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CONFERENCE PROCEEDINGS

Anti-Corruption Regulations in Emerging and Expeditionary Markets

New Markets, New Challenges

Elvira N. Loredó • Karlyn D. Stanley • Michael D. Greenberg



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1200 South Hayes Street, Arlington, VA 22202-5050
4570 Fifth Avenue, Suite 600, Pittsburgh, PA 15213-2665
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Preface

Emerging markets and postconflict nation-building environments are crucial to U.S. foreign policy because successful development, job growth, and economic normalization are prerequisites for peace and stability in areas where U.S. diplomatic and military initiatives are under way. Increasingly stringent enforcement of anti-corruption laws, such as the U.S. Foreign Corrupt Practices Act of 1977 (FCPA), highlights a tension in U.S. foreign policy interests. On the one hand, corruption is widely viewed as a destabilizing factor and a detriment to both investment and strong civil society institutions. On the other, aggressive enforcement of the FCPA may place U.S. businesses at a disadvantage in many foreign markets, particularly where competitors face fewer legal constraints and may engage in questionable business practices (such as bribery) that are unacceptable under U.S. law. The threat of civil and criminal sanctions under the FCPA has led some U.S.-based firms to reevaluate the viability of emerging and expeditionary markets altogether—an outcome that is problematic for firms themselves and that could have a perverse impact on U.S. foreign policy and economic interests.

On January 12, 2012, RAND convened a roundtable symposium in Washington, D.C., to focus on challenges to the private sector posed by corruption in emerging and expeditionary markets.

These proceedings summarize key issues and topics from the roundtable symposium. The document is not intended to be a transcript; rather, it organizes the major themes of discussion by topic, pointing out areas of agreement and disagreement among participants. To encourage open dialogue, we elected not to attribute specific remarks to individual participants, with the exception of the lunchtime guest speakers, who did not represent any corporate or official interests.

These proceedings should be of interest to policymakers and diplomats, corporate executives and directors, regulators, compliance and ethics practitioners, and other stakeholders with an interest in subjects related to anti-corruption initiatives, corporate governance and compliance, international development, and the relationship between private-sector anti-corruption efforts and foreign policy.

The RAND Center for Corporate Ethics and Governance

The RAND Center for Corporate Ethics and Governance (CCEG), a research center within RAND Law, Business, and Regulation (LBR), is committed to improving public understanding of corporate ethics, law, and governance and to identifying specific ways in which businesses can operate ethically, legally, and profitably. The center's work is supported by voluntary contributions from private-sector organizations and individuals with interests in research on these topics.

LBR, a research division of the RAND Corporation, is dedicated to improving policy and decisionmaking in civil justice, corporate ethics and governance, and business regulation. It serves policymakers and executives in both government and the private sector through studies of controversial and challenging issues in these areas. Its work builds on a long tradition of RAND research characterized by an interdisciplinary, empirical approach to public policy issues and rigorous standards of quality, objectivity, and independence.

LBR research is supported by pooled grants from a range of sources, including corporations, trade and professional associations, individuals, government agencies, and private foundations. It disseminates its work widely to policymakers, practitioners in law and business, other researchers, and the public. In accordance with RAND policy, all its reports are subject to peer review. Its publications do not necessarily reflect the opinions or policies of its research sponsors.

For more information on LBR, see <http://lbr.rand.org> or contact the director:

Paul Heaton
Acting Director, RAND Law, Business, and Regulation
1776 Main Street
P.O. Box 2138
Santa Monica, CA 90407-2138
310-393-0411 x7526
Paul_Heaton@rand.org

For more information on CCEG, see <http://lbr.rand.org/cceg> or contact the director:

Michael Greenberg
Director, RAND Center for Corporate Ethics and Governance
4570 Fifth Avenue, Suite 600
Pittsburgh, PA 15213
412-683-2300 x4648
Michael_Greenberg@rand.org

