STUCK IN THE BOTTLENECK
CORRUPTION IN AFRICAN PORTS

The rapid rise in shipping container traffic in sub-Saharan Africa over the past two decades underlines the lucrative opportunities for businesses on the continent. However, this development also exposes companies to risks of corruption as they expand deeper into emerging markets. Serious bottlenecks caused by poor infrastructure and lack of capacity, combined with widespread corruption in the customs administration at many ports are major issues for businesses transporting maritime cargo.

In parallel, anti-corruption enforcement has recently shown greater focus on small and operational bribes. This creates significant dilemmas for businesses transporting maritime cargo in Africa. While it is increasingly hazardous to pay operational bribes, failure to make such payments can lead to significant and costly delays in navigating standard port and customs procedures. Addressing the issue of corruption through a customs compliance strategy has become of integral importance for businesses transporting maritime cargo in Africa.

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Ports and trade in sub-Saharan Africa

Maritime trade has grown markedly in Africa since the 1990s. West Africa has seen the greatest increase in shipping container traffic: a 364% rise from 1995 to 2005 (*Beyond the Bottlenecks: Ports in Sub-Saharan Africa*, Ocean Shipping Consultants, June 2008). This increase has led to significant port congestion and long waiting times at African ports. A 2012 World Bank study found that, with the exception of Durban, cargo spent an average of 20 days in African ports, compared with three to four days in most other international ports.

The most commonly cited reasons for bottlenecks at African ports are lack of capacity; outdated and inefficient port infrastructure; administrative blockages; and corruption in port and customs authorities.

Many countries in sub-Saharan Africa are starting to seriously address the infrastructural and institutional deficiencies within the ports sector, in line with growing awareness of the importance of facilitating trade. Institutional reform of the ports sector, spearheaded particularly in Nigeria, has led to increasing use of the "landlord" model of port management, which is widely regarded as the preferred institutional set-up for the sector. Under this model, the public-sector withdraws from cargo-handling operations, allowing these to be concessioned to the private sector.

In line with these changes, many customs administrations are in the process of being reformed, with systems becoming increasingly automated and some functions subcontracted to the private sector. This has brought significant improvements in operational efficiency at certain ports. The automation of customs administration and introduction of a “one-stop shop” for clearance procedures at Douala port in Cameroon led to a reduction of average customs clearance time from almost 15 days in 2000 to just over three days in 2009, according to a 2011 World Bank working paper.

Institutional reforms, particularly combined with increased levels of automation, have had the further effect of reducing opportunities for corrupt officials to demand bribes. The importance of automation in the context of bribery and corruption was illustrated in a 2009 investigation into bribes paid at the ports of Durban in South Africa and Maputo in Mozambique (*On the Waterfront: An Empirical Study of Corruption in Ports* by Sandra Sequeira and Simeon Djankov, December 2008). The study highlighted the degree to which the level of automation had an inverse correlation with propensity to demand bribes. In Maputo, 80% of bribes were paid to customs rather than port authorities. The customs service in Mozambique is an arm of government and its processes lack automation, in contrast with the privately managed port. The situation in Durban is reversed, with customs authorities run by an independent regulator that has implemented a high level of automation.

Yet despite some progress, where opportunities exist for individual customs or port officers to solicit unofficial payments and while low salaries create an incentive, the risk of receiving demands for operational bribes to complete standard ports and customs procedures is likely to remain significant. This is reflected in surveys of business leaders. An April 2013 survey of international business attitudes to corruption conducted by Control Risks and the Economist Intelligence Unit found that demands for operational bribes or facilitation payments to have customs agencies process goods were a significant concern for a large proportion of business leaders.

Anti-bribery legislation

This degree of concern in part reflects a broadening in the scope of international anti-corruption legislation to target small bribes and facilitation payments.

Historically, facilitation payments were not a target of international anti-corruption legislation, which traditionally focused on bribes paid to public officials to secure contracts. The US Foreign Corrupt Practices Act (FCPA) was passed in 1977 as the first extraterritorial law to combat the bribery of foreign officials. Following protests by US companies, Congress in 1988 made a concession by amending the act to exclude the prohibition of “facilitation” payments, defined as payments “to expedite or secure a routine government action”. Similarly, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provides against bribes made “to obtain or retain business or improper advantage”, but the commentary to the provision asserts that it does not cover small “facilitation” payments to foreign officials to induce them to perform their functions. It noted that facilitation payments were a “corrosive phenomenon”, but said that they were better addressed through “support for programmes of good governance”.

