

**INTERNATIONAL CORRUPTION: HOW GHANA CAN COLLABORATE
WITH THE UNITED KINGDOM AND OTHER COUNTRIES TO BEAT IT:
aka THOUGHTS ON PREVENTION AND CURE**

Notes of a lecture given by John Hardy QC at the law faculty of the University of Ghana on 10 March 2010.

A statistic: the World Bank estimated that in 2004, 6% of the world's economy consisted of payments made by way of bribe.

1. I want to begin with an African success story in the fight against corruption. It concerns an all-too typical scenario: a small African state seeks to develop a natural resource project, an infrastructure development of potentially massive significance and benefit to its people. It does not have the construction resources and expertise to develop the project itself, and so it invites tenders and contributions from large Western construction companies. The scale and dimensions of the project are mouthwatering as commercial propositions for the competing companies.
2. The potential for corrupt commercial activity is apparent from that brief scenario. How is the country to conduct a tendering process? What should the country do to establish a commercial agency to represent its own commercial interests? How should the tendering process be supervised and, given the commercial confidentiality inherent in such a process, kept clean and above board?
3. Let me digress for a little while. Who, typically, would receive a bribe? He is not someone low down the pecking order, He must be someone of substance, capable of influencing or taking a decision. In terms of wealth he may not have much, but, relative to his neighbour, he has more, His seniority is such that, from the inside, he can influence or decide the outcome of the tendering process. Otherwise there is no point in bribing him. What of the bidders? It should not be forgotten that the companies engaged in the tendering process also have their self-interest to safeguard. Suppose that company 1, from country A where it is a household name and flagship company, will stop at nothing to secure a contract, while company 2, from country B where it, too, is a household name and flagship company, is prevented from doing so by its own domestic anti-corruption law. Both companies have wide investor bases, with shareholders across the world. Each is as good as the other in terms of quality of product, reliability of service, timing and duration of delivery and construction, and aftercare. There is little to choose between them. The temptation for company 1 to secure business through bribery, which company 2 cannot do, is irresistible. The shareholders are satisfied and invest more, the directors are rewarded with bonuses, the staff are happy and content in well-rewarded and secure jobs. But company 2 cannot effectively compete. Its shareholders rebel and sack the Board. The staff have no work and are made redundant. The company's share-price plummets. The company goes bust.

Since company 1 is now the only player in the field, it has a monopoly. It can be as uncompetitive as it wishes and charge what it likes for its products. The situation for the consumer – the purchasing country - is wholly unsatisfactory.

4. Let us provide an alternative ending to this little story. Eventually a new managing director is appointed by company 2. Country B is concerned about the parlous state of its flagship company. The new MD explains to his country's government that because there are no restrictions on the way in which company 1 operates overseas, his company, company 2 cannot effectively compete in the market place. What does the government do? It can't repeal its anti-corruption legislation, for that would be to surrender to and positively encourage crime. Nor, realistically, can it ask country A to introduce anti-corruption legislation, because if it did, the government of country A would legislate away the commercial advantage of its flagship company. The only solution for country B – in the absence of a co-ordinated, multi-lateral international consensual approach – is to tacitly ignore its own laws, to turn a blind eye.
5. What happens next? Company 2 is back from the brink, and able to compete effectively. How does the purchasing country – the consumer - decide which company to commission in these circumstances? The answer is that the contract goes to whoever pays the biggest bribe.
6. But this gives rise to a different and insidious problem for the consumer. Both company 1 and company 2 need to make a profit. The bigger the bribe, the more that bribe potentially eats into their profit. So they factor the bribe into the purchase price. That means in effect that where the purchaser is a country, those paying the purchase price – the taxpayers especially the poorer members of society - are paying more for the product, But they are not paying more to the company, although that is where the money initially goes. They are in fact paying their own representatives more than they should be paid, because the successful company pays the representatives the bribe which is factored into the purchase price.
7. Thus it can be seen that there are really three parties to this transaction: the successful bidding company, which through corrupt payments secures the contract, makes a profit, and guarantees its commercial future. It is perfectly happy. Then there are the representatives of the country who award the contract to the successful company in return for receiving bribes, Subject to their consciences, they are perfectly happy. Then there are the citizens and taxpayers of the country, who have to pay more in taxes in order that their representatives can receive bribes, I doubt that they are happy at all.
8. That is the gravamen of the bribery of foreign public officials: it comes at the expense of those least able to afford it. There are many forms of corruption, but this is the most damaging of all, since it involves the subversion of elected ministers and appointed officials whose duty is to serve the public. It therefore undermines the fabric of democracy, and presents an insidious challenge to the rule of law.