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Summary

International corruption has been identified as a major foreign policy problem for the United States because of its effects in undermining development, economic opportunity, and strong civil society institutions in emerging markets and transitional states. Efforts to combat corruption via the U.S. Foreign Corrupt Practices Act of 1977 (FCPA) and the United Kingdom's Bribery Act of 2010, as well as through ramped-up enforcement, have placed an emphasis on policing the behavior of U.S. and European firms as a lever to intervene against corruption occurring elsewhere. Related liability risks have forced many U.S. firms to walk a tightrope in dealing with the reality of corruption on the ground in emerging markets, such as China and India, and in postconflict environments, such as Afghanistan and Iraq. In some instances, incremental risk and cost may undermine firms' competitiveness in foreign markets. Taken to the extreme, a perverse result could involve the withdrawal of U.S. firms from some markets, thereby harming U.S. economic interests and influence while leaving the reality of corruption on the ground unchanged.

Recent debates over the wisdom of aggressive FCPA enforcement, as well as over the role of U.S. firms in overseas corruption scandals, conceal several important points of common interest. Both the U.S. private sector and the U.S. government stand to benefit from cultivating economic development and stronger civil society institutions overseas. Neither can succeed absent the success of U.S. firms in competing internationally and in contributing to development in emerging and expeditionary markets. U.S. businesses are both frontline victims of corruption when operating in those environments and potential allies of the U.S. government in combating corruption, strengthening civil society institutions, and advancing anti-corruption efforts overseas.

It is in this context that RAND convened the roundtable symposium "New Markets, New Challenges: Dealing with Anti-Corruption Regulation in Emerging and Expeditionary Markets" in Washington, D.C., on January 12, 2012. The purpose of the symposium was to stimulate a path-breaking conversation about the anti-corruption challenges and opportunities facing U.S. firms when the latter enter overseas markets where corruption is widespread. The event brought together two dozen participants, some with distinguished service as executives at major public companies and others with significant backgrounds in foreign policy, diplomatic service, law, and the nonprofit sector. Discussions focused on the practical difficulties facing private-sector companies that diligently comply with anti-corruption mandates, the challenges of unraveling the culture of corruption in parts of the world where it has compromised civil institutions, and opportunities for making private-sector businesses more effective allies in the fight against corruption.

Several major themes emerged during the symposium. First was the consensus recognition that corruption is a serious global problem—and one that has a direct negative impact not only on U.S. foreign policy but also on firms seeking to do business in emerging markets. Regulatory approaches, such as the FCPA, have heightened awareness of and emphasized corporate ethics and integrity. This being said, the symposium participants broadly agreed that punitive measures address, at best, only one facet of a much deeper-seated problem.

Risk was another theme that emerged in the discussion. Symposium participants described multiple ways in which risks and uncertainty can undermine firms in seeking to assess the true cost of doing business in emerging and expeditionary markets. FCPA compliance costs, threats to employee safety and corporate reputation, and related forms of competitive disadvantage were all cited as examples of uncertainty and risk.

A third theme that emerged was the importance of prevention as a complementary strategy in fighting corruption in emerging and expeditionary markets. Prevention efforts can take several forms, including closer collaboration among U.S. firms, U.S. government agencies, and international development banks in establishing broader anti-corruption standards with greater international transparency and accountability. Ultimately, the latter should help reduce risks to U.S. firms while leveling the international competitive playing field.

Morning Session: Bridging Legal, Business, and Foreign Policy Perspectives on Anti-Corruption Issues

The morning session opened with invited remarks from several speakers who offered legal, foreign policy, and business points of view on U.S. anti-corruption efforts. Moderated discussion around the symposium table followed. At the outset, it was noted that the FCPA has clearly helped drive significant compliance efforts and investments in virtually all large U.S. companies. On the downside, it was observed that ramped-up enforcement has coincided with provocative and inconsistent standards for FCPA investigation, very significant costs for U.S. firms, and the withdrawal of firms from some important foreign markets (most notably Nigeria). Participants suggested that U.S. Department of Justice (DOJ) FCPA enforcement activity needs to be balanced by other government anti-corruption initiatives, and particularly by a greater focus on overseas prevention efforts.

