johnson] argued the Travel Act counts should be dismissed because “under Swiss law, an IOC member is not an agent or fiduciary” which is required for the Utah charge (Welch, 2003, p. 10). In other words, the gift recipients do not represent their individual countries, but are ambassadors to the IOC (Mason, Thibault, and Misener, 2006). These defensive arguments were rejected in favor of allowing the criminal charges to proceed. The federal appeals court ruled that “denouncing corruption” in the Olympic bid process was important (Mackay, 2003) and the point of view of the Swiss law on the status of the IOC members is not material in this court. The intention (or lack thereof) of the Utah legislature to allow this activity has no support in law (Welch, 2003). The case was remanded back to the district level where the judge again dismissed the charges.

In the final trial decision, the prosecution presented its case and the defense filed a motion for acquittal, which is rarely approved, but was granted here (Hemphill, 2003). Judge David Sam said a reasonable jury could not find that either defendant had the required intent to promote, manage or facilitate any lawful activity, nor was there enough evidence to find that the defendants violated the Utah commercial bribery statute (Maenning, 2008). A juror commented that the defendants [Welch and Johnson] only had the best interests of Salt Lake in mind when they acted (Foy, 2003). Thus both SLOC members were acquitted of all illegal claims. After the ruling, Mitt Romney said, “of course, not being convicted of a crime isn’t vindication of wrongdoing...even when criminal conduct occurs, it may be difficult to prove- and that’s with effective prosecutors” (Romney, 2004, p. 23).

The use of the Travel Act was ineffective. As this case shows, often there are difficulties using this law to prosecute against corruption. The Travel Act assists

other law's reach. Tim Peterson, lawyer with Murphy and McGonigle, suggests that US investigators need a strong US nexus or evidence that material gifts are transferred through the US or wired through US bank accounts (Scott, 2015) for a conviction using the Travel Act. Here, there was neither. The prosecutors could not overcome the obstacle of proving bribery when the gift-giving was not in furtherance of the actors' jobs nor was the gift-giving really harming US persons or companies. Further, passive bribery is not illegal under the applicable US law so the Travel Act could not prosecute those asking for bribes.

As with many legal decisions, local politics played a role in its decision. It was difficult to get a guilty verdict from a Utah judge and jury for fear of losing the Olympic Games to another city (Scott, 2012). Also, it wasn't lost on the Utah citizens that the IOC members did not play by its own rules in the bidding process (Jennings and Sambrook, 2000) so why should its citizens face criminal punishment when they were only playing the game required to get the bid? It is the corruptive procedure of the IOC that led to this behavior. James E. Shelledy, former Salt Lake Tribune editor, said "the IOC under Samaranch was a culture of elitism, corruption and favoritism. I don't think anybody who watched up close could really come to another conclusion. But being able to document this is really difficult" (Shepard, 1999, n.p.) The overwhelming amount of evidence found by those investigating the Salt Lake bidding scandal has shown that it was not a one-time incident but rather part of a developed culture within the IOC (Hamilton, 2010). Former premier of Victoria, Joan Kirner said, "I have never seen a process more open to corruption in my life" (Jennings and Sambrook, 2000, pp. 72-73). It has been estimated that 5-7% of IOC members had taken or solicited bribes by Olympic bid cities (Mallon, 2000, p. 11). This bribery culture extends to other bids. For instance, Nagano's bid committee spent an average of US\$22,000 on 62 visiting IOC members (Mallon, 2000, p. 12) and Sydney's bid included a last minute offer of US\$70,000 to two African IOC members (Mallon, 2000, p. 13).

The International Olympic Committee's response

When IOC member Marc Holder heard about the gifts and payments that were "in clear violation of [IOC] rules" (Jennings and Sambrook, 2000, p. 49) and behavior that was well over the edge of acceptable conduct (Pound, 2004), he helped launch an investigation. At issue is a 1994 IOC rule limiting gifts or payments to IOC members before a bid vote to US\$150 (Shepard, 1999; Lenskyj, 2000). This IOC internal investigation was led by Richard Pound, IOC member from Canada, and only dealt with Olympic rule violations and not any specific criminal conduct (Hall, 1999). This investigation uncovered IOC members accepted more than

US\$1million in cash, gifts, first-class travel and college scholarships (Roughton, 1999) for themselves or close family members (Gordon, 2003).

