

NEW ZEALAND'S PANAMA CONNECTION: FINANCIAL SERVICES, FACILITATION PAYMENTS, AND A LEGAL SLIPPERY SLOPE

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RESUMEN

Una convergencia de escándalos, acentuada por los "Documentos de Panamá", ha centrado la atención en Nueva Zelanda como un "paraíso fiscal" emergente con controles anticorrupción potencialmente insuficientes y un desprecio quizás ingenuo por la vigilancia del fraude financiero. Nuestro estudio examina las bases de estas percepciones perjudiciales y las tendencias políticas basadas en la globalización desde la perspectiva del influyente trabajo de Michael Johnston, *Síndromes of Corruption*, en el cual identificó cuatro síndromes primarios: "Mercados de Influencia", "Cárteles de Elite", "Oligarcas Y clanes", y "Moguls oficiales". Identificó a Nueva Zelanda con la categoría de "Mercados de Influencia", en la cual las economías maduras de mercado, generalmente clasificadas como menos corruptas con poco soborno de alto nivel, y con instituciones estatales fuertes y legítimas, tienen problemas de corrupción sistémica con intereses Interés "que llegan a" dominar los Mercados de Influencia". Los países de esta categoría, argumenta, son particularmente vulnerables a la corrupción global. Nuestro estudio explora las rutas legales en el entorno global, como pagos de facilitación y fondos de confianza ciegos que amenazan la reputación de Nueva Zelanda como país percibido como menos corrupto, ya que fortalece sus propios Mercados de Influencia.

ABSTRACT

A convergence of scandals, accentuated by the 'Panama Papers', have focused attention on New Zealand as an emerging 'tax haven' with potentially insufficient anti-corruption controls and a perhaps naïve disregard for the policing of financial fraud. Our study examines the bases of these damaging perceptions, and political trends based upon globalisation from the perspective of Michael Johnston's influential 2005 work, *Syndromes of Corruption*, in which he identified four primary syndromes, 'Influence Markets', 'Elite Cartels', 'Oligarchs and Clans', and 'Official Moguls'. He identified New Zealand with the 'Influence Markets' category, one in which mature market economies, usually ranked as least corrupt with little high-level bribery, and with strong and legitimate state institutions, nevertheless have systemic corruption problems with 'wealthy interests seeking political interest' which come to 'dominate Influence Markets'. Countries in this category, he argues, are particularly vulnerable to global corruption. Our study explores legal routes in the global environment, such as facilitation payments and blind trust funds that threaten New Zealand's reputation as a perceived least corrupt country as it strengthens its own Influence Markets.

1. FOCUS OF THE STUDY

The academy has largely ignored the political implications of corruption scandals in the perceptions of low corruption countries such as New Zealand. Corruption is obviously defined in legal terms, and defined locally. Corruption scandals, on the other hand, presume a kind of self-righteous conviction that often bears little relation to the actual breaking of a law. As one renowned academic put it, albeit in very misleading terms,

Scandal is corruption revealed. Scandal is breach of virtue exposed. Apparently of religious origin, scandal is literally referred to the conduct of a religious functionary that tended to discredit the religion itself (Lowi, 1988: vii).

Nevertheless, the public perception, via corruption scandals, of corrupt practices, real or not, legal or illegal, may produce an environment that is potentially degrading to honest, transparent and open relations. Furthermore, in developed political systems, the legal marketing of influence, even when perfectly legal in local law, is nonetheless exclusionary in the same way as illegal corrupt practices in general. Moreover, exclusionary practices project potentially damaging perceptions, often expressed in scandals, that may tend to erode civility and citizens' willingness to 'play by the rules'. Such scandals also impact perceptions of a country's corruption status, as expressed in Transparency International's (TI) Corruption Perceptions Index (CPI), which can be damaging to reputation and, again, to societal levels of civility, transparency and voluntary law abiding behaviour.

Our study examines the bases of scandal-based damaging perceptions and political trends from a global perspective utilizing Michael Johnston's influential 2005 work, *Syndromes of Corruption*, in which he identified four primary syndromes, 'Influence Markets', 'Elite Cartels', 'Oligarchs and Clans', and 'Official Moguls'. He identified New Zealand with the 'Influence Markets' category, one in which mature market economies, usually ranked as least corrupt with little high-level bribery, and with strong and legitimate state institutions, nevertheless have systemic corruption problems with 'wealthy interests seeking political influence [which] will dominate Influence Markets' (Johnston 2005, p.43). Countries in this category, he argues, are particularly vulnerable to global corruption.