From a foreign policy perspective, it was observed that overseas corruption presents enormous risks to both U.S. firms and U.S. national security interests. Any successful approach to addressing corruption has to preserve the competitiveness and engagement of U.S. firms overseas; a failure to do so could sabotage the very development efforts that are crucial to U.S. foreign policy. Participants posed a series of questions regarding whether current U.S. anti-corruption policy adequately embraced the complexity of this landscape, whether a strong FCPA enforcement posture is wise or likely to be self-defeating over time, and whether and how U.S. policies can contribute to a better environment for international business, rather than creating a potential “no-win” situation for U.S. firms.

Several speakers focused on the business challenges associated with minimizing FCPA risk on the one hand and continuing to work in overseas emerging markets on the other. One speaker observed that major firm-level investments in compliance and training, and in country-based risk-assessment triage and planning, are crucial steps for managing this balance effectively. Another pointed out that the nature of the corruption threat depends on the type

of business that a given firm is pursuing, and that transactional work (e.g., banking) tends to involve a different set of corruption problems and responses compared with those faced by an enduring manufacturing or service operation. Still another person suggested that adopting a zero-tolerance policy for any illicit behavior within a firm is an important management strategy, and one that makes company expectations and standards unambiguously clear to employees. On a similar point, it was noted that protecting organizational culture and reputation ought to be a high priority for management in overseas operations, and particularly so in mitigating the potentially corrosive effects of a corrupt environment. Ultimately, careful executive-level scrutiny is required as firms decide which foreign markets are worth entering at all when the risks of corruption are such to make engagement prohibitive from a business case standpoint.

A final speaker emphasized the importance of deconflicting the U.S. anti-corruption policy agenda and discussed the business imperative of firms to operate effectively in emerging markets and transitional states. In particular, it was suggested that the aim of the FCPA should be to promote ethical business practices and political and economic alliances, rather than simply deter bribery. By extension, the hallmark of a successful anti-corruption policy is not to balance competing interests (i.e., business interests versus anti-corruption initiatives) but instead to reconcile them.

Afternoon Breakout Sessions: Strategies to Optimize the Anti-Corruption Landscape

In the afternoon, the symposium participants divided into three working groups of about six each. The small-group format was designed to facilitate deeper conversation while tackling several different questions and problems related to corruption and anti-corruption efforts. There was broad agreement among participants that the risks to firms posed by corruption, apart from FCPA enforcement, tend to fall into three categories: (1) risks related to corporate profit, (2) risks related to employee safety, and (3) risks related to the erosion of a firm's values. Each category of risk presents its own set of concerns for companies, for which the working group participants identified a corresponding set of potential mitigation steps.

The first breakout group was charged with addressing the following question: "Given that U.S. companies are compelled to operate under the FCPA, how can the competitive playing field be leveled?" Several suggestions were offered to promote this end, but the general conclusion was that the United States needs to consider a more holistic approach in pursuing its anti-corruption agenda. The recent policy emphasis under the FCPA has focused on penalties for U.S. nationals who abet or participate in corrupt acts. That emphasis needs to be complemented by other approaches to modifying corrupt behavior—not just among U.S. firms and nationals but among foreign firms, nationals, and officials as well. Some of the specific ideas proposed included new prevention initiatives, such as training and educational outreach programs targeting foreign officials and citizenry, public shaming of illicit conduct and bribe-taking (possibly supported by Internet reporting, following the model of overseas websites like ipaidabribe.com), establishing stronger international consensus on anti-corruption standards (less U.S.-centric and less dominated by the FCPA), and implementing new barriers and disincentives to specific corrupt practices in-country, as illustrated by the marking of "blood diamonds" to discourage illegal export and distribution from some parts of sub-Saharan Africa. It

was also suggested that any new initiatives along these lines be combined with formal evaluation and research to establish the efficacy and cost-effectiveness of the different proposals.

