

# International corruption and the recovery of its proceeds

## - an issue of development and growth for the developed as well as the developing

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**W**estern economies are in the doldrums, with news that central banks have not increased the amount of money they will print through quantitative easing and growth of 1% being greeted by politicians as a sign of increasing health. At the same time, there have been a number of comments by senior politicians and international leaders over the past few months identifying the targeting of corruption and its proceeds as a priority for facilitating development in what was once called the Third World. If developed economies are to find a path to renewed growth they must find new markets and opportunities. If developing economies are to realise their potential they must attract investment (by individuals and institutions confident that their investments are safe) rather than relying on aid. Targeting corruption and its proceeds may therefore be a development issue for more jurisdictions than just those in which it is traditionally thought of as being rife.

Of course it takes two to make a corrupt relationship; it is just as important that those who pay the bribes and don't ask questions when a government official arrives with millions to invest or spend are targeted as it is to pursue those who sell government functions and loot state assets.

The world is not short of anti-corruption legislation; from the Bribery Act in the UK and the Foreign Corrupt Practices Act (FCPA) in the United States to the Corruption of Foreign Public Officials Act (CFPOA) in Canada and the 1999 amendments to the

Criminal Code in Australia, governments throughout the developed world have outlawed the paying of bribes to foreign government officials. In the UK, section 6 of the Bribery Act 2010 contains an exclusive definition of the circumstances in which a person pays a "bribe" to a "foreign public official" (itself a phrase given its own definition by the statute)<sup>1</sup>:

- "P bribes F if, and only if -
- (a) directly or through a third party, P offers, promises or gives any financial or other advantage -
    - (i) to F, or
    - (ii) to another person at F's request or with F's assent or acquiescence, and
  - (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift."

Not only must the bribe fall within this definition, but it must be paid in order to influence the relevant public official, and with the intention of obtaining or retaining business or a business advantage.

This definition of course begs a number of possible questions, not least how often it might be expected that the law of a country will permit, much less require its public officials to be influenced in the performance of their functions by an offer, promise or gift from a foreign individual or company. All of those questions, have yet to be litigated in the context of a contested prosecution under the Act. However, the corruption of foreign officials first became an offence in UK law only in 2001.<sup>2</sup>

In the United States the FCPA has of course criminalised the

corruption of foreign officials since 1977, and the definition of foreign corruption is rather wider, but contains the well-known exception for "facilitation payments":<sup>3</sup>

"Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official."

Accordingly one is forced to ask "when is a payment not a bribe but a facilitation payment?" That is a question to which, hitherto, it has been difficult to find a definitive answer.

In Canada the CFPOA, which also contains an exception to the prohibition on bribing foreign officials, at least spells out clearly what does not constitute such a payment:<sup>4</sup>

"(5) For greater certainty, an "act of a routine nature" does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision."

The Canadian authorities/courts imposed the first eight figure penalty for foreign corruption in January of this year.<sup>5</sup>

In Australia the law has provided for a complex and comprehensive code prohibiting the corruption of foreign officials since 1999.<sup>6</sup> Although that legislation again provides for a defence if the payment was a "facilitation payment", what constitutes such a payment, and what does not, is set out. The Australian legislation also says in terms that it is no defence to a charge of bribing a foreign official that such payments or advantages are customary in the country in which they are made.<sup>7</sup>

Although it has had this comprehensive legislation in place since 1999, the Australian authorities initiated their first successful prosecution for foreign corruption in July 2011.<sup>8</sup>

The reader could be forgiven for taking away from this review of the legislation in four developed economies that the statutes criminalising the corruption of foreign officials make up a complex, esoteric corner of the law full of traps for the unwary, but ultimately without real teeth. For some years, with the exception of the United States, a review of the extent to which these provisions were actually used to bring prosecutions

might have led to a similar conclusion. Certainly, the OECD made comments in the first decade of this century about a number of jurisdictions suggesting that it was of this view. However, whether or not such a conclusion might have been justified in the past, times have changed:

- between 2007 and 2012 the UK conducted 27 prosecutions or regulatory actions concerning corruption, 21 of them related to payments overseas;<sup>9</sup>
- the total amount of penalties and disgorgements paid for violations of the FCPA in 2012 and 2013 (after cases arising from the Iraq oil for food programme had concluded) was over USD1.6 billion. The Department of Justice has also embarked on a number of prosecutions against individuals during the course of 2013;<sup>10</sup>
- the eight figure penalty imposed on Griffiths Energy by the Canadian authorities followed a self-report by the company and a plea of guilty, but still the authorities imposed the highest penalty for foreign corruption in Canadian history.

