Briefing note

June 2014

Bribery risks for companies investing in Africa

Bribery risks in Africa are not necessarily different in kind from bribery risks in other jurisdictions, but there is a perception that bribery is more prevalent in many African countries. As investors are increasingly drawn to the continent by a range of attractive opportunities – particularly in natural resources – they can also face challenges in the form of political unrest, security issues and corruption. The last ten years have also shown that prosecutors and regulators (particularly in the US) are not deterred from tackling investigations of conduct in Africa, by the challenges of investigating there and further, that they are not prepared to accept claims that 'that is how business is done here'.

According to a report by UNCTAD[1], foreign direct investment flows to African countries increased by 5 per cent in 2012 to US$50 billion (in contrast to a global FDI fall of 18 per cent), and African countries featured in a table of the top twenty economies by rate of return on inward FDI, with Angola at the head. Investment in natural resources and the extractive industries (notoriously a sector with a high level of bribery risks) remains the key driver, but investment has also broadened into consumer-oriented projects, and competition for the potentially lucrative rewards can be fierce.

One of the most successful countries in attracting inward investment is Nigeria[2]; however, this has also seen one of the most prominent recent bribery cases, the Bonny Island LNG project, which resulted in penalties of over USD1.9 billion and in sanctions on companies from Italy, the U.S., Japan and the UK, as well as prison terms for individuals involved (see Box).

The broad brush perception of Africa as corrupt is in fact contradicted by benchmarking tools, such as the Corruption Perceptions Index published by Transparency International ("TI CPI"), and the World Bank's Worldwide Governance Indicators ("WGI"). A glance at either of these tools shows a much more nuanced view. While Nigeria is ranked 144th (out of 177 countries) in the TI CPI 2013 with a score of 25[3], and is listed in the bottom 11% of 215 countries reviewed by the World Bank[4], Botswana, by contrast, has a TI CPI of 64 (compared to, say, the UK at 76, and above Portugal at 62 and Italy at 43). At the bottom of the table lies Somalia with a mere 8. The World Bank similarly scores Botswana fairly highly[5], with Somalia once again at the bottom.

Anecdotally, also, it appears that bribery risks considered common in some African countries, such as demands for facilitation payments, are not perceived to be a problem in other countries, such as South Africa. In different parts of Africa, other bribery risks may include payments to heads of local communities to facilitate development, land use or employment, informal payments to officials to register land title or take goods across borders or payments to security forces either to take enforcement action, or to pass road-checks. An understanding of the type of bribery risks likely to arise is crucial to developing policies and procedures for addressing them.

Whose laws apply?

All, or most African countries, will have laws prohibiting bribery. The African Union Convention on Preventing and Combating Corruption, adopted in 2003, has been ratified by 35 countries. But many companies operating in Africa are more concerned about the US Foreign Corrupt Practices Act (the "FCPA"), and the UK Bribery Act (the "UKBA"), which have extremely broad extra-territorial jurisdiction. US and UK prosecutors may be able to pursue companies investing or otherwise doing business in Africa, whether or not those companies are US or UK incorporated, and even if no part of the conduct takes place in the US or the UK.

So companies buying or investing in a company in Africa should always consider anti-bribery measures, particularly, pre-investment, undertaking specific anti-bribery due diligence. The

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1. UNCTAD World Investment Report 2013
2. According to the UNCTAD report Nigeria received the highest amount of FDI in 2012, followed by Mozambique, South Africa, the Democratic Republic of Congo and Ghana.
3. Out of a possible 100, where the higher the score, the lower the perceived level of bribery.
4. WGI 2012: Nigeria has a score of -1.13 (the range is -2-5 to + 2.5) by reference to the indicator 'Control of corruption'.
5. Botswana has a score of 0.9 and Somalia -1.6 in the WGI 2012 by reference to the indicator 'Control of corruption'.

Bonny Island, Nigeria

Between 1995 and 2004 a four company joint venture, comprising companies from France, the Netherlands, the U.S. and Japan (TSKJ), was awarded four engineering, procurement and construction (EPC) contracts, valued at more than $6 billion, by Nigeria LNG Ltd. to build the LNG facilities on Bonny Island, off the coast of Nigeria. The government-owned Nigerian National Petroleum Corporation was the largest shareholder of NLNG, owning 49 percent of the company.

But, following criminal investigations by the DOJ, with assistance from the FBI, SEC and authorities in France, Italy, Switzerland and the United Kingdom, the four companies, along with two agents engaged by TSKJ to help obtain the EPC contracts, have been the subject of fines amounting to USD 1.7 billion in total.