The second breakout group was charged with addressing the following question: “What kind of guidance could DOJ give to firms to disambiguate the risks of FCPA prosecution and to improve corporate compliance efforts?” The group’s participants made several suggestions for improvement, including clarification of successor liability, better explanation of the screening process for whistleblower tips that prompt subsequent FCPA investigations, and, potentially, direct intelligence-sharing between DOJ and the corporate community regarding identified in-country “bad actors.” The breakout group also considered the distinctive anti-corruption problems that arise for small and medium U.S. enterprises and explored several avenues for reducing their compliance burden, such as through DOJ pre-clearance of some commercial activities. Finally, the group considered the pros and cons of establishing internationally recognized compliance standards for anti-corruption and transparency, similar to International Standards Organization certifications, and whether such standards might eventually help limit legal risk and “level the playing field” among countries and competing firms. The group concluded that the idea was promising and worthy of further investigation.

The third breakout group was charged with addressing the following question: “What can be done to help mitigate the corruption and FCPA-prosecution risks that companies face in emerging markets while maintaining and enhancing their compliance efforts?” In response, the group explored several ideas. Consensus emerged that having DOJ reward strong FCPA compliance efforts could be a very positive step, as would be DOJ’s implementation of some kind of “safe harbor” connected to FCPA prosecution. The leniency provisions in the Federal Sentencing Guidelines for Organizational Crime were cited as a potential model, and the group discussed what the contours of a safe harbor might look like. In a very different vein, participants suggested that robust ethics and compliance training programs are a crucial step for firms seeking to mitigate corruption risks in their own overseas operations. Indoctrinating employees and foreign affiliates in the corporate values and expectations of the parent firm is a prerequisite for those values and expectations to be carried out, particularly in some overseas environments where corruption is endemic.

Acknowledgments

We would like to thank the panelists, speakers, and all those who engaged in the roundtable discussions, without whom the exchange of ideas documented here would not have been possible. We would also like to thank our sponsors, O'Melveny & Meyers and Motorola Solutions, Inc., for their generous support of the symposium event.

Finally, we would like to thank Patricia Calig, Amy Coombe, Jamie Morikawa, and Stephanie Tjioe at RAND for their assistance in every aspect of putting the symposium event together, managing logistics, capturing the discussions on the day of the event, and generating this proceedings document.

We note that the views expressed during the event represent the perspectives of the various participants and do not necessarily reflect the views of their employers, LBR, RAND, or the sponsors of the event.

Abbreviations

CCEG	RAND Center for Corporate Ethics and Governance
DOJ	U.S. Department of Justice
FCPA	U.S. Foreign Corrupt Practices Act of 1977
LBR	RAND Law, Business, and Regulation
MCC	Millennium Challenge Corporation
SME	small or medium enterprise

Introduction

The terrorist attacks of September 11, 2001, made clear the present danger to U.S. national security from unstable governments and extremist ideologies. These events provided a strong impetus for a more proactive foreign policy approach—one combining diplomacy, national and international intelligence resources, and military action to identify and remediate the risks of potential trouble spots before they flared. In the wake of the 9/11 attacks, debate about the underlying causes of terrorism focused attention on the links between poverty, bad governance, corruption, and political instability. While it has proved difficult to establish a causal relationship between corruption, poverty, poor governance, and dangerously failed states, a review of Transparency International's Corruption Perceptions Index, the World Bank's Governance Indicators, and the Economist Intelligence Unit's Political Instability Index shows that many of the world's most politically unstable countries are plagued by high levels of corruption, weak rule of law, and chronic poverty.¹

At the same time, it has become clear that the trillions of dollars spent on foreign assistance over the past five decades have not provided hoped-for returns in stability and prosperity in many troubled regions.² With this backdrop, in 2002, the U.S. Congress approved the establishment of the Millennium Challenge Corporation (MCC). MCC is a departure in foreign policy aid, linking aid grants to good governance, economic freedom, and investment in people and encouraging private investment and public-private partnerships to establish sustainable development. The emphasis on private-sector involvement as the principal method for creating sustainable development was reiterated in recent remarks by MCC's CEO, Daniel Yohannes:

It has been my goal since joining MCC to work even more collaboratively with the private sector. Our goal is to leverage aid dollars with private sector investments to ensure sustainable economic growth and poverty reduction.³

The U.S. State Department views public-private partnerships as an important facilitator for sustainable growth and the stabilization of governments. Yet, the incentives for U.S. firms to engage in developing markets are actually predicated on their prospects for profit and the

¹ See Transparency International, Corruption Perceptions Index, data from 2011; World Bank, Worldwide Governance Indicators, data from 1996–2010; Economist Intelligence Unit, *Global Fraud Report 2011–2012*, London: Kroll, 2012.

² Margaret Dennis, *A New Approach to Foreign Aid: A Case Study of the Millennium Challenge Account*, New York: Institute for International Law and Justice, Emerging Scholars Paper 12, 2008.

³ Millennium Challenge Corporation, "MCC CEO Daniel Yohannes Announces Invitation to Innovate Initiative," press release, March 28, 2011.

associated risks. For many U.S. firms, this equation has become more and more dominated by the uncertainty of exposure to prosecution under the Foreign Corrupt Practices Act (FCPA).

Congress passed the FCPA in 1977 in response to allegations of bribery by U.S. companies of foreign government officials to secure business deals in those countries. Because the United States was the first country—and, for a long time, the only country—to make it illegal to bribe foreign officials, there have been persistent criticisms that the FCPA places U.S. businesses at a competitive disadvantage internationally. Moreover, in recent years there has also been a widespread perception that the U.S. Department of Justice (DOJ) has intensified its enforcement under the FCPA and that it is increasingly using the statute as a tool to prosecute or threaten companies.⁴

U.S. firms operating overseas face a central challenge in dealing effectively with increasingly stringent anti-corruption demands under the law. Requirements under the FCPA and the United Kingdom's Anti-Bribery Act of 2010 can, at times, create tension as businesses confront the reality of corruption on the ground in places such as China, India, Afghanistan, and Iraq. U.S. firms seeking to operate in emerging markets and “expeditionary markets”⁵ are obligated to follow high standards of conduct and to avoid corruption, or else risk serious legal sanction. Their competitors, meanwhile, may face fewer legal constraints as they engage in questionable business practices (possibly including bribery) that may be locally endemic but unacceptable in the United States or United Kingdom. The threat of civil and criminal sanction under U.S. law has led some firms to reevaluate the viability of emerging and expeditionary markets altogether, an outcome that is problematic for firms themselves and for U.S. foreign policy interests in emerging and expeditionary markets.

Recent debates over the wisdom of aggressive FCPA enforcement in the United States, as well as over the role of U.S. firms in overseas corruption scandals, conceal several important points of common interest among U.S. firms, regulators, and policymakers. All stand to benefit from cultivating economic development and stronger civil society institutions overseas. None can succeed absent the success of U.S. firms in competing internationally and contributing to the development of emerging and expeditionary markets. U.S. firms themselves are both frontline victims of corruption when operating in those environments and key potential allies of the U.S. government in combating corruption, strengthening civil society institutions, and advancing anti-corruption efforts overseas.

It is in this context that RAND convened the roundtable symposium “New Markets, New Challenges: Dealing with Anti-Corruption Regulation in Emerging and Expeditionary Markets” in Washington, D.C., on January 12, 2012. The purpose of the symposium was to stimulate a broad conversation about the role of anti-corruption efforts and the challenges faced by U.S. firms that engage in business in overseas markets where corruption is endemic and has more or less compromised civil society institutions. The symposium brought together a group of more than two dozen participants, some with distinguished service as executives at major public companies and others with significant backgrounds in foreign policy, diplomatic service, law, and the nonprofit sector. Discussions focused on the practical difficulties facing private-sector companies that diligently comply with anti-corruption mandates, the challenges

⁴ “Justice’s Bribery Racket,” *Wall Street Journal*, February, 16, 2012.

