

## **ETHICAL AND LEGAL ENVIRONMENT OF BUSINESS BRIBERY IN FIRM PERFORMANCE**

Terry Immanuel Yoseph Winarta

*Universitas Ciputra, Surabaya, winarta.terry@ciputra.ac.id*

### **ABSTRAK:**

Sebuah analisa tentang penyuapan di standart globalisasi, yang memberikan peninjauan luas terhadap kelakuannya di pemerintahan dan masyarakat pada umumnya. Analisa yang menunjukkan keterkaitan hubungan antara praktek penyuapan dan perusahaan-perusahaan di negara-negara berkembang. Aksi penyuapan bisa diterjemahkan dalam beberapa bentuk pemberian dimana aksi tersebut disebut legal oleh beberapa pihak resmi pemerintah dalam suatu negara tersebut. Pendekatan yang akan dikembangkan dalam analisa ini akan mengenalkan para pihak pebisnis terhadap contoh aksi penyuapan dan bahayanya yang dapat mempengaruhi lingkungan bisnis tersebut.

**Kata Kunci:** Penyuapan, Penyogokan, Negara Berkembang, Korupsi, Penggelapan.

### **ABSTRACT:**

*An analysis discussing bribery in globalization standard, which provides a broad overview towards its behavior in governmental and societal actions in general terms. An analysis which displays an interrelation between bribery practices and firms in developing countries. The act of bribery can be rendered into various types of giving where those are considered legal by the official government regulations in certain countries. An approach will be expanded in this analysis to introduce business personals into examples of bribery acts and the dangers which jeopardize relating business environments.*

**Keywords:** *Bribery, Developing Countries, Corruption, Embezzlement.*

## **INTRODUCTION**

The following paper is an overview of bribery practices. The main objective is to provide readers with perspective of bribery in the business world. The practice of bribery can be demonstrated as an influenced action of a certain party discharging his or her civil or ethical duties, caused by the act of giving, receiving or requesting something of a value towards them from another party. (US Legal, Inc, n.d.) In the United States, bribery is highly considered as an illegal practice in any form possible. In the meantime, majority of bribery practices still commonly exist in less-developed countries (LDCs). As cultures might vary in labeling bribery, different point of views and contexts thwart the effort in defining bribery. (Gao, 2011). Some practices are even considered as normal as it is a "prevalent social custom" (Steidlmeier, 1999) or ethically acceptable. As expected, a concern has been rising in recent years regarding investment risk evaluation in the uprising bribery crisis in global scale, especially in the developing country; including the BRIC block. (Brazil, Russia, India and China) (Mutlu, 2014) Bribery practices often rises the controversial statement whether it helps or hurts the growth of a firm, despite it is being illegal. According to the research by Jessie Zhou

and Mike Peng, who have written hypothesis on bribery, they say that the practice of bribing is considered costly in term of political, legal and financial aspect. (Zhou & Peng, 2011)

A study was done in China, showing that any governmental relation will result in general firm positive performance. (Park & Luo, 2001) Bribery is done by many enterprises in order to obtain government contracts, to receive import licenses, and to forestall complications to which they might otherwise be subject. (Hines Jr, 1995) A Professor in Chinese University of Hong Kong stated that, where securing resources is often left unfair in developing markets, firms opt to conduct bribery in order to: dodge or cut down taxes, obtain crucial contracts, avoid laws and regulations, or to monopolize the entire market itself. (Powpaka, 2002) Many of the companies in less-developed countries see the practice of bribery is necessary to stay alive in the throat-cutting market competition.

## **LITERATURE REVIEW**

In order to understand bribery, one must carefully examine its similar terms such as: **corruption** and **embezzlement**. **Corruption** is not a foreign term in the political and business world. In the political world, Harvard political scientist, Joseph S. Nye defines it as *“behavior which deviates from the normal duties of a public role because of private-regarding, pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influences.”* (Nye, 1967) Similar to bribery, corruption is often practiced in order to satisfy a certain party while taking advantage of the other. Transparency International, the global coalition agency against corruption, has given the corruption index as a prompt that power abuse, fraud and bribery still continues to devastate societies around the world. (Transparency International, n.d.) In addition, its website provide a 2013 survey where the country of Somalia held the first position of being the most corrupted country among other 174 nations.

The second term **embezzlement**, is defined as misuse or fraud of trust in assets or funds by a person held responsible over those assets. (Cai & Li, 2011) Although bribery and embezzlement are similar, there is a clear difference between the two terms. For example, in sport setting, a player is considered as practicing embezzlement when he takes illegal enhancement drugs to achieve inhumane power. On the other hand, practice of bribery in sport consists of paying the referee to take a favor on one side causing in a more favorable result. Both will result in a similar unlawful altered outcome, through different approaches.