According to court documents (as reported by the DOJ), TSKJ hired two agents, a Japanese trading house and a UK solicitor, to pay bribes to a wide range of Nigerian government officials to assist in obtaining and retaining the EPC contracts. TSKJ paid approximately $132 million to a Gibraltar corporation controlled by the solicitor and $51 million to the Japanese trading house during the course of the bribery scheme and intended for these payments to be used, in part, for bribes to Nigerian government officials.

Tesler, the solicitor, pleaded guilty in Texas to conspiring to bribe top-ranking Nigerian politicians and officials in breach of the FCPA. He admitted that he acted as a middleman for the consortium and routed the payments through bank accounts in Monaco and Switzerland between 1994 and 2004. US prosecutors said that Tesler arranged for $1m in $100 notes to be loaded into a pilot's briefcase and then passed on to a politician's hotel room to finance a political party in Nigeria. He was sentenced to 21 months imprisonment and agreed to forfeit $148,964,568. The DOJ announced in January 2012 that the Japanese trading house had agreed to pay USD 54.6 million to resolve the charges against it.

extent of anti-bribery due diligence to be undertaken will typically depend on:

(i) which anti-bribery laws are likely to apply;

(ii) the risks presented by the location, sector and nature of the transaction (see further below);

(iii) the value of the transaction; and

(iv) the resources available / risk appetite of the purchaser / investor.

Liability for historic acts of bribery in acquisitions

An investor will generally not have criminal liability under the UKBA for acts of bribery committed by the target company or individuals at the target company before the investment, where the bribery was unrelated to the purchase and the investor had no involvement. Depending on the circumstances, the investor may have liability under the FCPA for prior acts of the target company as a successor to the target company. In late 2010 reports that the Securities and Exchange Commission was investigating a European financial services company in connection with alleged irregular sales-related payments by a German printing equipment manufacturing company in which the financial services company's private equity arm held a majority interest alarmed the private equity community. However, a subsequent cease-and-desist order made only passing reference to these allegations, noting that none of the irregularities had involved government projects or payments to foreign officials. Press speculation at the time suggested that US authorities had had difficulties in obtaining relevant information because of German information disclosure laws.

Whether or not the investor has criminal liability, the target company itself, or the relevant individuals at the target company, will remain liable for historic acts of bribery following purchase / investment. This could result in significant costs for the target company in investigating allegations of bribery, defending against prosecutions, or in penalties imposed by regulators, prosecutors or courts, with resultant implications for the value of the purchaser's investment. Depending on the circumstances, this could be dealt with in contract negotiations on price.

Under UK law, there may also be ongoing money laundering implications. If a person in the UK regulated sector knows or suspects, or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering (which includes simply being in possession of money that constitutes a person's benefit from criminal conduct), he could be committing an offence by not making a report to the UK Financial Intelligence Unit. A person who is not in the regulated sector may commit an offence if he transfers criminal property, is concerned in an arrangement which he knows or suspects facilitates the use or control of criminal property, or acquires, uses or possesses criminal property.

Even where there is no criminal liability, UK prosecutors may be able to seek civil recovery of the proceeds of crime. In some instances, civil recovery has been made of dividends paid to a UK parent company by an overseas subsidiary, where the subsidiary has obtained

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Selling books in East and West Africa

In July 2011 Macmillan Publishers Limited ("MPL") was ordered to pay over £11 million representing sums generated through unlawful conduct related to its Education Division in East and West Africa[6], under Part 5 of the Proceeds of Crime Act 2002.

The SFO started investigating MPL following a report from the World Bank that an agent had tried to pay a sum of money in order to influence the award of a World Bank funded tender to supply educational materials in Southern Sudan (the company did not win the contract). The SFO and World Bank extended the scope of investigation to Rwanda, Uganda and Zambia. The findings were that it was impossible to be sure that the awards of tenders to the company in the three jurisdictions were not accompanied by a corrupt relationship and it was therefore "plain that the Company may have received revenue that had been derived from unlawful conduct". Taking into consideration various factors, including the cooperation of MPL with the inquiry and its appointment of external consultants to recommend and help implement an internal appropriate anti-bribery and corruption compliance regime, MPL was ordered to pay £11,263,852.28 and costs. The company was also debarred from participating in World Bank funded tender business for a minimum period of three years.