The following study examines the political implications of two major putative corruption scandals that have overtaken New Zealand over the past year in an attempt to assess their relation to corruption, to institutional and legal shortcomings, and to New Zealand's adaptability to a rapidly changing global climate. The first of these, the so-called 'Panama Paper's Scandal', identified New Zealand as a 'tax haven', was a 'sobering wake-up call', at least according to New Zealand's Minister of Internal Affairs, Peter Dunne (Sachdeva, 2016), and again raised the problem of elite lobbying, this time by the Prime Minister's personal lawyer, Ken Whitney, who apparently attempted to prevent the drafting of legislation that would provide for transparency and accountability in New Zealand's foreign owned trust funds (Watkins, 2016). The second, which boiled over again in 2016, involved an earlier \$11 million value gift in cash, live sheep and equipment to a disgruntled Saudi businessman, apparently as a facilitation payment to assure the eventual success of a New Zealand-Saudi free trade agreement (Heron, 2016), one which, after nearly a decade, has yet to be concluded.

2. INFLUENCE PEDDLING

Johnston's (2005) approach to the study of corruption is based on a view that corruption is not a singular phenomenon, but is embedded differentially in a number of contexts. All societies experience corruption of one sort or another, he maintains, including those which rank highly in corruption perception indices and, moreover, there is thus little point in placing societies on a continuum (such as the CPI) which rank them from low to high levels of

corruption. Greater insight, he suggests, can be gained by considering how people use illicit means to gain access to wealth and power in different societal contexts.

In countries like New Zealand, he defines corruption as taking the form of *influence markets*. This type of corruption occurs in contexts where there are strong state institutions and involves the gaining of access to influence, with politicians often serving as intermediaries who provide their connections. Such mature market democracies are characterised by ‘legitimate constitutional frameworks, political competition, free news media, strong civil societies and open economies’ (Johnston 2005, p. 42). While these types of countries have strong institutions that do act as checks on abuses, they have not so much as ‘solved’ the problem of corruption, ‘as they have developed states and political systems accommodating to wealth interests, fitting the rules to the society ... [, and where] the political influence of wealth follows well established channels’ (Johnston 2005, p. 42). Most influence market corruption occurs within the system, he maintains, and ‘revolves around access to, and advantages within, established institutions, rather than deals and connections circumventing them’ (ibid.). This type of influence may well be legal, as Lessig (2011) has observed in the US context, but it is nonetheless corrupt. In these contexts, corruption (at least the blatant bribery that is picked up in Transparency International scores) is the exception rather than the rule. But that is not to say that such practices are unproblematic and that they do not need attention.

Andersson’s (2008, p. 199) notion of ‘corruption danger zones’ is a useful concept to guide such an exercise.

Danger zones are areas of activities in society where corrupt transactions are most likely to occur. Such areas are, however, not characterised by high levels of corruption. Instead they may be characterised by other factors, such as a great many opportunities for corruption, frequent corrupt offers, a high level of suspicion, and the presence of important facts identified in such a way that corruption could be promoted.

There is a lack of such research examining vulnerabilities to corruption in the least perceived corrupt countries (Andersson 2008, p. 194). It is therefore necessary to look closely at this question in order to increase our understanding about corruption vulnerabilities and where the risks lie.

Elsewhere (Zirker and Barrett, *forthcoming*), we have distinguished between corruption and corruption scandals; briefly stated, they are not the same thing. In countries like New Zealand there is likely to be as much media discussion of scandals as there is of corruption, but the two are not the same thing. Additionally, corruption in such countries remains covert, particularly if it takes the form of the indirect breach of legal norms, ‘where gains from ... [an] exchange may be contingent, secondary, or collateral, coming in to balance for both sides over a long period of time’ (Andersson 2008, 198). Where the corruption is indirect, that is, where it does not break laws per se, but rather facilitates the breaking of domestic or foreign laws, it is often perceived as being at the margins of acceptability, but such corruption is significant because it corrodes the moral integrity of the polity and, ultimately, public confidence in democratic institutions. It is this type of corruption, however, that is most likely to be found in contemporary developed governments.