### **History of Bribery**

The first recorded statute of bribery was passed by the Richard II in 1384. The statute by the English King is translated from Latin as, *“...robe, fee, pension, gift, nor reward of any but the King, except reward of meat and drink, which shall be no great value.”* (Lindgren, 1993) Although the statute did not directly mention about the term “bribery”, some refer it today as the first general occurrence of bribery practice.

In the early 20th century, there has been a discussion about the term “commercial bribery”. This term is popularized in China due to high level of corruption that was going on in the 1952. In broad term, commercial bribery is defined as bribery involving

business. The concept of commercial bribery emerged out of a series of changes in Chinese laws that defined the criminal nature of bribery. (Wedeman, 2013)

Over the years, the cases of bribery in business has increased tremendously. According to a report by Want China Times (WCT) in 2011, the leading business journal in china, “the number of senior executives at state and private corporations arrested on corruption charges increased from 95 in 2009 to 155 in 2010, and then 220 in 2011.” Those charged in 2011 included SOE executives and 111 private entrepreneurs. (Corporate Corruption, 2012) These numbers have proven that the practice of bribery has amplified throughout the centuries.

In United States, there is a recorded business-bribery case back in 2009 which is considered as the most severe one. A construction and engineering company called Kellogg Brown & Root was fined \$402 million under the FCPA and its CEO was sentenced to two and a half years in prison; as it was caught bribing the Nigerian Officials with hundreds of millions of dollars in attempt to securing a natural gas plant. (Mohr, 2012)

### United States Law and Regulations

For the purpose of this paper, one shall carefully examined the United States Law and Regulations as the basis of law in international level. The following statements are quoted directly from U.S Government law which address the issue on bribery practices in business realm:

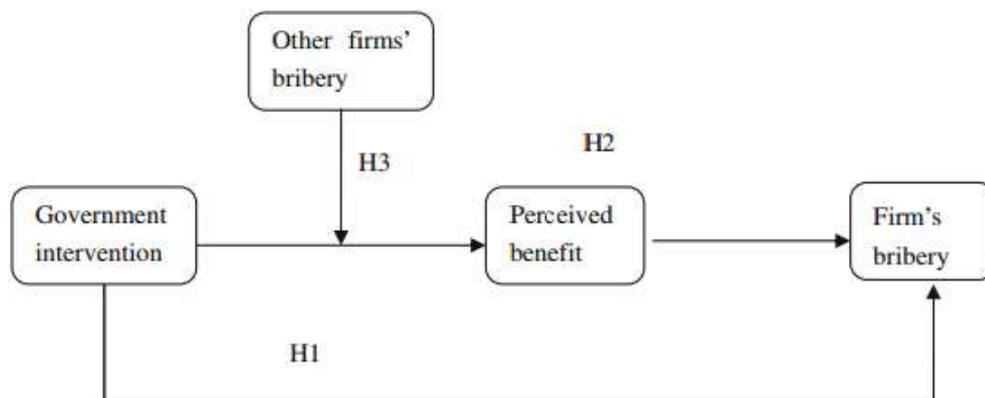
- *“Under the bribery law, at [18 U.S.C. § 201\(b\)](#) (See Appendix A), an executive branch employee may not demand, seek, receive, accept or agree to accept anything of value “in return for being influenced in the performance of any official act.”(United States Office of Government Ethics, n.d.)*
- *“Although the laws do not specifically describe that getting a gift is wrong, the law limits the extent of gratuities. The U.S. Supreme Court in United States v. Sun-Diamond Growers of California, 526 U.S. 398, 404-405 (1999), describes the two crimes as follows:*
  - *“The first crime, described in §201(b)(1) as to the giver, and §201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, inter alia, “to influence any official act” (giver) or in return for “being influenced in the performance of any official act” (recipient). The second crime, defined in §201(c)(1)(A) as to the giver, and §201(c)(1)(B) as to the recipient, is illegal gratuity, which requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient), “for or because of any official act performed or to be performed by such public official.”(United States Office of Government Ethics, n.d.)*
- *“The distinguishing feature of each crime is its intent element. Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a quid pro quo— a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.”(UNITED STATES of America, Appellee, v. Mark ALFISI, Defendant-Appellant., 2002)*

**Recent News / Case Scenario**

In the business setting, bribery can happen in many forms; from as simple as giving a security guard with some gifts, in order to be allowed to park in the reserved space, to paying government officials in order to avoid income tax. In a recent event of political setting that has made a huge news headline, Brazilian politics were arrested due to bribery case. The case was about bribing the people in order to vote for government officials in Congress. (Leahy, 2013)

Another recent case in business setting was the attempt of bribery of an American Information Technology company towards the Indian government officials. Nazir Karigar, former CIO of CryptoMetrics, was sentenced to 3 years in prison for his attempt to secure a technology contract with one of the government-owned commercial airline. He was in charge of a scheme to allocate more than \$450,000 in value to bribe Indian government officials. (Mackrael, 2014) Today, the reason why bribery is performed in various settings, such as business and political settings, is because men are driven by the thirst of worldly successes which gives them an immoral idea where achievements through illegal practices is socially acceptable.