There may be many reasons behind this apparently more aggressive approach by prosecuting agencies in the developed world, but in recent months the political debate around corruption has refocused, away from the corrosive effect such practices have on business and towards corruption as a development issue.

According to the United Nation's Stolen Asset Recovery (StAR) programme, over the past 20 or so years, a total of some USD32 billion in stolen or corrupt assets has been recovered or is frozen in proceedings around the world, many in offshore jurisdictions.<sup>11</sup> The overwhelming majority of those proceedings have been brought by government agencies, or in proceedings which are ancillary to prosecutions or non-prosecution based civil actions by government agencies. Whilst this figure is a large number, it must be borne in mind that nearly USD25 billion of the total consists of funds and assets frozen as belonging to or returned to Libya following the fall of the Gaddafi regime. Many of the cases have taken years to complete, but a review of the StAR corruption cases database does show a marked increase in activity over recent years. It seems tolerably clear that the Arab Spring, and the focus on the assets of the former dictators of the Middle East, has given a new impetus to

governments in freezing and repatriating stolen state assets. The government of the United Kingdom has set up a task force responsible for securing such assets, as have the States of Jersey. The authorities in Switzerland have a well-developed practice in dealing with requests for assistance by foreign jurisdictions in locating, freezing and repatriating the proceeds of corruption of looting of state assets, not least as a result of the litigation surrounding the assets of Sani Abacha throughout the 1990s and the first decade of this century.

According to Transparency International, some USD1.25 trillion leaves developing countries in illicit outflows each year. They also point out that this figure is equivalent to the GDP of Switzerland, South Africa and Belgium.<sup>12</sup> To give another comparator, this figure is equivalent to approximately 8% of the estimated nominal GDP of the United States, and a little under 2% of the entire global GDP in 2011.<sup>13</sup> These numbers illustrate starkly the extent to which stopping the illicit outflow of funds from developing economies will give room for growth in those economies, growth which will provide investment opportunities for those in the developed world. Notwithstanding the increased activity in recent years, these figures show the marked disparity between the amount of money which leaves developing economies in illicit outflows each year and the amount recovered by asset recovery efforts so far.

State authorities around the world have a number of resources at their disposal to attack the proceeds of corruption, including criminal forfeiture and restitution orders, and civil penalties. In a number of Civil Law jurisdictions those from whom assets have been looted are able to intervene in criminal proceedings to make a claim to those assets, but in Common Law countries traditionally such proceedings have been considered to be between the defendant and the state, with the victims of crime being left either to make a claim to the relevant law enforcement agency (such as in the USA under the victims' statute) or to ask the relevant prosecuting agency to make a claim for compensation on its behalf (such as in the UK under the Powers of Criminal Courts (Sentencing) Act 2000).

In the UK in particular, a strict application of the law could be taken to lead to states (and indeed investors) from whom assets have been looted through corruption being

left out in the cold while a criminal prosecution is undertaken. In cases of acquisitive crime the Proceeds of Crime Act 2002 provides for a regime of worldwide criminal freezing orders.<sup>14</sup> In *Serious Fraud Office v Lexi Holdings*<sup>15</sup> the victim of a fraud applied to vary such an order to recover its losses. The Court of Appeal held that, while it could recover any assets over which it could make a direct proprietary claim, the so-called “legislative steer”,<sup>16</sup> a provision directing the court as to how it should exercise its discretion to make and vary criminal freezing orders, prohibited the court from allowing Lexi Holdings to recover amounts which it had lost but in relation to which it was an unsecured creditor, notwithstanding that it was seeking to recover the losses caused by the very fraud which was the subject of the substantive prosecution.

Recent cases, however, suggest that this strict rule is being reconsidered by the UK courts. In *Re Stanford Investment Bank*<sup>17</sup> the Central Criminal Court held that funds frozen by a criminal freezing order could be released to the liquidators of Stanford Investment Bank to permit them to pursue the liquidation for the benefit of the creditors, who were also victims of the fraud giving rise to the freezing order. In *R v Jawad*<sup>18</sup> the Court of Appeal considered whether the possibility that a defendant would willingly pay compensation to the victim of his crime meant that no confiscation order for the benefit which the defendant had gained from that crime should be made. The Court determined that the possibility of such payment was not enough; actual payment had to be made, and, notwithstanding the decision in *Lexi Holdings*, suggested that if necessary an application should be made to vary any criminal freezing order to enable it to be made.