However, recent years have seen an accelerating trend towards an erosion of the facilitation payment exemption. The OECD in December 2009 issued a recommendation that called on member states to "prohibit or discourage them". In April 2010 the British government passed the Bribery Act (UKBA), which came into force in 2011. The act provides no defence for facilitation payments, meaning that they are included in its definition of bribery and prohibited. Moreover, the definition of bribery is broader than that of the OECD convention, being based on the concept of soliciting an "improper performance" rather than gaining an "improper advantage". A payment to a customs official to induce or expedite a standard procedure could be caught under the UKBA.

> [Facilitation payments are] an abuse of power and position on behalf of the public official demanding and/or accepting these payments [that] unfairly distort the provision of services, resulting in those companies that readily make the payments being granted the best access to services
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> Transparency International Bribes Payers Index 2011

Alongside the strengthening of anti-bribery legislation, there has been a significant increase in the number of enforcement actions taken against companies for making corrupt payments to customs officials. Most notably, the US Department of Justice and Securities and Exchange Commission in November 2010 concluded an investigation into a Swiss logistics company over the payment of bribes to evade normal customs procedures. The company admitted to having paid thousands of small bribes, amounting to US$27m, to officials in Africa and Central Asia. It was required to pay a US$70.56m criminal penalty under a deferred prosecution agreement.

The offence for which the company was prosecuted fell under the FCPA definition of a bribe rather than a facilitation payment because the payments were made to evade rather than to expedite normal customs procedures, and were orchestrated systematically across the company's business. The penalty highlights that US authorities are prepared to target companies that routinely pay small bribes in connection with standard logistical operations.

These trends in the scope and enforcement of international anti-corruption legislation create significant dilemmas for business leaders. While the tightening of legislation can make it hazardous to pay operational bribes, the failure to make such payments can lead to significant delays in navigating standard port and customs procedures. This can be particularly problematic for businesses transporting valuable or time-sensitive goods, such as perishable foodstuffs.

Moreover, all businesses face the risk that, if customs clearance procedures are delayed, demurrage fees may become due to the port authority or operator. In many ports in Africa, such as Matadi in the Democratic Republic of Congo, there is a significant spike in demurrage tariffs after a few days' free time that become applicable if there are delays in clearing customs processes and other standard procedures. This presents a strong incentive for a cargo owner or its customs clearance agent to make "facilitation" payments to expedite standard processes. This is particularly applicable to customs clearance agents whose *raison d'être* is the ability to clear customs procedures in an efficient and timely manner.

Implications

Designing a clear compliance strategy has become an issue of great importance for businesses transporting maritime cargo in Africa. This lets them protect themselves against prosecution under anti-bribery legislation and defend their reputation for ethical conduct.

The legal and regulatory regime varies across different ports in the region, so it is vital to have a good understanding of the environment through which goods are being transported. Given the frequent complexity of customs and port-level bureaucracies, insight from those with practical experience on the ground is vital to understand how business is conducted and how relationships within the port are established and maintained.

To assist this process, many companies rely on the services of third-party logistics providers, which operate at the port and have a greater understanding of the local procedures of how business is conducted and where the potential for delays and demands for corrupt payments may arise.

However, using third-party agents presents its own risks. Under existing anti-bribery legislation, companies are potentially responsible for the actions of agents acting on their behalf. If a customs clearing agent makes a payment to improperly move its client's shipments to the head of a customs processing line, the client would be responsible for the actions of the customs broker. It is vital that companies put adequate controls into place to ensure, as far as possible, that third-party agents avoid paying bribes within the port, even if this results in increased demurrage costs.

As companies are frequently able to exercise only limited day-to-day control over external agents, it is important as a first stage that potential agents are assessed through a rigorous pre-engagement screening exercise. Where a company's goods are transported via a port in which customs services are categorised by a high level of corruption, the company should apply greater scrutiny in selecting its local agent. Public record information is often difficult to obtain in jurisdictions characterised by widespread corruption, so it is important to assess the reputation and probity of an agent using intelligence from knowledgeable individuals on the ground.

Following the vetting process, companies will want to seek a written agreement with any agent stating that the latter will act in compliance with relevant anti-bribery legislation. However, adequate procedures must extend beyond the engagement process and the signing of a written agreement. As far as possible, continuing dialogue must be maintained. This should extend to training, in native languages if possible. Such an agreement should stress that anti-bribery compliance overrides obligations to get shipments through ports and customs as fast as possible. A robust anti-corruption policy may at times lead to longer waiting times and fines when shipments pass through different procedures. Adopting such a policy will involve upfront costs, but will go a long way to minimising exposure to damaging prosecutions in the long-term.

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