We have identified two areas that we have chosen to call *corruption danger zones*. What follows is an examination of media reports and government inquiries into two cases that can each be said to fit into the category of one of these corruption danger zones, with a view to contributing to our understanding of the conditions likely to encourage corruption in developed countries which have heretofore evinced low perceptions of corruption. Drawing on Andersson’s (2008, p. 199) conceptual framework, our work focuses on his five factors: ‘location of corruption (i.e., level of government), actors (i.e., politicians and public officials), legal or non-legal norms, direct or indirect transactions, and public reactions and opinions’. We propose to

examine the Panama Papers' and 'Saudi Sheep' scandals in this context.

3. CORRUPTION IN A DEVELOPED, TRANSPARENT ECONOMY: INFLUENCE MARKETS, LOBBYING AND ANONYMOUS TRUST FUNDS

In April 2016, reports of a virtual trove of confidential documents from a Panama-based law firm, Mossack Fonseca, began to surface in the international media. Approximately 11.5 million documents, dating from the 1970s, had been accessed (via computer 'hacking') in early 2015 from the records of Mossack Fonseca, and these were leaked to the German newspaper, *Süddeutsche Zeitung*, which subsequently invited the support of the International Consortium of Investigative Journalists (ICIJ) in making the documents available internationally to journalists and media outlets. The papers pointed to the existence of tax havens, trust schemes, and criminal activities that had been covered up by legal practices, and revealed how Mossack Fonseca had promoted the exploitation of tax policies to enable wealthy individuals to hide assets and avoid paying taxes.

These reports were duly mentioned in the New Zealand media, particularly as they included reference to New Zealand as a tax haven, with allegations that New Zealand had facilitated such acts as 'tax evasion, financing corruption, money laundering, sanctions violation and hiding of assets' (Shewan 2016, p. 8). RNZ News, Television New Zealand (One News) and investigative journalist Nicky Hager then collaborated in examining references to New Zealand in the 'Panama Papers Affair'. While any suggestion that New Zealand was a tax haven was strenuously denied by Prime Minister John Key, and described as 'ridiculous' by Minister of Revenue Michael Woodhouse, disquieting evidence gradually emerged. The release of the papers had significant implications for a number of world leaders of 'low corruption' countries. Iceland's Prime Minister, Sigmundur David Gunnlaugsson, was pressured to resign after it emerged that he had discreetly sold to his wife a stake in an offshore firm holding investments in Icelandic banks, apparently hiding family assets offshore to avoid tax.

British Prime Minister David Cameron also faced pressure when it was revealed his father had used Mossack Fonseca to set up shell companies to hide income. While New Zealand was also accused of a number of questionable financial arrangements, the principle focus of charges in the media was in relation to New Zealand's putative status as a 'tax haven' through its foreign-friendly trust funds. These charges were roundly rejected by the government, referring to a 2013 OECD report that had rated the New Zealand tax system highly. Journalists investigating the story, however, pointed out that New Zealand's foreign trust laws did allow tax-free and secret ownership of New Zealand trust funds by off shore foreigners, and that these trust funds protected assets and wealth, provided a good degree of banking secrecy, and hence facilitated the avoidance of tax liability in home countries. Central to these allegations were questions regarding the robustness of New Zealand's trust disclosure rules.

As both offshore and New Zealand-based media continued to uncover new stories of possible links of these New Zealand trusts to corruption, the pressures on the government increased, and, on 11 April 2016, the Minister of Finance, Bill English, and Minister of Revenue, Michael Woodhouse, appointed John Shewan as an 'independent expert' to review NZ's foreign trust disclosure rules. The Shewan Inquiry, as it became known, was tasked with examining whether New Zealand's disclosure rules were suitable, or 'fit for the purpose', and whether practical improvements could be made (Shewan, 2016, p. 6). This did indicate the government's concern that the New Zealand foreign trust provisions allowed, at least to some degree, the hiding of assets and the evasion of tax. New Zealand's positive reputation as a corruption free country, one that cooperated with other powers to discourage and prevent abusive tax activities, was apparently now seen by the government as being at stake. With regard to cooperation with other jurisdictions over tax policy, the most recent measure upon which that reputation had been based

was the rating of ‘compliant’, the highest possible ranking, in the 2013 Peer Review report of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes.

