Dealing with Corruption/Bribery in a Host country

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Abstract: Multinational business managers and companies with an ethical bent of mind find it difficult to navigate bribery/corruption in a host country which has systemic or large scale corruption and often end up debating such decisions. This paper proposes the ‘stakeholder compliance approach’ as a decision-making guideline to assist the managerial decision-making process in such situations.

Keywords: Bribery, Corruption, Stakeholder, Managerial Decision-making

Corruption literature and the works of various international anti-corruption agencies such as Transparency International document numerous instances of bribery involving public officials and multinational companies. Despite two significant international anti-corruption legislations\(^1\) and four other regional ones\(^2\), the incidence of bribery in international business has not decreased but on the contrary has increased as indicated by the Bribe Payers Indices\(^3\) of 2002 and 2006. Bribes are sought by public officials as a quid pro quo for their discretionary powers and as a rent for their services, also termed in literature as ‘rent seeking behaviour’ on part of public officials (Bhagwati, 1982; Bardhan, 1997). Likewise bribes may be offered to buy the discretionary powers of a public official by gain seeking business managers as extensively discussed in Roy (2008). Some managers and companies accept and even take part in bribery as a matter of commercial prudence or economic necessity while others refuse for a number of reasons. Yet others face an ethical dilemma in their decision-making, especially in an international context. In such cases usually a debate ensues as to whether home country morals and standards are to be applied or host country morals and standards are to be adopted in their business conduct. This debate between application of home or host country morals and standards is found in the works of De George (1990); Bowie (1999) and Donaldson & Dunfee, (1999). Authors such as Bowie (1999:19-25) take a stand that all business actions including bribery/corruption should be viewed in terms of Kantian deontology while some others strongly argue that corruption should be evaluated in terms of ‘consequentialism’ (Jonson, 1997: 172-177).

Irrespective of the arguments, utilitarian or deontological, there is no denying that multinational business policy and operational decisions made while dealing with corrupt

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\(^1\) The OECD Anti-bribery Convention, 1999 and the United Nations Convention Against Corruption, 2003

\(^2\) OAS Anti-Corruption Convention, 1996; Council of Europe (Criminal) Convention, 1998; Council of Europe (Civil) Convention, 1999; African Union Convention on Combating Corruption, 2003 in its nascent stages

\(^3\) Bribe Payers Indices (also known as BPI) show the propensity to bribe on part of companies from exporting/trading nations. The latest BPI is available at [www.transparency.org](http://www.transparency.org)
demands and/or bribery in a host country can have a profound impact on commercial as well as stakeholder issues such as sustainable development and human rights. The cases of Shell (as explored in Wheeler et. al., 2002) and Enron USA (as in McClear & Elkind, 2003) reveal how operational decisions when tainted with corruption can have serious repercussions for the company and its stakeholders. Shell was accused of complicity in human rights violations in Nigeria while Enron faced allegations of corruption, bribery in India and Brazil.

This paper aims to propose the ‘most appropriate’ way for multinational companies in dealing with bribery/corruption with an underlying assumption that the subject company is ethically predisposed and stakeholder conscious or is oscillating in its decision-making but the company is willing to consider an ethical way out of a corruption-related situation. In addition, this paper limits its scope to “grand corruption” (as defined in Elliot, 1997) and excludes all situations of facilitating payments (small payments demanded by lower level officials also termed as “petty corruption in Elliot, 1997) which most multinational companies are forced to pay in certain parts of the world in course of doing business.

The first section of the paper briefly examines the impact of bribery/corruption in business and society on stakeholders followed by a discussion of two multinational business approaches noticed in practice, in dealing with corruption/bribery in a host country. Section two explains one of these approaches, namely the ‘when in Rome approach’ to dealing with bribery/corruption while section three critically looks at the ‘legal compliance approach’ to dealing with corruption and its shortcomings vis-à-vis stakeholder issues such as human rights. The final section of the paper proposes a third approach for multinational business managers in dealing with corruption and bribery. It extends the legal compliance approach to include protection of stakeholder interests consciously. The paper proposes that the third approach to dealing with corruption and bribery in a host country is more appropriate than confining one’s actions to the moral minimum of compliance with law or a surrender to corruption/bribery as in the “when in Rome” approach.

