No limits for crime? (Corporate) Criminal responsibility for acts of subsidiaries and agents abroad

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Introductory examples: A European corporation purchases wood (or any other good) from Asia. The purchase contracts specify the quality of the goods and also that the wood may not be taken/stolen from virgin woods. The seller undersigns these obligations, but actually sells such “prohibited” logs. A European corporation attempts to gain a huge construction contract for an airport in Asia; it uses agents to lobby for its interests, prohibiting any bribing. The contract is awarded, but the agent has used bribes. The same with a sales contract for railway infrastructure. Cases like the aforementioned are currently discussed intensively.

Question: Under what conditions shall the law intervene, impose (strict liability) rules on the corporation, require an “organizational form” to conduct business in such an environment and punish the management of the corporation or even the legal person itself? The tendency is a continuous extension of legal responsibility. These developments happen, however, in the absence of a pertinent analysis; in particular, in the absence of an analysis in the light of transaction cost theory.

This paper is “unorthodox”, but it addresses a new and highly relevant topic.

- Make-or-by-Decision according to transaction costs (framework):
  - When would A buy from a third party, when would he produce himself? A spectrum of possibilities.
    - On one side: the (spot) market, horizontal transactions are quick and cheap.
    - On the other side: the organization (vertical production).
  - Transaction cost theory
    - The price system can be efficient, but there are costs involved with using it (transaction costs), these costs can become so high that other forms of supply become more attractive.
    - Organizational structure can be efficient, but there are costs involved with using it (transaction costs in terms of organizational and monitoring costs), they can become so high that other forms of supply become more attractive.
    - There are in-between “hybrid” forms of semi-organization (e.g. long term contracts in the automotive sector).

- Conclusion (I):
  - No such thing as single best way of production (make or buy); depends on relative costs and prices.
  - Not efficient to burden efficient structure with inefficient legal extra-duties “as such”.
    - Peter Lewisch (or CEO of company) purchases water-melon on street; requirement to ask vendor for proof of compliance with all regulatory duties?
    - Peter Lewisch (or CEO of company) asks travel agent in Asia to organize boat trip to island adjacent to military area;
requirement to ask travel agent for proof of not having bribed military official?

- Conclusion (II):
  - If a corporation approaches new markets overseas, use of agents (= contractual, not organizational relationship) may be the single best option (namely, better than own subsidiaries).
  - Same regarding suppliers (purchase of cotton, wood, shirts from country X).
  - Would be inefficient to force the corporation to adopt an “organizational relationship” vis-à-vis agent/supplier (“bribe preventing organization”).
  - Counter-argument: Just a tool to internalize the otherwise “external” costs of bribery.
  - Counter-counter-argument: Principal is not least cost avoider.

That means: If a sales structure, say by (i) deliberate cross-border spot-contracts, by (ii) the use of sales agents, or by use of (iii) franchise-partners is the economically efficient way to conduct economic exchange, it is questionable, why legal (institutional) requirements should be imposed that necessarily change this efficient pattern. It should be sufficient to deal with these issues on a contractual basis. It does not seem warranted to impose legal responsibility (in particular, criminal individual or corporate criminal sanctions) in these cases.

The paper provides a thorough analysis of the respective questions.