A year later, in July 2012, Oxford Publishing Ltd agreed to pay almost £1.9 million as settlement after admitting unlawful conduct in its East African operations, by two subsidiaries, Oxford University Press East Africa (**OUPEA**) (covering Kenya, Burundi, Malawi, Rwanda, Sudan and Uganda) and Oxford University Press Tanzania (**OUPT**) (responsible for Tanzania and the semi-autonomous Zanzibar archipelago). The unlawful conduct concerned possible irregularities in tendering practices by OUPEA and OUPT in public tenders for contracts to supply governments with text books and other educational materials for the school curricula.

The SFO again decided to pursue a civil recovery (under section 276 of the Proceeds of Crime Act 2002) rather than a criminal prosecution, listing a number of reasons, including: difficulties in obtaining evidence from the jurisdictions involved and potential risks to the personal welfare of affected persons; cooperation; the fact that the products supplied were of a good standard and provided at 'open market' values; the resources needed to facilitate an investigation into this matter were considerable; and a civil recovery disposal allowed a better strategic deployment of resources to other investigations with a higher probability of criminal prosecution. OUPEA and OUPT were the subject of parallel World Bank procedures which resulted in them being debarred from participating in World Bank funded tenders for a number of years.

contracts through bribery. US regulators also may be able to seek civil penalties for prior acts of bribery, either directly against the target company or through successor liability theories.

In a civil recovery action taken by the SFO in the UK, and related to the Bonny Island contracts, MW Kellogg Ltd, a subsidiary of KBR (one of the members of the consortium), was ordered to pay £7 million in February 2011, even though the SFO said it recognised that MWKL took no part in the criminal activity (i.e. the payment of bribes for the EPC contracts) which generated the funds. MWKL had received the funds through share dividends payable from profits and revenues generated by the contracts illegally obtained by MWKL's parent company and others. The SFO action reflected their finding that MWKL was used by the parent company and was not a willing participant in the corruption.

The SFO has taken other successful civil recovery proceedings against Balfour Beatty (which was ordered to pay £2.25 m in October 2008 in relation to a contract to build a library in Alexandria, Egypt) and more recently against Oxford University Press and Macmillan Publishing in relation to contracts in East and West Africa.

Liability for future behaviour of target

Under US law, purchasers are expected to stop all acts of bribery in the future. The US Department of Justice and the Securities and Exchange Commission encourage all companies to conduct pre-acquisition due diligence to, among other things, identify any such conduct and, through mitigation measures reduce the risk that the investor / purchaser will continue to pay bribes post-acquisition. Companies and individuals (including US persons and officers, directors, or agents of issuers of US securities or US companies) can be held civilly or criminally liable for engaging in or authorizing acts of bribery. In July 2009 the Securities and Exchange Commission[7] filed a settled enforcement against Nature's Sunshine Products Inc. ("NSP"), its Chief Executive Officer Douglas Faggioli and its former Chief Financial Officer Craig D. Huff, in relation to cash payments made in 2000 and

6. SFO Press Release 22 July 2011

7. U.S. Securities and Exchange Commission Litigation Release No. 21162 / July 31, 2009
SEC v. Nature's Sunshine Products, Inc., Douglas Faggioli and Craig D. Huff, Case No. 09CV672 (D. Utah, Filed July 31, 2009)

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BAE in Tanzania

In 1999 British Aerospace Defence Systems Ltd agreed with the government of Tanzania to supply a radar defence system for Dar-es-Salaam International Airport. But the US $39.97 million contract was, according to the SFO, obtained through payments made by a local businessman, Shailesh Vithlani, hired to advise BAE on its negotiations with the government on the radar contract. BAE had entered into arrangements under which around $12.4 million was paid to two offshore companies controlled by Vithlani. BAE accepted that there was a high probability that part of this sum would be used to favour it in the contract negotiations[8].

In sentencing BAE, the judge said that he took the view that BAE were concealing from the auditors and ultimately the public the fact that they were making payments to Vithlani via offshore companies, with the intention that he should be able to make payments to such people as he thought fit to secure the radar contract for BAE, but that BAE did not want to know the details. BAE Systems plc pleaded guilty to aiding and abetting a breach of section 221 of the Companies Act 1985, i.e. failing to keep accounting records sufficient to explain the payments to the two offshore companies. BAE was fined £500,000 and costs, the settlement agreement including a payment of around £30 million to the Government of Tanzania, to be used for educational projects in Tanzania.