While he did not have access to the Panama Papers themselves, Shewan’s inquiry examined the trust structures referred to in the media reports, particularly the allegations of secrecy and the hiding of funds, and to the charges of non-payment of foreign taxes. On tax matters, he looked into ‘alleged evasion of a foreign country’s tax through non-disclosure, or avoidance through the use of a structure that takes advantage of differences between New Zealand’s treatment of foreign trusts and the treatment in the overseas country’ (Shewan 2016, p.9). A key focus was on whether such alleged practices actually occurred, or were likely to have occurred, within the context of New Zealand’s disclosure requirements and its tax and anti-money laundering laws.

On the same day that the Shewan Inquiry was announced, it was also revealed that Key had declared a financial link to a company specialising in foreign trusts, Antipodes Trust Group Limited. Moreover, his own personal lawyer was found to have lobbied the then-Minister for Revenue, Todd McClay, in 2014, apparently opposing the Inland Revenue Department’s (IRD) plan to review the foreign trust laws. Matt Nippert, of the New Zealand Herald, through a Green Party Official Information Act (OIA) request, found that Ken Whitney, the director of the Antipodes Trust Group, had indeed petitioned McClay, given expectations that public officials were about to clamp down on the foreign trust sector. In an email to McClay, he had written that

We are concerned that there appears to be a sudden change of view by the IRD in respect of their previous support for the industry. I have spoken to the Prime Minister about this and he advised that the Government has no plans to change the status of the foreign trust regime. The PM asked me to contact you to arrange a meeting at your convenience with a small group of industry leaders who are keen to engage to explain how the regime works and the benefits to NZ of an industry which has been painstakingly built up over the last 25 years or so (Nippert 2016).

This email, along with other documents that were released, indicates that Inland Revenue officials were intent on tightening the foreign trust regime, but were put off by lobbying from industry insiders, and perhaps by Prime Minister Key’s intervention. The 2014 review was halted. The reason given was ‘wider government priorities’, with McClay writing to the trust industry that

Owing to wider government priorities, we will not be considering regulatory reform of your industry at this stage... I trust that this provides you and your industry with the certainty needed to continue to do business in New Zealand (Nippert 2016).

It was not until the release of the Panama Papers and the media coverage given to foreign trusts that a further review of the policy was conducted.

It is against the background of a strident media and a willing public service that Shewan’s inquiry was carried out. Throughout the inquiry period, reports from New Zealand-based journalists with access to the Panama Papers continued to appear, uncovering further instances of high profile individuals, some of whom were alleged to have convictions in other jurisdictions, and who were reported as having interests in intricately constructed New Zealand offshore trust structures that held considerable overseas assets. While Shewan (2016, p. 10) concluded that ‘it [was] not possible to conclude ... whether funds held through the New Zealand structures [were] illicit, or if there [had] been any failure to pay tax that should have been paid in offshore jurisdictions,’ he did conclude that current disclosure rules were inadequate and he made a series of recommendations around the collection of information from offshore taxpayers and that these be shared across jurisdictions.

4. THE SAUDI SHEEP FACILITATION PAYMENT SCANDAL

The Saudi case involves New Zealand's live-sheep export industry with Saudi Arabia. In this case, there is evidence of large 'facilitation payments' as a part of a strategy in dealing with barriers to access to markets, and it points to a risk, identified by Tanzi (1998, p. 253) associated with growth in international trade and the creation of 'situations in which the payment of bribes (often euphemistically called 'commissions') may be highly beneficial to the companies that pay them by giving them to profitable contracts over competitors'. More specifically, the Saudi case involves facilitation payments as a part of the brokering of a free-trade with Saudi Arabia.