9. Like money laundering, to which it is directly related in the sense that as soon as a public official receives a bribe, he acquires the proceeds of crime, the bribery of foreign public officials is a disease: a political disease, a social and cultural disease, and an economic disease.
10. It is a political disease because it causes decisions to be made for the wrong reasons: the elected representative or official does not ask himself “what’s in it for the people I represent?” Instead he asks himself “what’s in it for me?” It is a social and cultural disease because in the sense that if it is not regarded as socially and culturally reprehensible this prolongs the toxic effect of the political and economic diseases. It is an economic disease for the reason already identified: the losers are those least able to pay.

Diagram:

Provider

\ (Kick back 100)

| (Contract 300) Official

/ (Legitimate Salary 200)

Citizen

11. I haven’t forgotten: let me come back to an African success story - an African country, an infrastructure project, bribes, and successful prosecutions. The Lesotho Highlands Water Project was one of the largest dam projects in the world. It was set up in 1986 with the twin aims of providing hydro-electric power to Lesotho, and delivering water to South Africa, A treaty was signed between the two countries. That same year the Lesotho Highlands Development Authority was established to oversee the project. Its first chief executive was a local engineer, Masupha Sole.
12. The project was partly funded by the World Bank, and attracted interest from many major Western Construction Companies.
13. Concerns over the running of the LHDA led to audit in 1994. This uncovered serious irregularities on the part of Mr. Sole. This led to his dismissal and a civil action was begun against him by the LHDA to recover misappropriated funds.
14. Mr. Sole may well have been a very good engineer, and for all we know, a capable chief executive. But he had a problem – he was forgetful. He forgot he had bank accounts in South Africa, and in Switzerland. So he denied having them. But as I explained to you yesterday, the culture of banking has changed, even in Switzerland, and client confidentiality can be supervened by proper requests for international assistance. Thus the Lesotho authorities made a request about Mr. Sole, and the Swiss investigations found he held several accounts in Switzerland. Not only had Mr. Sole “forgotten” he had these

accounts, perhaps more surprisingly, he had also forgotten that he had well over US\$1,000,000 squirreled away in them. But that was not all. The Swiss investigation also revealed that, whilst the payments had been made through so-called intermediaries, the origin of every one of the payments was one of the contractors on the LHWP.

15. Mr Sole lost the civil case, and he was also tried and convicted of bribery and fraud. But what is important about this case is that the authorities in Lesotho were not content to let matters rest there. Notwithstanding the evidential and jurisdictional issues involved in proving and asserting jurisdiction over payments made in Switzerland, the authorities went ahead and prosecuted a number of the companies from whom those payments had come.
16. Sole himself argued that a court in Lesotho did not have jurisdiction in a case in which the alleged bribes were paid in another country and no money changed hands in Lesotho. But the case was being tried by an experienced expatriate judge, by name Cullinan. He reviewed the authorities on jurisdiction – those which are based wholly on the concept of acts and omissions occurring intra-territorially, and those based on the principle of “harmful effects”, that is to say where conduct takes place outside the jurisdiction, but the harmful effects of that conduct are felt within the jurisdiction.
17. One of those authorities was a Canadian case: *Libman v The Queen* (1985) 21 DLR (4th) 174 in which La Foret J said that while it remained true that the “primary basis of criminal jurisdiction is territorial States increasingly exercise jurisdiction over criminal behaviour in other States that has harmful consequences within their own territory or jurisdiction”
18. Judge Cullinan applied this principle. He was upheld by the Court of Appeal who said in their judgment about the nature of corruption of public officials: “The Crown argued that [jurisdiction] was sufficiently established by the harmful consequences immediately inflicted upon the integrity of public administration in Lesotho by the conclusion of the corrupt agreements. We agree. The development scheme administered administered by the LHDA is of great importance to Lesotho, and indeed, to the Southern African Development Community. It involves Lesotho’s international relations and is central to its economic future. Its success and integrity matter vitally to this country. Corrupt agreements by its chief executive with its international contractors, if established, would be a cancer at its heart.”
19. Thus it was that plucky little Lesotho, through determined investigation and prosecution, succeeded in eradicating its cancer by securing the convictions of both bribe-taker and bribe-givers.
20. As I observed earlier, giving you my example of companies 1 and 2, and countries A and B, there can be no realistic bi-lateral efforts to combat bribery. Efforts will not succeed unless they are at least regional, and more – global. But dealing with African issues, it is more likely, say, that a French construction company will win a contract to build in Africa, than an African company will win a contract to undertake a construction project in France.