2001 by the Brazilian subsidiary of NSP, a manufacturer of nutritional and personal care products, to customs officials to import unregistered products into Brazil and the subsequent falsification of its books and records to conceal the payments. The complaint alleged that the two corporate officers, in their capacities as control persons, violated the books and records and internal controls provisions of U.S. securities laws in connection with the Brazilian cash payments. NSP, Faggioli and Huff, without admitting or denying the allegations of the complaint, consented to the entry of final judgments enjoining each of the defendants from future violations of the above-stated provisions and imposing monetary civil penalties.

While the FCPA's jurisdictional ambit requires a connection to the United States, these provisions are broadly construed and can sweep in conduct by US companies, US persons, US issuers, multinational companies that list on US exchanges, or anyone engaging in conduct in the United States or using US mails or US telecommunications systems (including e-mails) in connection with a bribe. The English solicitor in the Bonny Island case was extradited to the U.S. on the grounds that the payments were made in U.S. dollars.

Companies that are considered issuers under the FCPA, including non-US companies that issue securities on a US exchange may also have civil liability under the FCPA's accounting provisions (which include books and records and internal control requirements). Companies and individuals including officers, directors, stockholders and agents of such companies, can also be held criminally liable under the FCPA's accounting provisions for knowingly failing to comply with the requirements.

Under the UKBA, a purchaser would only be criminally liable for future behaviour of the target (assuming no direct involvement, such as conspiracy) where the target was considered to be an "associated person" of the purchaser, i.e. in circumstances where the target was performing services for or on behalf of the purchaser. This might be the case, e.g. where the target company or joint venture was an integral part of the purchaser's group and/or under the control of direction of the purchaser / investor. A company in which a private equity firm has invested is unlikely to be considered an associated person purely by virtue of that investment. There may, however, be money laundering implications as above. Additionally, although there is no 'books and records' offence in the UKBA, UK authorities have shown they are willing to use similar provisions in company legislation, as they did against BAE.

Where a UK company has committed a UKBA bribery offence (other than failing to prevent bribery) a director of that company (including, e.g. a director appointed to the company by a private equity investor) may be criminally liable where he has consented or connived at the offence.

Selling on / exit

Many international businesses / investors, particularly those subject to the FCPA and/or the UKBA, have detailed anti-bribery controls, and undertake anti-bribery due diligence before purchase / investment. The results of the due diligence will influence the decision whether to invest or not, and the offer price. Investors may therefore face difficulties in exiting investments in target companies that do not have appropriate anti-bribery policies and procedures in place, and may find the pool of available investors more limited. Or due diligence at that stage may uncover bribery issues which may affect the price, or deter investors altogether.

[8] SFO Press Release, 21 December 2010

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Political risks

In countries where the political regime is unstable, or where leaders have excessive power, there is a risk that official authorizations may be withdrawn without due cause, or that public sector contracts may be re-awarded arbitrarily. An incoming political regime may reject contractors who have entered into agreements with the old regime, and may allege that such contracts or authorizations were obtained through bribery.

Business partner risks

Laws in some African countries include requirements for foreign investors to employ local people, to have local representation in management, to procure supplies from locally owned entities, or to have a local partner or co-owner. While there are potential advantages to be gained, in terms of the benefits of local knowledge and an increased stake in the local community, corruption risks should also be considered, as companies can be liable for the acts of these agents/partners conducted on their behalf. Particular care should be exercised, and additional due diligence should be carried out where a local partner, agent or consultant is recommended, or required, by a public official.

Where a local partner is engaged to obtain licences or government approvals through high level contacts, anti-bribery controls should include additional due diligence on possible links between the partner and the public decision makers, contractual warranties on the use of monies provided to the local partner, and financial checks. Payments to consultants or agents for services in obtaining licences and approvals should be commensurate with the services provided, the scope of which should be fully set out in the consultancy / agency agreement. The foreign investor should consider whether to include audit rights and/or ongoing monitoring rights to exercise control over future payments by the consultant or agent. Payments to local consultants should generally be made to a bank account in the name of the consultant in the jurisdiction where the consultant is located and/or provides services.

Business partner risks are fully illustrated by charges filed by the DOJ in relation to payments to customs officials. In 2010 the DOJ announced that five oil and gas service companies and subsidiaries, along with a global freight forwarding company, had agreed to resolve FCPA proceedings, paying a total of USD 156 million in criminal penalties, and, in a related settlement with the SEC, civil penalties of around USD 80 million. The (Swiss) logistics services company admitted being involved in a scheme to pay bribes to foreign officials in at least seven countries, including Angola and Nigeria, on behalf of its customers, while its customers admitted that they had approved or condoned the payments and falsely recorded them as legitimate business expenses.