**Rent Seeking Theory**



**Fig. 1** The hypothesized theoretical framework

The following part of the research focuses on the Rent-Seeking Theory. This theory has been very accommodative in explaining the global sensation of corruption ever since it was developed by Gordon Tullock back in 1970. (Coleman, 1990)The Rent-Seeking Theory explains that government involvement in economic events is the main cause of corruption. (Buchanan, 1980)Government involvement includes: tariffs, licenses, authorizations, permits, approvals, tax, quotas and so on. (Manion, 2004)The main idea of Rent-Seeking is when government tries to implement new regulations and laws which threaten firms' advancement in various aspects. New regulations and laws causing taxation issues is one of the main aspect firms feel burdened in thriving to persist in competition. (Rose-Ackerman, 1999)As more tax is to be paid in order for them to survive, firms seek bribery to government officials as one of the solution for preferred treatments. (Homans, 1961). The scarcity of preferred treatments causes firms to conduct Rent-Seeking activities. (Buchanan, 1980)The previous statement supports

firms believe that bribery is essential only when profit exceeds potential dangers; depicted on Fig 1.

Source: The hypothesized theoretical framework (Gao, 2011)

### **Stakeholders**

First and most influencing party in bribery is the government officials. Most of the cases regarding bribery are interrelated with government activities. Businesses are either hindered by government involvements or businesses bribe officials in exchange for preferred treatments. Since government officials have access to economic resources and have to decide on whom will be given and to what extent, (Shabbir & Anwar, 2007) firms view bribery practice as an opportunity and way to be given permission for those resources mainly for beneficial purposes.(Gao, 2011)

The next stakeholder is the international corruption or bribery agencies. As corruption index has risen over decades, it has gained a conspicuous spot in global news. The United Nation (UN) and Organization for Economic Cooperation and Development (OECD), have exhibited conventions enforcing their members on ways to combat corruption and bribery. (Heineman & Heimann, 2006) In 2006, the Department of Justice has formed an independent unit focusing in handling prosecutions and participating in multi-agency involved in combatting corruptions; in attempt to address the grotesque result of 30 years ineffective enforcement by Foreign Corrupt Practice Act (FCPA). (OECD, 2010) The independent unit main purpose was to ban bribery – with no tolerance – as a business strategy in entering global market. (Adkins & Segal, 2012) Unfortunately, the unit had failed miserably due to corrupted perceptions. (Weismann, Buscaglia, & Peterson, 2014) In a 2010 study conducted by Forbes and Deloitte Financial Advisory Services LLP revealed that integrity is declining sharply among 500 financial services industries in Northern America due to different depth of perceptions which appear in global markets. (Deloitte/ Forbes, 2010)

The next stakeholder is businesses' customers. Bribery has been proven as illegal practices internationally. Without questions, illegal activities will devalue any firms involved. Devaluation of these firms brings bad reputation to the customers. With a damaged corporate culture, customers will less likely to repeat their business with the same firm. If customers have a side deal that enriches them for selecting one product over another and if, as is the case with government officials, the money to purchase the product isn't theirs, temptations is great to pay more than market price for the bribe-payers product. (Wrage A. A., 2007)

The next stakeholder is employees. Employees can either take part or be affected by bribery depending on how much tolerance does the firm give. Firms with high tolerance of bribe have low probability to discipline its employees about bribery practices. For instance, top managers will decline to discipline its bribing employees if he sees that bribery is a way of conducting business. On the other hand, top managers is more inclined to discipline his employees if they choose not to practice it. (Wated & Sanchez, 2005) Meanwhile, like customers, employees will less likely to be satisfied working in a company where it deals against governments' laws and regulations. Like a parasite, bribery payment is bound to cherish or devour corporate culture who pays respective honor for laws and regulations in common. (Wrage A. A., 2007)

The next and most important stakeholder is the company's shareholders. This is in regard that shareholders are the decision-makers for the company's direction. The likelihood of firm bribery can be determined on the cost-benefit ratio. When the ratio leans more towards profit, the likelihood of bribery practice will be greater as it benefits a number of large shareholders. However, if the cost is more dominant, then a company might avoid doing bribery at all to build safe walls for most of shareholders. (Ramdani & Witteloostuijn, 2012)