4 Human rights as enshrined in the United National Universal Declaration of Human Rights and can involve situations of using child labour, unfair employment practices, denying or taking away means of one’s livelihood such as land being acquired without adequate and proper compensation. This is only indicative and not exhaustive.
I. Bribery/Corruption: Stakeholder Impact

The prevalence of corruption and bribery in every ancient civilization, be it Babylonian, Egyptian, Judaean, Indian, Chinese, Roman and Greek, is discussed at length in the work of Alatas (1990), amongst other notable ones. Human society has never been without the presence of corruption and bribery. Today, corruption and bribery are not confined to any geographical boundary or any single nation or a particular culture, but occur universally on a daily basis. Transparency International, an international NGO fighting corruption, records daily media reports of corruption/bribery from all over the world. Not a single working day passes without instances of corruption/bribery being reported as having occurred in some part of the globe. That brings us to the next question as to how serious is the impact of Corruption and Bribery on society if it is happening on a daily basis?

Empirical studies by World Bank economists such as Mauro (1997) provide tentative evidence about the economic effects (i.e. lowers growth and investment) of corruption. Mauro (1998) has also provided the first cross-country (across sovereign nations) empirical evidence that corruption affects the composition of government expenditure and adversely impacts government expenditure on education. Gupta, Demello & Sharan (2001) suggest in their study that nations with higher incidence of corruption also experience higher military expenditure in relation to both a nation’s GDP and government spending. Leite & Weidmann (2002), in their empirical studies of natural resource rich nations, who are otherwise poor, found that such nations experience slow economic growth due to the incidence of rent-seeking activities of public officials and corruption. Gupta, Davoodi & Tiongson (2002) concluded in their empirical study that nations with high levels of corruption experience adverse consequences on infant mortality rates, higher percentage of low birth weight babies and higher dropout rates in primary schools (the authors used Corruption Perception Indices of each country selected for the study and then used individual country data against the above three variables to support their findings). Tanzi (1998:45) explains the qualitative effects of corruption on the economy, namely: distortion of markets, distortion of allocation of resources, distortion of incentives, corruption as an arbitrary tax, increase in poverty, reduction of the legitimacy of a free market mechanism and distortion of the fundamental role of government.

5 Accessible at www.transparency.org
6 Corruption Perception Indices are annual indices released by Transparency International. They convey the level of corruption in a country as perceived by its people (business leaders, press, academics, accountants are usually surveyed)
Nevertheless, responses to corruption-related situations differ amongst managers and companies. Some may reject bribery/corruption outright while others may consider bribery/corruption as a matter of commercial necessity and adopt one of the two approaches noticed in practice and mentioned in literature. They are the ‘when in Rome approach’ and the ‘legal compliance approach’. But both these approaches do not usually take into account the impact of one’s corrupt acts on stakeholder interests (such as issues of sustainable development and/or human rights).

II. The ‘when in Rome approach’:

In a host country situation, a popular response to corruption in business is to adopt the ‘when in Rome approach’. Its meaning and essence originates from the saying “when in Rome, do as the Romans”. This approach has been defined in the work of Fadiman (1991). Usually when one adopts the ‘when in Rome approach’, multinational business managers justify their bribery as being dictated by local business conditions and a host country system that is corrupt. The argument advanced is that others pay a bribe or involve in acts of corruption, hence if the company does it then it is a suitable response to the host country business environment and if the company does not bribe then the company will not be able to do business in that country. Figure 1 depicts the ‘when in Rome approach’.