How should bribery risks be addressed?

Risk Assessment

Where a company is doing business in an African territory for the first time, or is investing in a new sector, it will be expected (under guidance published by the UK government to accompany the UKBA ("UKBA guidance")) to carry out a risk assessment, typically looking at five broad risks:

- ***Country risk:*** the country's score on the TI CPI can be a starting point, but it may also be useful to understand whether the country has effective anti-bribery legislation which is enforced, whether the government is stable, or if leader holds excessive power, if the company / target company has contracts with government / state-owned entities, to what extent will there be public oversight of contracts, whether there have been allegations of misconduct in relation to comparable contracts, and whether the success of the venture is dependent on political goodwill or legislation (existing or prospective)?
- ***Sectoral risk:*** many investments in Africa will relate to the extractive industries which are generally considered to be high risk. Other high risk sectors include large scale infrastructure, utilities and real estate[9]. Companies should consider whether the country has signed the Extractive Industries Transparency Initiative, to what extent companies operating in the relevant sector have to interact with ministers or public officials, and what the general reputation of

ministers or public officials in the relevant sector(s) is like. The cases of Macmillan and Oxford Publishing (see Box) demonstrate however that bribery is not limited to high risk sectors.

- ***Transaction risk:*** the UKBA guidance specifies certain factors that give rise to higher risks, e.g. dependence on official licences, permits or governmental authorisations, whether the company will be winning business through public procurement processes, and whether the company will be making a charitable contributions, social investments or political donations.

- ***Business opportunity risk:*** the company should consider how the business opportunity arose, whether there are agents, intermediaries or other parties who are being paid either above market prices, or for unclearly defined services and whether due diligence has been undertaken on such parties.

- ***Business partnership risk:*** the company should consider whether, and to what extent, it is using intermediaries in interactions with public officials, or to win business or obtain business advantages (see above).

Due diligence

Where a company is investing in a country with which it is familiar, a full risk assessment is unlikely to be necessary, but anti-bribery due diligence should generally be considered. As noted above, the US authorities expect companies to carry out extensive bribery due diligence – "[c]omprehensive due diligence demonstrates a genuine commitment to uncovering and preventing FCPA violations," although conducting diligence does not provide a complete defence to liability. A 'mini' risk assessment can identify the appropriate level of due diligence required.

UK authorities are likely to expect a similar level of due diligence, depending on the risks, in respect of persons who perform or will perform services for or on behalf of the organization, and have indicated they expect investors to carry out anti-bribery due diligence. While, as noted above, it is unlikely investors will have criminal liability under the UKBA as a result of a simple investment, prosecutors are likely to look at due diligence measures in determining whether to seek civil recovery of proceeds of crime.

It is also important to note that regulated firms in the UK are subject to separate requirements, and will be expected to have carried out anti-bribery due diligence as part of the checks and controls they are required to have in place by the Financial Conduct Authority; at least one company has been fined for failing to conduct adequate due diligence on third party introducers, including introducers in Nigeria, Egypt, Sudan and Gabon, even where no bribery was demonstrated to have occurred.

In essence, investors need to ensure that their due diligence enables them:

(i) to identify whether there are any historical or current bribery issues;

(ii) if so, to assess whether these issues can be sufficiently mitigated, and whether the target company will be commercially viable when operating in compliance with anti-bribery laws; and

(iii) to assess the existing compliance culture and framework and establish what steps are necessary to implement an effective anti-bribery compliance programme.

It is important to be aware of the types of bribery issues that are likely to arise so that the due diligence inquiries can be appropriately framed.

Other measures

Anti-bribery representations and warranties should be included in share purchase agreements, and other contracts as relevant. It should be noted that a representation to comply with all applicable laws may not always be sufficient protection, as there may be circumstances in which, say, the UKBA will apply to the investor but not to the person giving the representation. Once an investment has been made, it is important to ensure, to the extent that it is possible, that the investee company adopts appropriately robust anti-bribery policies and procedures.

Conclusion

A failure to understand the relevant bribery risks, and to carry out appropriate due diligence, could lead to criminal liability at worst. Other possible consequences include the possibility of civil recovery action in relation to the proceeds of crime, liability under anti-money laundering legislation, the investment ceasing to be commercially viable and difficulties in selling the asset on. Investors are increasingly drawn to Africa by a range of attractive investment opportunities, but it is important that they take steps to understand the environment in which they are investing, and to address the level and nature of bribery risks relevant to the specific location and sector in which they are investing.

[9] see http://bpi.transparency.org/bpi2011/.

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