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The problem of Curbing Grand Scale Global Corruption

My name is Jack Blum. I am a Washington lawyer who works on issues related to international corruption, tax evasion and financial crime. My practice focuses includes money laundering compliance work for banks and brokerage firms, representation of the victims of complex financial fraud, and assistance to various governments and government agencies regarding offshore financial structures and tax evasion. I currently represent the Government of Nigeria in its efforts to obtain mutual legal assistance from the United States in the KBR bribery case - a case that illustrates the problems of dealing with cross border corruption and about which I will say more about in my testimony.

Thirty years of experience with foreign corruption issues has led me to the following conclusions:

- Amendments to the Foreign Corrupt Practices Act (FCPA) may facilitate domestic prosecutions, but will not address the major underlying issue - grand scale corruption which impoverishes a nation to enrich the people who run the government.
- Years of work on mutual legal assistance treaties and anti-corruption conventions designed to facilitate cooperation have still not made the prospect of bringing all of the perpetrators of grand scale corruption to justice more likely. Nothing addresses corruption in plain sight -- the agreements are all designed to respond after the fact.
- The best prospect for real results lie in the area of civil recovery undertaken by itself or in conjunction with criminal prosecution.
- To help the effort Congress should pass laws facilitating civil recovery, laws that expand the jurisdiction of US courts on these matters and that hold financial institutions civilly liable for failure to protect the interests of the beneficial owners of stolen money -- the country that was looted.

The grand scale corruption issue is more important than ever. Obvious cases of grand scale corruption abound. Examples include the Obiangs of Equatorial Guinea, the family of the president of Kazakhstan, the now retired Daniel Arap Moi of Kenya, and the former presidents of Nigeria who retired to London with a substantial portion of the national patrimony. The amounts flowing out of the developing world as a result of corruption in all probability exceed the amount of direct foreign assistance flowing in. Finding a way of curbing the flow of this corruption money must be a priority.

The existing network of treaties and conventions, while far better than the one in place thirty years ago, is still not effective in stopping the flow of illicit funds. The problems are deep and systemic and require careful thought. At the core is the same central problem at the heart of every truly global issue in urgent need of solution -- the prerogatives of national sovereignty. In no area are those prerogatives more

vigorously asserted than in the area of criminal law -- and anti-corruption efforts have mostly focused on criminal law responses.

The need for global coordination on the issue of corruption was obvious when the FCPA was being considered. In the 1970's the Senate Foreign Relations Committee, which I then served as Associate Counsel, exposed the bribes Lockheed Aircraft paid to a clutch of foreign heads of state including the Prime Minister of Japan. At the time, there was no mechanism for the Senate to share its evidence with the Japanese prosecutors or for that matter with the prosecutors of other interested countries. The State Department then began urgent negotiations with Japan which put in place the first mutual legal assistance agreement. Others quickly followed.

What the countries did with the evidence was up to them. Japan eventually prosecuted, convicted and imprisoned Prime Minister Tanaka. In contrast, Mexico never even requested the Lockheed evidence the Foreign Relations Committee had obtained.

Working for the UN Centre on Transnational Corporations in 1976 I attempted to draft an international anti-corruption agreement. That first UN effort was, and still is, referred to in some quarters as the "disaster of 1976." Ideological differences, commercial rivalries, and national interests overrode what little momentum the anti-corruption initiative had. I learned that nothing could be drafted that would in any way interfere with national sovereignty. In plain English if the crook is a sitting head of state there is nothing the international community can do short of an embargo or invasion.

I revisited the corruption issue in the late 1980's as Special Counsel to the Senate Foreign Relations Committee - this time as the Committee began to look into the issue of money laundering. I vividly remember a drug dealer who had roots in the Cayman Islands testifying, almost as an aside, that the then Prime Minister of Jamaica, Edward Seaga, had hidden bank accounts in Cayman. When the hearing ended, and I returned to my office my phone rang with a call from a very angry Prime Minister Seaga. He wanted to know how he was to handle a situation in which he could not defend himself.

"What business was it of the United States to undermine this government?," he asked. "How can I possibly defend myself? Was this not an attack on Jamaican sovereignty?"

Indeed the questions had merit and were part of the same challenge the Committee faced in the Lockheed Japanese bribery case. How could the United States open an investigation that would lead to corruption charges against a foreign head of state who could not be prosecuted here? What were the foreign policy implications?

In 1989 I was the co-author of a UN Report on Offshore Havens and Money Laundering and in 1990 became the Chair of a UN Experts group on asset recovery. Our objective was to find a way for counties which had been victimized by grand scale corruption to go after the funds using civil actions and repatriate them.

The experts group included lawyers and persecutors from around the world. In the course of our wide ranging discussions the limits of criminal prosecution became apparent. Criminal law by its very nature is

territorial. Countries can prosecute crimes within their jurisdiction. In some cases countries expand their jurisdictional claims to cover crimes against their citizens, crimes by their citizens wherever committed, and crimes that have an impact on their territory. To deal with the issue of crimes that cross borders, countries have developed a system of extradition treaties and mutual legal assistance agreements. Thus far, with the exception of the International Criminal Court which the United States does not participate in, there is no international criminal law. Indeed, the newly negotiated anti-corruption conventions still call signatory state to pass their own implementing criminal legislation.

There are many good reasons to be cautious when it comes to the creation of an international criminal law. For the United States the most serious is the preservation of the Constitutional rights of American citizens. While our system of justice has its flaws most of us would find it unacceptable to be charged in a system that lacked the Fifth Amendment right to remain silent, did not guarantee a jury trial or did not presume innocence until proven guilty.