Three IOC members resigned over the scandal, including: Pirjo Haggman (Finland), Bashir Mohammed Attarabulsi (Libya) and David Sibandze (Swaziland) (Jennings and Sambrook, 2000). The IOC expelled six other members (Hall, 1999). The expelled members were Augustin Arroyo of Ecuador, Jean Claude Ganja of the Congo, Zen Gadir of the Sudan, Lamine Keita of Mali, Charles Mukora of Kenya, and Sergio Santander of Chile (Jennings and Sambrook, 2000). There were nine other IOC members that were investigated but only received warnings without a recommendation of expulsion: Phillip Coles (Australia), Louis Guirandou-N'Diaye (Côte d'Ivoire), Willi Kaltschmitt (Guatemala), Kim Un-Yong (Korea), Shagdarjav Magvan (Mongolia), Anani Matthia (Togo), Vitaly Smirnov (Russia), and Mohammed Zerguini (Algeria) (Mallon, 2000).

The Foreign Corrupt Practices Act

United States law is limited when regulating the actions of the United States Olympic Committee (USOC) and candidate cities via the provisions in the Ted Stevens Amateur Sports Act of 1978 (Hamilton, 2010) and existing statutes. It appears that by not altering US law [such as the Ted Stevens Amateur Sports Act of 1978] following the 2002 Olympic bidding controversy, the US Congress feels that the current status of US bribery laws is sufficient in deterring future illegal acts (Hamilton, 2010). Thus, despite US Congressional hearings where former US Senator George Mitchell recommended amending the FCPA to reach IOC members and host city bid boosters (N.n., 1999), and the very public prosecutorial failure, there were no changes to the laws available to fight against this specific type of corruption. The major issue in *Welch* was the lack of applicable law available to prosecute Welch and Johnson. In 2002, the activity was not criminal. In 2015, the legal outcome may be different.

The Foreign Corrupt Practices Act (FCPA) is a US law that prohibits the bribing of foreign officials. Unfortunately the FCPA's reach is limited to the bribing of foreign officials from a governmental department, agency or instrumentality of a foreign government. Foreign officials may include officers, employees or representatives of any government at any level, or officials of foreign political parties (Cassin, 2008). The law has two components: an anti-bribery provision and an internal controls and reporting provision (Lippitt, 2013). The FCPA accounting provisions are a potentially powerful tool for combating commercial bribery and the text of the FCPA does not limit the accounting provisions to conduct relating to the bribery of foreign government officials (Rupp and Fink, 2012). The accounting provisions are intended

to prevent the use of corporate assets for corrupt purposes (Rupp and Fink, 2012).

Generally, the US Department of Justice prosecutes the anti-bribery violations and the U.S. Securities and Exchange Commission enforces the accounting provisions (Cassin, 2008). Penalties for violations can vary depending on the extent and duration of the violations, the level of benefit the company received, and the level of cooperation from the target of the investigation (Waters and Kraus, 2013). If a corporation violates the FCPA, the corporation is subject to a US\$2 million criminal fine and a civil penalty of up to US\$10,000. Any individual [officer, director, or stockholder] who willfully violates the provisions of the law is subject to a US\$250,000 criminal fine, five-year imprisonment, or both, and a US\$10,000 civil penalty (Kaikati and Label, 1980). The entire organization may be held criminally liable for an act within the scope of an employee's job duties, even if the employee acted contrary to company policy (Cassin, 2008). Because the IOC and its individual members are not technically affiliated with any particular government within the meaning of the FCPA, it was not an appropriate law for the prosecutors to use in 2002.

In 2014, a US court redefined the foreign official requirement. In *United States v. Esquenazi*, the Eleventh Circuit provided a framework to analyze how a non-governmental organization may be considered an instrumentality of a foreign government. This court defined an instrumentality as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own" (*Esquenazi*, 2014, p. 8). Amongst the analytical factors provided the court, an organization may be considered an "instrument of the government" when a government subsidizes the entity's costs, if the entity's officers are appointed or associated with the government, or if the government has appointed the entity for a particular purpose, such as health or sport. This decision may implicate officials of non-governmental organizations that carry out tasks in the same manner that public organizations perform them (Fitzgerald, 2012). The FCPA would apply to a national athletic association depending on governmental funding, whether the officers are appointed by or associated with the government, and whether the government has formally designated the entity for its purpose (Murphy and McGonigle, 2014). These factors may be especially evident where ministry-level positions have been created for the regulation of sport (Murphy and McGonigle, 2014). In other words, now the FCPA extends to employees of state-controlled entities such as many National Olympic Committees. Therefore, if an IOC member is also a member of the NOC or employed within a Ministry of Sport, then that IOC member may be considered a foreign official for FCPA purposes.

The FCPA's jurisdiction is not limited to US citizens. The law may have jurisdiction over any foreign person who causes an act in furtherance of the corruption. Thus, the FCPA may include the bribery activity by citizens of other countries if they were a part of the bribery activity.