21. Thus the need for international action focuses upon making the acceptance of a bribe unacceptable everywhere, but the offering of a bribe to, or the bribing of, an overseas public official particularly unacceptable in countries where companies typically trade abroad. This had consequences for the United Kingdom in that it had to legislate to create extra-territorial jurisdiction, While the LHWP case was not of itself the springboard for international action, it ran concurrently with it. That international action was both multi-lateral, leading to domestic legislation, and non-governmental in the sense that business groups recognised the need to guard against overseas corruption, and moves began to establish best practice guidelines for commercial activities in foreign jurisdictions.
22. At the forefront of the international effort is the OECD. The Covention on Combating Bribery of Foreign Public Officials in International Business Transactions came into force on 15 February 1999. The Convention is concerned with the “supply side” of bribery, that is to say those who offer and/or give bribes, rather than those who solicit and/or receive them.
23. It has been followed by supplementary recommendations issued in December last year.
24. Note should also be taken of he terms of the African Union Convention on Preventing and Combating Corruption of 2003 which, sadly, may be more effective in some parts of Africa than in others.
25. I want to turn now to the case of *Mabey & Johnson*, a corporate prosecution. This case concluded on 25 September last year when, in respect of conduct relating to Ghana throughout much of the last decade, the company was fined £750,000. It was also ordered to pay reparations to the Republic of Ghana in the sum of £658,000. This was part of a package of penalties costs and confiscations amounting in total £6.6 million.
26. The facts of the case against the company are well known. They are not confined to Ghana. I don't propose to deal with them at all.
27. What I do want to do, however, is to try to clear up some misunderstandings that it seems to me are widespread in Ghana concerning the naming of certain elected representatives and officials during the court proceedings in London. Why, it I asked, were the Ghanaians identified by name (so, too, I should say at this point, was a senior member of the Jamaican government) when the directors and mangers of Mabey & Johnson were anonymised, that is referred to only as Directors A,B,C, D and so forth. Is this evidence of some neo-colonialism, or latent racism?
28. I can answer that question emphatically. The answer is no it is not. The reasons this course was taken were as follows: first, there was and is no prospect of any named Ghanaian elected representative or official being prosecuted in the courts of the United Kingdom. But, second, that is not the position with the directors and managers. They remain under investigation.

The company itself was prosecuted early on, since it had co-operated with the investigation, and changed both its management personnel and its management practices since the date of the offending. The corruption it admitted was historic, and if it was to be left in a position where it was or might be capable of continuing to trade, it was essential it was dealt with as soon as possible, and that it did not remain in limbo pending a long drawn-out and protracted investigation of the role of individuals. An entirely innocent workforce, numbering several hundred stood to lose their jobs if the situation of the company was not resolved speedily.

29. Those considerations did not apply to the directors and managers under investigation. But what would be the position if they were brought to trial, and the press had reported them name for name when the company was sentenced on 25 September. The answer is that it may have been possible for them to argue, if they were to be tried, that they could not have a fair trial in the UK because of previous prejudicial press reporting. So they were referred to by letter, rather than name. That is the only reason they were anonymised.
30. Third, careful consideration was given to naming the ministers and officials whose names appeared. But there was no prospect at that stage that they would be investigated or brought to trial in their home jurisdictions. The risk of prejudice at trial was therefore impossible to evaluate. However, in order for the UK court to be able to assess the culpability of the company, it was necessary to explain the level at which they engaged in corrupt activity: this was not petty corruption of minor, local bureaucrats, it was corruption at a very senior level of government. It would have been impossible to identify that level of seniority by only referring to position, since the name of the position holder would have come out in the press in any event. Therefore the usual course was followed, that is people were identified by name unless there were compelling reasons not to do so. The information concerning these payments was supplied directly by M & J to the SFO, and supported by documentary evidence. We have no reason to suppose that M & J were being untruthful in what they told us, but the persons named face only allegations. Those allegations, if they are to result in trials at all will result in trials elsewhere than in the United Kingdom.
32. Lastly, I want to look at some of the provisions of the Bill before the UK Parliament which, when passed as anticipated this summer, will become the Bribery Act 2010. In doing so, I want to pose an intriguing question: would Judas Iscariot have been punishable under this Act?