⁵ *Expeditionary markets* are characterized by political and economic instability, a disregard for the rule of law, and fragile security. These are often postconflict countries, such as Iraq and Afghanistan, but are not restricted to places with direct U.S. military involvement.

of unraveling the culture of corruption in places where it has compromised civil institutions, and opportunities for making private-sector businesses a key resource and stronger ally in the fight against corruption.

The symposium addressed the issue of corruption and anti-corruption legislation from the legal perspective, the foreign policy perspective, and the business perspective. These perspectives were the subjects of an expert panel discussion during the morning session. In the afternoon, the invited participants broke into working groups to develop ideas about how best to confront the problems created by corruption and anti-corruption regulations.

Chapter Two of these proceedings summarizes the discussion during the morning session. Chapter Three provides a brief summary of invited remarks on anti-corruption by two lunchtime speakers who had worked as senior officials, respectively, in the office of the Special Inspector General for Afghanistan Reconstruction and on international development financing efforts connected to the Export-Import Bank of the United States. Chapter Four presents the results of the afternoon working group sessions.

Morning Session: Bridging Legal, Business, and Foreign Policy Perspectives on Anti-Corruption Initiatives

The morning session opened with invited remarks by several speakers, who offered legal, foreign policy, and business points of view on U.S. anti-corruption efforts. Moderated discussion around the symposium table followed. At the outset, it was noted that the FCPA has clearly helped to drive significant compliance efforts and investments in virtually all large U.S. companies. On the downside, participants observed that ramped-up enforcement has coincided with provocative and inconsistent standards for FCPA investigation, very significant costs for U.S. firms, and the withdrawal of firms from some important foreign markets (most notably Nigeria). It was suggested that DOJ FCPA enforcement activity needs to be balanced by other government anti-corruption initiatives, and particularly by a greater focus on overseas prevention efforts.

From a foreign policy perspective, participants agreed that overseas corruption presents enormous risks to both U.S. firms and U.S. national security interests. Any successful approach to addressing corruption must preserve the competitiveness and engagement of U.S. firms overseas; a failure to do so could sabotage the very development efforts that are crucial to U.S. foreign policy. A series of questions were posed regarding whether current U.S. anti-corruption policy adequately embraces the complexity of this landscape, whether a strong FCPA enforcement posture is wise or has the potential to be self-defeating over time, and whether and how U.S. policies can contribute to a better environment for international business, rather than creating a potential “no-win” situation for U.S. firms.

The Benefits and Drawbacks Associated with U.S. Anti-Corruption Law and Enforcement

Symposium participants discussed several major achievements to which the FCPA has contributed, including the fact that nearly all large U.S. companies now have (1) corporate compliance programs, (2) explicit anti-corruption policies, and (3) formal employee training programs on anti-corruption issues. Participants discussed how corporations now seek to guard against even innocuous conduct that might be misconstrued as bribery, such as by exercising greater conservatism in gift-giving practices and more stringent control over travel expenses. There was also consensus that compliance generally—and anti-corruption compliance in particular—now receives attention at the highest levels within U.S. corporations.

There was debate, however, about whether significantly increased FCPA enforcement since 2000 has been a bane or boon to U.S. companies. One observed consequence of the recent enforcement trend has been that some U.S. companies have ceased doing business entirely in

certain countries (for example, Nigeria). Several participants argued that this unintended consequence has negative ramifications, both economic and diplomatic, since there is a significant benefit to developing countries when U.S. companies participate in their economies and offer a positive business model. From the foreign policy perspective, U.S. influence potentially suffers, to the extent that there is a widespread departure of U.S. companies from developing countries and emerging economies as a result of perceived FCPA enforcement risks.