In the 2002 scandal, there were a few IOC members who could have been

considered “foreign officials” though the prosecutor may have been reluctant to use the FCPA since those members were not representing their countries but rather the IOC. However, due to the *Esquenazi* decision, the nexus between the IOC members representing a sport ministry and FCPA is now much stronger. It could be argued that through this sport appointment that Olympic site selection would be a part of their job responsibilities. For instance, Jean-Claude Ganga of the Congo, may have qualified as a “foreign official” because of his ambassadorship to China, but as the Congo Minister for Tourism, Sports and Leisure (Mackay, 1999) the connection to the FCPA is much clearer. Likewise, Lamine Keita of Mali served as the Minister of Industrial Development and Tourism (Mackay, 1999), which could classify him as a foreign official in this fact pattern. Similarly, Charles Mukora of Kenya was the chairman of the Kenya National Sports Council (Mackay, 1999).

The limitations of the Foreign Corrupt Practices Act

The FCPA does have limits to its scope. First, the law does not criminalize passive bribery or the act of asking for gifts or bribes. Therefore, in a situation such as the Olympic bribery culture, the FCPA may not stop corruption but might transfer the activity to a nation that does not bar bribery or wants to host a mega-event so badly that it does not care about the methods needed to obtain it.

Next, the anti-bribery provisions of the FCPA apply only to corrupt payments made to foreign officials (Rupp and Fink, 2012). While acting in their role as IOC members, they are not representing their ministry positions, even if they are designates of their federal government to the IOC (Mason, et al., 2006). In the reanalyzing of the Salt Lake City scandal, some of the IOC members may not be considered foreign officials since they still did not fall under the new definition. A court may be reluctant to extend the *Esquenazi* as far as these facts would require.

The FCPA focuses its behavior on the actors and the bribing organization, but not the accepting organization. The law prohibits behavior of the US citizens and similarly situated foreign persons. It would not affect the IOC members taking gifts nor the IOC itself. Those actors would suffer public embarrassment and scrutiny, but not criminal sanctions from the United States. Thus, when the court implicates individuals, the legal authority over the IOC would be indirect (Pielke, 2013).

The legislative history of the FCPA does not include the IOC. In May 1998 the FCPA was amended. This amendment expanded the definition of public official to include representatives of international organizations, such as: the World Trade Organization and the International Committee of the Red Cross, but not the IOC (N.n., 1999). Numerous attempts to include international sport organizations such as the IOC or FIFA have failed.

Finally, the law is a bit unclear as to applicability to non-profit organizations. Technically, the law would cover this type of business arrangement, however, enforcement has been very minimal. In fact, FCPA expert Professor Mike Koehler has never found any enforcement action against a non-profit or non-governmental organization (Koehler, 2015). Nevertheless, non-profits have requested and received FCPA Opinion Procedures Releases concerning potential liability (Koehler, 2015).

Conclusion

Based on the analysis, it is difficult to foresee a successful prosecution against sport corruption using the FCPA in its current state. Many of the obstacles that faced the 2002 prosecution are still in existence now. First, it may be difficult to find a judge or jury willing to criminalize behavior that led to the awarding of an Olympics or World Cup. These mega-events are still popular with most of the citizens and create a great deal of excitement. In other words, why would a US judicial system punish its citizens if they are acting within the expected culture of the sport organization to secure a winning bid?

However, if the gift-giving activity was unsuccessful and the bid was not awarded, then the law may be useful. But the US would face negative criticism since the legal action was a response to losing the bid. Further, these claims of "sour grapes" may cause great harm to future bids as well. Sport organizations would become reluctant to have a US bid if the sport organization would expect to face a legal action if it is not awarded to the US.

The FCPA criminalizes the bidders but does not change the corrupt culture. As the US and other countries enforce these anti-bribery laws, the sport organizations and, more importantly, the members seeking gifts, may still have other countries willing to "pay" for the winning bid.

Without the FCPA, a US prosecutor may still be able to bring criminal charges. The US government's record of bringing actions under the Travel Act, even if unsuccessful in Salt Lake, suggests that the Travel Act could be employed more frequently in the future against foreign commercial bribery (Rupp and Fink, 2012). For instance, the US legal claims for the 2015 FIFA scandal were racketeering, wire fraud and money laundering (McFarland, 2015) which are supported by the Travel Act. The US may also use tax laws. However, these options are not as specific to the action as FCPA would be.

Finally, in order for the FCPA to apply to the IOC, it still would require an extension of the law. This extension is directly against the legislative history of the law. The Congress has discussed amending the FCPA in the past but has chosen not to do so.

Recommendations

Since corruption has become a major issue within the international sports environment, there has to be legal punishments to govern this type of conduct.