New Zealand has a long history of live sheep exports to Saudi Arabia, for slaughter and consumption. These exports were halted in 2003 following the deaths of a large number of animals while in transit. There was a subsequent investigation into animal health protocols, and there were also discussions about a memorandum of understanding between New Zealand and Saudi Arabia to address animal welfare issues during the export of live sheep. Later in 2007, however, a Customs Export Prohibition Order was made prohibiting live sheep exports unless there was an exemption provided by the Director General of the Ministry and Agriculture and Fisheries. No exemptions have subsequently been approved, and that order remains in place today. The Al Khalaf Group were seeking, however, to develop a MOU on the basis of an expectation that this would provide the grounds for an exemption, but later in 2009 the Minister of Agriculture stated publically that exports were unlikely to resume because of ongoing concerns about animal welfare. There were, therefore, two conflicting messages being sent by the New Zealand government to the Al Khalaf Group – that there was the possibility of a MOU which would provide a way around the export Prohibition Order and public statements that exports were unlikely to continue, and these led to strains in the relationship between New Zealand and Saudi Arabia.

While these events were unfolding in the live sheep export industry sector, New Zealand also began, in 2007, to explore the development of a free trade agreement with Saudi Arabia. Sheik Hmood of the Al Khalaf Group had continued to invest in the sheep industry in New Zealand in the expectation that a MOU would be achieved, and an exception to the ban on live sheep exports granted. He believed he had been unjustly treated in the decision to maintain the ban, and this contributed to the diplomatic tensions between New Zealand and Saudi Arabia, and was seen as 'poisoning' the free-trade negotiations (Auditor General 2016.). The result of this attempt to balance issues of animal welfare against a desire to extend trade relations was that the relationship with Saudi Arabia deteriorated.

The response of Minister McCully and of government officials to this issue is of interest here. Following their subsequent negotiations with the Al Khalaf Group, they proposed a commercial solution that would involve producing a contract for services with the Al Khalaf Group, for which the New Zealand Government would pay \$4 million, with a further \$6 million being provided by New Zealand companies as a gift to the Al Khalaf Group, these taking the form of goods and services to be installed on Sheik Hmood's farm in Saudi Arabia (the Agrihub). This proposed solution was put before Cabinet in February 2013, along with the advice that the Al Khalaf Group had been provided with legal counsel that it had grounds to sue the New Zealand Government for \$20 to \$30 million. Cabinet was also advised that this solution, the contract for payment to a private business, would smooth the way towards achieving a free trade agreement which, if achieved, would double returns from exports to Saudi Arabia.

On these matters, the Auditor General (Provost 2016) observed that no explanation as to how the figure of \$10 million was derived was provided to the Cabinet, there was no advice on the substance of the claim that there was a legal risk of being sued, and there was no wider analysis of other possible obstacles to achieving a free trade agreement with Saudi Arabia. The

proposal of a payment as a solution to the problem was derived on the basis of poor quality information and what was described by the Auditor General as an inadequate level of analysis of that information. Cabinet, however, did approve the payment, which subsequently rose to a figure of \$11.5 million.

This is a case, therefore, where a payment to a private business interest was made in hopes of resolving a diplomatic issue between governments, and supposedly facilitating the achievement of a free trade deal, although these objectives were unstated. At the time of the Auditor General's 2016 inquiry, \$8.7 million of the \$11.5 million had been paid. This was not a transparent process, and were it not for the media scrutiny and subsequent government inquiry, it would have remained hidden from the public. While the inquiry did not find evidence of legally-defined corruption, it did raise serious questions about the process.

5. DISCUSSION

The cases point to the existence of corruption *danger zones* and the conditions likely to encourage corruption in developed countries which have heretofore evinced low perceived levels of corruption. Both cases involve instances of internationalisation, and New Zealand's pursuit of openness in its trade relationships is an important contextual factor in creating such conditions in which there is vulnerability to corruption. New Zealand is valued as having an open approach to conducting trade and business with the rest of the world, but this porosity of economic borders apparently also increases vulnerability to questionable practices from trade partners.

Such practices, in effect, can 'seep' into the New Zealand economy and polity. Internationalization, then, can increase opportunities for exchanges of trade, but it can also accelerate the exchange of values and practices, and this in turn can affect how solidly government officials, particularly those with responsibility for facilitating international trade and relationships, are able to resist corrupt practices. As Andersson (2008, p. 201) bluntly puts it, 'open borders invite not only people and trade but also organized crime,' and this appears to be evident in the case of the Panama Papers. In reference to the organised utilisation of New Zealand's foreign trust provisions by corrupt international investors to conceal assets from other tax jurisdictions, New Zealand, as a consequence, was referred to by the Financial Review as 'the quiet tax haven achiever' (Chenoweth 2016), an indication of the damage to the national reputation that had already occurred as a consequence of regulatory inadequacies in the oversight, or non-oversight, of foreign trusts.