**Figure 1: The ‘when in Rome approach’ in dealing with Bribery/Corruption in a host country**

![Diagram of 'when in Rome approach']

Multinational business managers in such situations like to believe that their decisions were objectively made in the greater interest of the company and more so because other companies are doing it and the business environment in the host country is such. But, this cannot be logically treated as objective because a decision-making manager cannot separate himself or herself from the usual object of observation (economic goals). The decision-maker in a corruption-related situation is placed in a situation of “position-dependent objectivity” or “positional objectivity” Sen (2002:463-483). According to Sen (2002:465) the notion of positional objectivity, “is important in understanding the objectivity of beliefs, whether or not these beliefs happen to be correct.” He goes on to explain, “what we can observe depends on our position vis-à-vis the objects of observation.” The observer (decision-making manager) cannot separate oneself from the object of observation (economic goals).
The presence of positional objectivity in a corruption-related situation is apparent from the memoirs of Carl Kotchian, director of Lockheed. Kotchian, in his personal memoir, Lockheed Sales Mission: Seventy Days in Tokyo (Jacoby et.al, 1977:163) wrote:

> Was it really possible, from the standpoint of reality, to say, “I refuse to pay”? I thought of all the effort expended by the thousands of men since the conception and designing of the L-1011 Tristar; our superhuman efforts to avoid bankruptcy because of our own financial difficulties as well as similar difficulties of the engine maker (Rolls Royce); the successive defeats in both the KSSU and Atlas competitions in the European theater. I thought of the painful final efforts of the seventy days. And I thought of being told: If you make this payment, you can surely get the order of as many as 21 airplanes.” I must admit that my moral and ethical considerations gave way to the commercial gains we had been seeking for so many hard days and weeks.

Kotchian’s question: “Was it really possible, from the standpoint of reality, to say, “I refuse to pay?” offers a position-dependent insight into the mind of a decision-making manager. Kotchian concludes that there is no other solution but to pay a bribe for securing the much needed business deal. The discussion here is not to find fault with either party to the bribe transaction, but to achieve a deeper understanding of the ‘when in Rome approach’. It is possible that after Lockheed’s bribery was exposed, Carl Kotchian may have written his memoirs as a public relations device or he may have written it in genuine remorse and reflection. Whatever the purpose, if we search for answers in any such situation of corruption and bribery in a host country situation, then we are likely to face the proverbial question of whether the chicken came first or the egg. Someone wanted to pay a bribe so someone took it or it could be someone asked for a bribe so somebody paid it. Irrespective of Kotchian’s argument, his ‘when in Rome’ approach did not save him or Lockheed from US Senate investigations and the consequences Lockheed faced thereafter. Thus, adopting a ‘when in Rome approach’ in corruption-related situations cannot absolve the participant company or its employees participating in a corrupt transaction from legal and ethical obligations towards a company’s stakeholders by merely saying that business conditions dictated the act of bribery/corruption.

**III: The ‘Legal compliance approach’**

The ‘legal compliance approach’ considers compliance with the law as a response to demands for bribes or corrupt situations in a host country. In case of US companies, it also includes compliance with home country laws i.e. the US Foreign Corrupt Practices Act, 1977 that expressly prohibits overseas bribery to procure business. Figure 2 depicts the legal compliance approach
But since 1999, compliance with law for a multinational company is not restricted to compliance with host country or home country laws alone but it also calls for an understanding of the international and regional anti-bribery and anti-corruption conventions that may become applicable to a multinational company. A brief discussion of two prominent international anti-corruption legislations relevant to the ‘legal compliance approach’ for companies:

**The OECD Convention**

The OECD Convention for Combating Bribery of Foreign Public Officials came into effect on February 15, 1999. The 17 article Convention “criminalises active bribery of foreign public officials” and lays down guidelines for 34 signatory nations to adopt and implement the Convention within their national legal infrastructure. These signatory nations control 70% of exports and 90% of foreign direct investment worldwide (Pieth, 1999). The objective of the OECD Convention is to reduce or eliminate bribery in international business conduct. The purpose is to achieve good governance, economic development and fair competitive conditions in international business. The preamble to the convention document states:

Bribery is a widespread phenomenon in international business including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.