## **RESEARCH METHODS**

This paper bases its research on United States Law to clearly define the negativity of bribery practices. Scoping its negativity impact based on U.S Law and Regulations on local and international businesses, the researcher carries out this study using secondary data elaborated by the World Bank Enterprise Survey from 2006 in 132 developing countries using comprehensive questionnaire and basic methods; which eased the researcher to find the interrelation between bribery practices and firm performances in multinational platform. The firms analyzed in each country are selected at random and have to be non-governmental firms which consist of five or more employees. The data covers "1,200-1,800 business owners and top managers in larger countries, 360 in medium-sized countries and 150 in smaller countries. The result is a sample of 106,805 surveyed enterprises." (Williams, Martinez-Perez, & Kadir, 2016)

In order to fully comprehend the relationship between bribery practices and firm performances, another secondary data by Colin C. Williams has carefully explained the need of three "*dependent variables*" (Williams, Martinez-Perez, & Kadir, 2016) used to describe the data collected on WBES, specifically:

1. Real Annual Sales Growth (in percentage): the first variable used by WBES to records the data is the firms' annual sales performance compared to its previous year. The common interval used to measure the difference in sales growth is two years, while in some other countries the interval used is three. Due to currency differences and ease of uniformity, all sales figures will be converted into US Dollar.
2. Annual employment growth (in percentage): the second variable used is the company turn-over rate. This variable also includes the development of each employee in the firm, based on his performance throughout the interval used; and is not limited to employees hired or fired by the firms. This variable uses the same level of interval as the previous variable.
3. Annual productivity growth (in percentage): the last variable used is the growth of productivity of each full-time employees in a one-year period. The productivity of each individual can be measured by the number of sales produced per head. The interval used is similar to the previous variables above. For the purpose of uniformity, sales figure will also be converted into US Dollar per capita.

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## **RESEARCH RESULTS**

### **Arguments For or Against Bribery Conduct**

The first argument regarding bribery is perspective difference among various cultures, as certain cultures view that pursuing goals through any means necessary is elementary issue. (Martin, Cullen, Johnson, & Parboteeah, 2007). While western civilization normally sees bribery as an illegal act, many less-developed countries in Asia look at it as giving gifts. In national level, bribery is related to dimensions of culture, socio-economic, and historical development. (Treisman, 2000) Studies shows that people with intense competing culture of prestige, wealth and status are most likely prioritizing their advantages over others (Khatri, Tsang, & Begley, 2006). Thus, the traditions and customs in western societies clearly draw a border between gifts and bribery, where they define the illegality of bribery practices. Meanwhile, in other parts of the world, giving or receiving gifts (illegal or not) are considered as building relationships or business interests – which is seen as a normal behavior.

Last, when company invests in a highly corrupted-government country, bribery is expected to occur to stay in competition due to harsh economic condition (Cuervo-Cazurra, 2006). When firms should compete for scarce resources, they are more likely to survive and succeed with pressure (Baucus & Near, 1991). On contrary, firms with a culture of sharing usually sacrifice their self-interest for the sake of sustaining others (Schwartz & Bilsky, 1990). The company which invests in highly corrupted-government country should hold the responsibility to assist with the corruption issue, not be involved in it. The company should treat the foreign country as their home country.

## **SUMMARY AND IMPLICATIONS**

The arguments about bribery – whether it is for or against, can still be lengthened. There are apparent reasons why individuals still practice it, though it is for personal or organizational gain. However, in the end, the conclusion will remain equivalent: bribery is unethical and illegal.

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**BIODATA**

- **Name** : Terry Immanuel Yoseph Winarta B.S., M.B.A.
- **Education** :
  - 2008: Ordinary ('O')-Level High School Certificate from New Town Secondary School in Singapore
  - 2012: Bachelor Degree in Science in Concentration of Business Management at Pensacola Christian College, Pensacola, FL.
  - 2014: Master Degree in Master of Business Administration at Pensacola Christian College, Pensacola, FL.
- **Thesis Research:**
  - 2013: at Pensacola Christian College and University of West Florida, Pensacola, FL.
- **Working Experiences:**
  - 2009-2012: Full-time summer job in renowned Japanese Restaurant in Manhattan, New York as a Server, Bartender and Assistant Manager.
  - 2012-2013: Full-time employment at A Beka Book, a Christian books publisher, in Pensacola, Florida as Bundler Operator, Machine Supervisor, Printing Press Organizer and Fork-Lift Operator.
  - 2014-2016: Full-time employment at Manna Mobil, a renowned car dealer in Surabaya, Indonesia as Sales Executive, Financial Manager and Administrative Personnel.
  - 2016-current: Full-time employment at Universitas Ciputra in the department of International Business Management – International Classes as Lecturer.