The Panama case seems to be a clear instance of Johnston's notion of 'market influence', or rather, influence peddling, the use of politicians as intermediaries to influence government policy in a way that favours particular interests. The lobbying of the Minister of Revenue by elite members of the foreign trust beneficiaries, and their specific reference to the preference that the Prime Minister, in effect to put-off the launching of an inquiry into trust tax regulations, appears, in blunt terms, to be little more than a case of influence peddling. It certainly succeeded in moving concerns with unregulated foreign trusts in New Zealand off of the government's agenda. Were it not for the release of the Panama Papers, it may well have stayed off of the agenda.

The Saudi case reflects the degree to which the growth of international trade has created situations in which the payment of bribes, or 'facilitation payments', as they are legally regarded,¹ is likely to be a part of 'just doing business'. It is an instance of the values and norms of trade partners seeping in to New Zealand government practices. While the Auditor General found that facilitation payments were not illegal, they could be regarded as resting on the margins of corruption, and they certainly have the potential to be corrupting. Such scandals certainly reinforce this observation, and impact public perceptions of a country's sense of itself, its status

¹ 'Facilitation payments' are legal under New Zealand law, 'the payment of bribes' is not.

as a non-corrupt society, its reputation, indeed, its civility, transparency and general willingness to engage in law abiding behaviour.

These cases, then, are considerably more than just media scandals. They point to a deeply concerning tendency within government to achieve economic ends without regard for prevailing cultural norms, for due process, or even for basic ethical standards. Turning a blind eye to minimal regulations and tax laws relating to a burgeoning foreign trust industry might be defended on simplistic economic grounds, of course. An economic justification for the Saudi sheep deal payments could also be made: after all, a free trade agreement might eventually lead to significant growth in export returns. Such a mercenary disregard for basic standards of business ethics in both cases, however, has great potential to damage New Zealand's reputation for fair dealing and integrity. We suggest that this has far greater implications for the New Zealand economy in the long run.

There is a decided lack of research regarding the vulnerability to corruption of perceived least corrupt countries, and that these cases provide an opportunity to look beyond scandals, and to adopt a more theoretically informed account of the problematic behaviours in each situation (Andersson 2008, p. 194). Moreover, examining cases such as these may well add to our understanding of our global susceptibility to corruption and, more specifically, where the least recognised but perhaps most seductive risks ultimately lie.

Contrary to our conclusion in our forthcoming article in *Political Science*, and based primarily on the recent information made available in these two dramatic cases, the theoretical and pragmatic distance between corruption scandals and corruption *per se* appears to be narrowing in the case of New Zealand, not widening, as we originally argued. In the foreign-owned trust fund case, evidence of inappropriate lobbying raises the question of conflict of interest at the highest levels of government, and hence provides undeniable evidence that something is severely 'rotten in Denmark'.

In the absence of formal sanctions for past illicit behaviour, it is difficult to see how minor corrections in the rules will address this pervasive problem, evidenced by the public disclosures of the actions of the Prime Minister's personal attorney, concrete evidence of influence marketing as described by Johnston (2005). As regards the Saudi sheep deal, the New Zealand Government's descent so deeply into (or, perhaps, beyond) facilitation payments, in this case to a private individual, to assure a free- (or freer-) trade agreement with a foreign government, appears to verge very close to the grey area between legal (if questionable) *facilitation payments* and *illegal offshore bribery*. Both of these cases, then, contradict our earlier conclusion that the bulk of the corruption scandals in New Zealand arising in the first decades of this century were far from indicative of corruption *per se*. In our estimate, these scandals have indicated just how facilely corruption can slip through the rules, and how important it is to have whistle blowers and a vigilant and active news media. Speaking again bluntly, we need more light, apparently more now than ever before. As the late poet and songwriter Leonard Cohen wrote, 'there is a crack, a crack, in everything, that's how the light gets in.'

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