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The preamble has identified “good governance and economic development” as issues to be protected by the convention. The seventeen article OECD Convention criminalises active bribery of foreign public officials and uses words such as “offer”, “attempt” and “conspiracy” in the first article of the convention to define the offence of active bribery but the Convention and its articles fail to cover passive bribery, private to private corruption, compensation for parties affected by corruption, responsibility of state for corrupt behaviour of public officials, whistleblower protection, funding of political parties.

However, the OECD Convention, 1999 has been not been able to eliminate/reduce the incidence of corruption and bribery in international business as is evident from the results of the Bribe Payer’s Indices 2002 and 2006 published by Transparency International. The results indicate that propensity towards overseas bribery has not gone down after the Convention came in force. The indices also indicate that companies from OECD signatory countries such as USA, Japan, France, Spain, Germany, Singapore and United Kingdom are involved in paying bribes. Peter Eigen, Chairman of Transparency International has gone on record saying that, “large numbers of multinational corporations from the richest nations are pursuing a criminal course to win contracts in leading emerging market economies of the world.” In a survey conducted by Transparency International, it was revealed that only 19% of the 835 respondents were aware of the OECD Convention criminalising bribery, implying that 81% of these business experts were not even aware of its existence.

However in situations where a multinational company and its managers are aware of the OECD Convention and intend to comply with the requirements of the OECD Convention it would be sufficient for a company to follow a decision-process as under without reflecting on stakeholder issues.

Figure 3: The OECD Compliance Model:

- Corporate decision on overseas bribe payment
- Is it active bribery of a foreign public official? (offer, attempt, conspiracy)
- If not, then bribe could be paid
- If yes, then do not pay a bribe

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8 Private-to-private corruption has been defined in UNCAP, 2003 and refers to corruption within the private sector.
9 [www.transparency.org](http://www.transparency.org)
10 ibid
Hence, if a company were involved in any other form of bribery, other than active bribery, then they would arguably have complied with the minimum requirements of the OECD Convention. Such a company can also escape prosecution in a maze of laws pertaining to jurisdiction and rules of evidence in most countries who are not signatories of the OECD Convention. As is evident from the above, such compliance if used will still leave a scope for stakeholder dissatisfaction and unethical behaviour in situations of ‘private-to-private corruption’ or in situations of “passive bribery” (Roy, 2008).

*The UN Convention against Corruption, 2003 (UNCAP)*

This is the most significant anti-corruption convention by far, with the largest number of signatory nations and participant nations. The Convention has been signed by 111 nations and is open for signing to all nations and regional economic organizations. In its preamble the Convention acknowledges that corruption is a threat to democracy, stability and security of societies, ethical values and justice. It recognizes the link between ‘corruption and organized crime’ and declares corruption as a global issue that requires a multi-disciplinary approach with international co-operation to prevent and control it. The 71 article Convention provides an exhaustive coverage by far, of issues relevant to the public sector and public officials ranging from relevant definitions, jurisdictional issues, preventive anti-corruption policies and practices (article 5), preventive anti-corruption bodies (article 6), public sector (article 7), Code of Conduct for Public officials (article 8), public procurement and management of public finances (article 9), public reporting (article 10) to abuse of functions (article 19), illicit enrichment (article 20), laundering of proceeds of crime (article 23), obstruction of justice (article 25), freezing, seizure and confiscation (article 31), protection of witnesses, experts, victims (article 32), whistleblower protection (article 33), co-operation between nations (article 38), between law enforcement agencies (article 37), international co-operation (article 43), extradition (article 44), joint investigations (article 49), assets recovery process (article 51, 52, 53, 54, 55, 56).

From the perspective of the private sector, this Convention provides an exhaustive coverage of provisions covering accounting, financial issues and governance issues (article 12), denying tax deductibility for bribes paid (article 12), bribery of national public officials (article 15), bribery of foreign public officials and officials of public international organizations (article 16), trading in influence (article 18), bribery within the private sector

11 [www.un.org](http://www.un.org)
(article 21), embezzlement of property in the private sector (article 22), liability of legal persons and natural persons in charge of the legal persons (article 26).