As a result of the territorial limitations, criminal law is largely dysfunctional in the area of complex white collar crime. Despite the plethora of bi-lateral mutual legal assistance agreements it is still virtually impossible to compel testimony in a US court from a foreign witness who chooses not to cooperate. Although there are procedures for the movement of evidence across international borders, the process is slow and cumbersome. National interests and political forces sometime trump real cooperation. A screaming example of this is the BAE (British Aircraft Industries) Saudi bribery case which was closed down by the UK government. The UK was shameless in saying the investigation was closed to protect the thousands of jobs tied to the global defense equipment contracts the company had obtained. My understanding is that the Justice Department is pursuing the case, but without the active help of the UK I do not expect much.

Then there is the issue of corruption in Kazakhstan. The country is notoriously corrupt. It is obvious that much of it mineral wealth has been diverted for the benefit of the President and his associates. There is a pending case against an alleged bag man who handled payoffs for US companies. However, the defendant, James Giffen, who entered a plea of not guilty in June 2004, has yet to come to trial. One has to wonder whether the size of the country's oil reserves is the real issue behind the delay.

As part of my work with the United Nations I became involved in the Abacha asset recovery case. What I discovered was that the criminal cooperation agreements were not terribly helpful to the recovery effort. The UK government stalled in providing information in what I believe was an effort to protect its financial institutions. In accordance with an agreement regarding the freezing of stolen assets, the government of Liechtenstein froze the Abacha money, but then refused to repatriate it because there have been no conviction on the "predicate" offense. The problem was that Abacha was the criminal. He died, and under common law the crime dies with the defendant. The international agreements regarding asset seizure require that there be a foreign prosecution underway and that the government asking for the seizure show that the funds are in fact tired to the crime.

Finally there is the issue of time. Each government wants to complete its investigation of the crimes associated with a bribe payment before it turns evidence over to other governments. Take the current

KBR/Nigerian bribe case as an example. The key defendant pled guilty in September of 2008. In the plea, reference is made to payments to three high Nigerian government officials between 1995 and 2002. Because of a parallel investigation in France in 2004, relating to a French partner of KBR, we know that the payments involved a company run by KBR, that was set up on the Portuguese Island of Madeira. The reports indicate that in addition a Gibraltar Company and a British lawyer are involved. The Nigerian officials said to have received the money remain unidentified.

The Nigerian request is now on temporary hold because of the "ongoing" investigation. Assuming that the Department of Justice delivers the information to Nigeria in short order the Nigerian investigation will then cut across France, the UK , Gibraltar, and Portugal. And that just covers what we now know. Most likely the money trail will move through a few more secrecy havens. With luck the criminal case in Nigeria may take form sometime in 2011 or 2012, assuming all the governments involved deliver, and the trail of the money does not involve too many more jurisdictions.

Will there be any money left to recover by the time the case is concluded? How effective will the punishment be if the case in concluded 15 years after the event?

The issue is a pressing one for Nigeria because it has cast a cloud over at least three governments. Quite properly, the US has not named the alleged recipients of the bribes. Imagine the problems that naming the alleged recipients would create if it was later learned the money in fact siphoned off by as yet unidentified middlemen.

And although many Americans will question the effectiveness of the Nigerian criminal justice process, the Nigerians on the receiving end of the charges deserve the right to defend themselves and their reputations. Nigerian citizens deserve knowing how their national patrimony came to be misused.

The Patriot Act

The financial provisions of the Patriot Act were a huge step forward in controlling the flow of funds derived from criminal sources. Every financial institution now monitors its customers' transactions and reports suspicious transactions to FINCEN. Based on my own experience, most institutions are diligent in their compliance efforts. The ones that have not been as diligent have been the target of tough enforcement actions that sent a message across the banking industry.

The transaction screening requires enhanced due diligence regarding the accounts of politically exposed persons -- so called PEPs. Suspicious Activity Reparts that result from this screening go to FINCEN for law enforcement review. From personal experience I can tell you that the US law enforcement agencies are not eager to take on the case of a foreign official living outside the United States who has suspicious bank transactions.

If an institution files a suspicious activity report they have complied with the law. The decision of what to do about the account and the customer is up to the institution. The smarter financial institutions will avoid reputational risk by closing the account and forcing the customer to go elsewhere. The money will

move and that will be the end of the story. There is nothing in the law that requires the institution to close the account.

The solution would be to hold an institution responsible for taking on a questionable account, or worse yet assisting in arranging an offshore structure for a PEP. I believe that any institution that takes on an account knowing of the likely tainted source of funds should be held responsible as the "constructive trustee" for the true owner of the money. Thus if a bank handled bribe money, the bank could be liable to repay any amount that has been moved through its facilities. The English courts have adopted this position and it does not seem to have inhibited the ability of the UK's financial institutions to operate. I also believe that after the first large recovery against a financial institution the level of care the banks will exercise will increase substantially.

Finally the Committee should be aware that most US courts dismiss cases involving foreign corruption on grounds that the case would be best tried in another jurisdiction. Congress could grant the US courts wider jurisdiction in civil recovery cases against financial institutions to make it easier on civil plaintiffs.

The most promising anti-corruption effort now under way is taking shape under the leadership of Lord Daniel Brennan, Q.C. Working with a group of non-profits he has formed a steering committee of which I am a member to create a non-profit institution to receive the assignment of the right to sue for recovery from a victimized country. It would then provide the requisite expertise, fund the recovery effort and repatriate the funds. The proposal should be ready for wider public discussion in the next several months.