Ordinarily a criminal court in the UK must make a confiscation order for the value of a defendant’s benefit from crime whenever it is satisfied that assets exist with which such an order can be satisfied. However, where a civil claim is made by the victim of a crime for the recovery of their loss, that obligation becomes a discretionary power.<sup>19</sup> For many years it was thought that there was no difficulty with making such a claim where assets could be traced to corruption. Nearly 20 years ago, in *Attorney General for Hong Kong v Reid*<sup>20</sup>, the Privy Council had no hesitation in holding that an official

who accepted a bribe held that bribe, and anything bought with it, on trust for the state for whom that official worked. This principle was thrown into doubt in 2011 by the decision of the Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance*,<sup>21</sup> in which it was held that not all of the proceeds of a breach of fiduciary duty could be made the subject of a proprietary claim. In the context of state corruption and the looting of state assets, however, the effect of this decision was significantly reduced at the start of this year by the further decision of the Court of Appeal in *FHR European Ventures LLP v Mankarious*,<sup>22</sup> in which a secret commission paid by the seller of a hotel to the purchaser’s agent, and its fruits, were held by the Court to be held on constructive trust for that purchaser. At the conclusion of his judgment in this case, Sir Terence Etherton, the Chancellor of the High Court, expressed his concern that this area of the law had become complex, and called for its review.

The Proceeds of Crime Act also provides for a regime of non-conviction-based forfeiture in the UK,<sup>23</sup> in which the victim of a crime is able to intervene directly and, so long as the funds in question were not obtained by that victim themselves by crime, the stolen assets, or their value, will be returned to them. The same is true where cash (which is a term of art not necessarily referring to notes and coins) is seized by the UK authorities and an application is made to forfeit that cash.

Navigating a complex legal framework in order to recover stolen assets when they are seized from the thief by the state is by no means a problem encountered uniquely in the UK. However, the difficulties can be overcome if the correct procedures are used and, given the change in attitude concerning corruption generally, those seeking to recover its proceeds are likely to find that law enforcement agencies around the world, and if necessary courts around the world, will co-operate if the right applications are made.

Whilst targeting corruption and its proceeds has long been considered a “good thing”, hard action which would undermine a culture of entitlement and challenge a feeling of impunity on the part of the corrupt has been, perhaps, not all it could be. The political wind has undoubtedly changed in recent times, and the Arab spring has given an impetus for action. From the point of view of those with substantial funds

looking for the next big investment opportunity, and governments looking for new markets which will help their economies to grow, supporting and indeed actively encouraging that action should be seen as not just a “good thing” but as part of a positive commercial strategy for the future. The development of a global legal norm that the proceeds of corruption will be taken from the corrupt and returned to their rightful owner can only help to increase the funds available to developing countries to achieve their potential. It will also, however, inevitably give those considering investing in that development greater confidence that their investment will be safe, and that the returns which can be expected will be that much better.

#### END NOTES:

1. *Bribery Act 2010, section 6(2) and (3).*
2. *Anti-Terrorism, Crime and Security Act 2001.*
3. *USC 15 s 78d-1(b).*
4. *Corruption of Foreign Public Officials Act, section 3.*
5. *Following the self-report by Griffiths Energy.*
6. *Criminal Code Act 1995, Division 70.*
7. *Criminal Code Act 1995, section 70.4.*
8. *Securrency International Pty Ltd and Note Printing International Ltd.*
9. *Ernst & Young Bribery Digest, July 2012.*
10. *Source: SEC and DoJ websites.*
11. *Source: StAR Corruption Cases. Database. This figure does not include cases in which the amounts returned or frozen are not specified.*
12. *The sources given by TI for this figure are: Global Financial Integrity, ‘Illicit Financial Flows from Developing Countries’ (2011); World Bank, ‘World Bank Indicators Database’ (2011); Oxfam, ‘Cost of Ending Poverty’.*
13. *Source: World Bank.*
14. *Proceeds of Crime Act 2002, sections 40ff.*
15. [2009] QB 376.
16. *POCA section 69.*
17. [2012] Lloyd’s Rep FC 255.
18. [2013] EWCA Crim 644.
19. *POCA s. 6(6).*
20. [1994] 1 AC 324.
21. [2012] Ch 453.
22. [2013] 1 Lloyd’s Rep 416.
23. *POCA, Part 5.*



Commissions in Asia, the new English Bribery Act and the US Foreign Corrupt Practices Act April 2011, Issue 215

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