Like all previous anti-corruption conventions (regional and international), this one too fails to explicitly mention the link between corruption (both in business and in public life) and stakeholder issues such as human rights, although the preamble does make a passing reference to the issue of sustainable development. Articles 34 and 35 deal with the consequences of corruption (without any mention of the issue of human rights or sustainable development) and provides for compensation to victims of corruption. This seems to imply that human rights abuse victims can institute damage recovery proceedings against erring companies and company executives. The recent out of court settlement whereby Shell paid a sum of $15.5 million to the victims of human rights abuse from Nigeria is a vindication in this direction12.

The Relevance of anti-corruption Conventions to business decision-making:
These anti-corruption conventions and their exhaustive coverage of corruption-related issues are testimony to the incidence of corruption and bribery and the far-reaching consequences of corruption. These conventions have provided frameworks to signatory nations to amend and adapt their local laws to these conventions. But, the prerogative to amend laws and bring them in tune with the conventions rests with the nation in question and many nations are still bogged down by the failings of their own legal system. Extradition agreements and jurisdictional issues need to be streamlined before the articles in these conventions acquire some teeth. Moreover, neither of these two conventions recognizes the incidence of facilitating payments of small amounts, a reality of everyday life in many countries around the world. Therefore, from the perspective of a multinational business manager dealing with a corruption-related situation, there is still plenty of scope for a manager or a company to escape accountability in the maze of current anomalies in law, asymmetric enforceability and jurisdictional issues.

Protecting Stakeholders: The Stakeholder Compliance Approach
The third approach proposed in this paper is based on the stakeholder concept and compliance with stakeholder interests as a more appropriate commitment of business to society. The term ‘stakeholder’ has gained prominence in management literature during the last 25 years, especially through the works of scholars such as Freeman & Reed (1983) Freeman (1984);

12 www.guardian.co.uk/world/2009/jun/08/nigeria-usa/ accessed on 26 June 2009
The concept can be defined, both, in a narrow sense or a wide sense depending on which perspective one adopts. Freeman & Reed (1983) have defined a stakeholder as any identifiable group/individual who can affect the achievement of an organisation’s objectives or who is affected by the achievement of an organisation’s objectives. In a narrow sense, the same authors have defined a stakeholder as any identifiable group/individual on which the organisation is dependent for its continued survival. In other words, a stakeholder can be an unknown group or an individual who is either affected by the actions of the company or whose actions can affect the company. Therefore, if a company took part in an act of bribery or corruption, there is a possibility that as a consequence a group of people or an individual could be affected by that, and in turn if that group of people/individual take action against the company as a result then it can harm/hamper the company’s objectives.

Dealing with bribery/corruption using the ‘when in Rome approach’ or the ‘legal compliance approach’ does not rule out certain situations that can affect stakeholders or in turn attract stakeholder protests and actions against the company. Moreover, there can also be situations where a company has complied with the law and not done anything illegal, but has set in motion acts that harm/ affect stakeholders. For instance, a company can legitimately donate to election campaigns, lobby politicians, provide some permissible gifts or facilities (example: scholarships to children of public officials from company-funded charitable trusts) to public officials with an expectation of some reciprocal benefit for the company. Such reciprocal benefits may range from securing legal sanction for the company’s business operations that could harm the environment (example: lax pollution control laws); permit business practices that are complicit\(^{13}\) in the violation of human rights (example: ignoring the use of child labour by contractors); business decisions that could affect communities and sections of society (such as the decision to set up a manufacturing activity on existing farmland on which a local community is dependent without exploring other possibilities but instead using government support and legislation to evict farmers from their land). In the aforesaid situations, companies could be complying with the law and yet could use their power and wealth to subtly ‘buy’ action in their favour from the government, and these government sanctions within a legal framework could still have an impact on people, while companies pursue their economic objectives.