First, The IOC should make itself to be held accountable under the United States [and other countries'] anti-bribery law to allow for potential prosecution of both the individuals providing the inducement and the complicit IOC members under the FCPA (Hamilton, 2010). But currently the sport federations have a completely different approach to a nation's governance against them. For example, FIFA will not operate in a country that imposes taxes on them (Rassel, 2012). Until now, there really has "been little incentive for IOC members to control the behavior because of the possibility of an erosion of power and control" (Mason, et al., 2006). Perhaps pressure from sponsors, fans and governments will push the IOC and the sport federations to become legally compliant with anti-bribery law (e.g., Davis, 2008).

The Organization for Economic Cooperation and Development (OECD) Bribery Convention is an agreement between thirty-four member nations to create criminal sanctions on corporations who offer bribes to foreign officials in order to gain an unfair business advantage (Saloufakos-Parsons, 2001). The limitations of the OECD Bribery Convention are its focus on active bribery only. It punishes the person offering the bribe, but not the person who accepts the bribe. The OECD recommends that the bribe must be offered to a foreign public official and the bribe must be made in connection to an international business transaction (Saloufakos-Parsons, 2001). Also, there needs to be some connection to the country so the court has jurisdiction. By the IOC availing itself to all national laws, every citizen would be prevented from bribing IOC members.

Although some nations have strong laws against passive bribery, the IOC needs to encourage more countries to criminalize asking for gifts. The UK's Bribery Act of 2010 has a broader scope than the FCPA (Scott, 2014) and includes provisions against passive bribery (Transparency International UK, n.d.) against private citizens (CMS, 2013). Some other nations that prevent passive bribery in the private sector include Austria, Belgium, Bulgaria, France, Italy, Russia, and Romania among others (CMS, 2013). However, it is a bit unclear if the IOC and other sport organization would still qualify under these laws due to the same issues that face the use of FCPA. Again, the IOC would need to state that they would expect these laws to govern their behavior.

It would be in the best interests of the IOC and sport federation to avail itself and its members to the national laws. This would send a clear message that the sport organizations are run with integrity. This message would be consistent with stands against doping and match-fixing.

Approximately 65 international sport organizations, including the IOC and

FIFA, are headquartered in Switzerland. Until recently the Swiss laws have been very friendly to these groups. Presently, Swiss law prohibits sport corruption that involves match-fixing as well as includes sport federation officials as “publically exposed persons” thus eligible for money laundering and other financial crimes (The Local, 2015). However, the Swiss Parliament is debating changes to its Unfair Competition Act and the Swiss Criminal Code to make corruption in international sport organizations a criminal offense (Geeraert, 2014). The proposed changes would make private corruption a criminal offense (Geeraert, 2014). Although the bill has yet to be finalized, it is already under attack as being watered down. Initially, private corruption would carry a maximum five-year prison term but that was decreased to three-years (Swissinfo.ch, 2015). Also, the complaint must be deemed a “threat to the [Swiss] public interest” (The Local, 2015). This provision creates a logical defense that sport bribery outside the nation’s borders does not impact the Swiss citizens. The international sport organizations may respond to this legislation by leaving Switzerland for a more-friendly location, but that decision would face tremendous international scrutiny. The sport organizations need to make a clear statement that the Swiss laws apply to them and will decline to use the “threat to the public interest” defense since all claims of corruption will impact how the world views the country.

The Court for Arbitration of Sport (CAS) was created to act as an international sport judicial system. CAS is gradually becoming more prominent in resolving international sport disputes (Rassel, 2012). International sport organizations may prefer this arbitration system as opposed to facing criminal courts. Currently, the IOC and the sport federations have not granted CAS the authority to judge the actions of the officials (Rassel, 2012). It could be used to decide on corruption claims. But CAS is not an investigative organization so it would rely on either the IOC to investigate itself or have another method to gather information.

The IOC needs to strengthen its internal rules against passive bribery. This is the best forum to change the corrupt culture of international sport organizations. Unfortunately the IOC ethics committee has no power to compel evidence or witnesses (Pound, 2004) so it may not be an effective investigative entity in its current organization.

When a corruption scandal does appear, the sport organization needs to act swiftly and appropriately. The action should include the removal of the winning event from the country that tainted the bidding process and a ban on future sport participation.

Whether the behavior is doping, match-fixing or bribery, corruption is very problematic to sport organizations, such as the IOC. Preventing these behaviors are supported on many levels, including the United Nations’ Global Compact 10th Principle where “businesses should work against corruption in all its forms, including extortion and bribery” (United Nations Global Compact Office, 2014, p. 9). Michael Ikpoki, member of the UN Sport Sponsoring and Hospitalities Sub-Working Group, encourages a “precautionary and proactive [rather] than reactionary” approach to

corruption (United Nations Global Compact Office, 2014, foreword). The IOC needs to set the standard against corruption in all facets of sport.

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