Multinational business managers usually consider the achievement of economic goals as the most important aspect of their presence in a host country while the current law and existing

\(^{13}\) For a more detailed understanding of what amounts to being “Complicit in Human rights violations” please refer to the UN Global Compact and related websites at [www.un.org](http://www.un.org).
anti-corruption conventions are considered as parameters within which one can operate. That in turn also implies that whatever the law has not expressly prohibited or has seemingly permitted may indeed be harmful to stakeholder interests i.e. *inter-alia* issues of sustainable development, protection of the environment, human rights issues. The managerial focus on economic objectives alone in corruption-related situations was evident in a survey of 41 multinational business managers at Mumbai, India. The surveyed multinational business managers dealt with corruption/bribery in a host country (India) with a focus on the economic goals of business and not on the stakeholder impact of their actions (Roy, 2005).

In addition, when managers follow the narrow path of the legal compliance approach without thinking about stakeholder issues, there is also a risk that ethical boundaries will be pushed, especially in countries where the laws are still inadequate in terms of covering various situations and exceptions. This situation was observed in the case of Enron’s dealings in India and Brazil. In the same case, Sims (2002:174) observed that the culture at Enron “ate away at the company’s ethical boundaries, allowing more and more questionable behaviour to slip through the cracks.”

Conduct of business should not lead to outcomes of human suffering, degradation of the environment, loss of means of livelihood or any such outcome that will mean a legacy of pain and regret for us and our future generations. Although sustained profit outcomes are essential for the continued survival of business, its very existence is also dependent on the continued goodwill and acceptance of business operations by society. Business cannot and does not operate in an isolated sphere, but within society. If society rejects the actions of business, sooner or later business will find it difficult to sustain profitability and survive (example: the demise of Enron). Thus dealing with corruption and bribery in a host country is not only a matter of legal compliance, but also an exercise to be alert about stakeholder issues that can be affected by any corrupt acts on part of the decision-making multinational business manager. Figure 4 depicts the proposed ‘stakeholder compliance approach’ in dealing with corruption/bribery in a host country or even in one’s home country. The law is a moral minimum and usually moves at a pace slower than all the ingenuous ways of corruption, bribery and fraud that surface from time to time as ‘scandals’ in our newspapers and media. New laws and amendments made to existing laws, whether nationally or internationally, are a matter of hindsight not foresight as these scandals provide a learning curve experience (example: The Sarbannes Oxley Act passed in USA after the fall of Enron, World.Com., Parmalat and a few others).
A stakeholder approach to dealing with corruption/bribery widens the frame of reference from pursuit of ‘economic objectives’ to pursuit of ‘economic and social responsibility objectives’. A narrow view would be to consider these objectives as incompatible for business managers, but a strategic view would be to consider satisfaction of both objectives as inter-dependent and self-enriching. Freeman (2008) has convincingly argued in favour of companies managing for stakeholders. He has advanced four arguments in support, namely: The ‘argument from consequences’ which recognizes the joint interests of business and society in surviving and thriving; the ‘argument from rights’ where one recognizes stakeholders have rights and if this is not recognized then we could attract consequences; the ‘argument from character’ which argues to make ethics integral to the way one thinks and acts in business with the objective of avoiding bad faith and ultimately self-deception (example: The Enron Scandal) and lastly, an argument as a ‘pragmatist’ weaving a common thread with the previous three arguments recognizing that business is a platform for “concern with freedom, equality, consequences decency, shared purpose, and paying attention to all the effects of how we create value for each other” (Freeman 2008:86).

What is then called for is an internal motivation on part of multinational business managers to add their own conscience to the statute and honour stakeholder obligations such as human rights, protection of the environment and issues of sustainable development as their contribution to society as managers and custodians of societal wealth. This process is depicted in Figure 4.

**Figure 4: The Stakeholder approach in dealing with corruption:**
This is in recognition that in a democratic society, engaging and eliminating corruption is also a process of conscience in terms of honouring basic stakeholders’ rights at the individual managerial level. Democratic societies cannot function on legal processes alone; in order to thrive they need commitments from individuals who are part of society. The adoption of a ‘stakeholder compliance approach’ by multinational business managers is a better practice in dealing with corruption/bribery, and a tribute to democracy and the value creation role of business in society.

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