The group also discussed the costs to U.S. corporations, in terms of time and resources, of conducting FCPA-related investigations and responding to DOJ enforcement activities. Examples included corporate investigations into unattributed FCPA allegations of political corruption, which illustrated the cost and frustration sometimes experienced by U.S. companies as they seek to “prove a negative” while satisfying the anti-corruption inquiries of U.S. regulatory agencies. Another example illustrated how, despite its best FCPA compliance efforts, a U.S. company can sometimes find itself the target of an in-depth FCPA investigation due to factors entirely outside its control—in this instance, an in-country consortium of local partners surreptitiously put together by an African government unwittingly exposing the U.S. firm to a violation under the FCPA. The inability to protect against unsubstantiated allegations of FCPA violations, despite having implemented a “gold-standard” corporate compliance program, was cited as a major disincentive to U.S. companies seeking to enter and participate in emerging markets.

The group then discussed the efficacy of U.S. corporations’ “zero-tolerance” bribery rules, which state that facilitation payments to foreign officials of any kind will not be tolerated by management.¹ One participant explained that this aspect of compliance policy is imperative, because once even a small facilitation payment is made in a foreign country, it sends a message and establishes expectations among those who might ask for bribes. Facilitation payments, while theoretically permitted in some circumstances under the FCPA, are also problematic because they make it difficult for a company to justify to its employees why one type of payment is acceptable and another is not. Allowing facilitation payments adds to the uncertainty of determining what is and is not acceptable corporate behavior.

Several participants concluded that the best management approach to this problem is to simply prohibit any type of bribe or facilitation payment, whether to a vendor or a government official. From a legal perspective, one participant pointed out that since the Fifth Circuit’s decision in *Kay*,² any payment to obtain a foreign license or permit, or to expedite goods through customs, could potentially fall within the scope of the FCPA. The group concluded that, in response to the increased risk from the *Kay* decision, U.S. companies should look for and correct any blind spots in their FCPA compliance programs concerning facilitation payments. As a general rule, the more bureaucratic and antiquated the systems of governance and commerce are in a foreign country, the more likely that facilitation payments (and outright bribes) will be sought by foreign nationals.

¹ Note that under the FCPA provision codified in 15 U.S.C. § 78dd-1(b), a “facilitating payment” to a foreign official is not expressly prohibited, where the purpose of that payment is solely “to expedite or to secure the performance of a routine governmental action.”

² *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

How Corruption Threatens U.S. Business, National Security, and Foreign Policy Interests

The discussion turned to how overseas corruption poses a fundamental threat to U.S. companies' sales and the jobs of American workers. When foreign officials extort business executives, or when these officials are bribed by foreign rivals, U.S. companies can lose contracts to competitors with deeper pockets and fewer scruples. Participants discussed recent examples of major foreign contracts that were lost because of bribery, expressing concern that some countries simply turn a blind eye to such instances of corruption. Foreign policy experts explained that, in addition to adverse business consequences, foreign corruption poses a threat to the national security and foreign policy interest of the United States. For example, bribery of corrupt foreign officials can (and historically has) put weapons in the hands of terrorists or tyrants. The bribery of government officials—in Afghanistan and elsewhere—has also allowed narcotics traffickers to move their deadly products into U.S. cities and offer them to U.S. citizens.

Several of the participants represented companies that pursue significant business interests in the Middle East, Russia, China, and India. Foreign policy experts pointed out that business success in these markets is not only necessary for the health of the U.S. economy but essential in spreading the U.S. business practices that will create critical transformations in these countries. One of the foreign policy dilemmas that the experts shared was whether U.S. government policy concerning corruption adequately embraces the complexity of doing business in emerging and expeditionary markets. Specifically, are U.S. policies and legislation such as the FCPA helping to create a better environment for U.S. business, or have they reached a point of diminished returns?

The group was divided about how U.S. policies affect the foreign business environment. There was extensive discussion about the U.K. Anti-Bribery Act, which explicitly makes the existence of a strong compliance program a defense in a government investigation. Participants pointed out that, in contrast, under U.S. law, even a strong FCPA compliance program will not provide a defense against the actions of a rogue employee. Some participants did note that U.S. law helps to shield their companies from constant pressure by foreign officials to provide bribes, since the officials are well aware of the companies' "zero tolerance" for bribery because of the FCPA.

A Risk-Based Approach to Combating Corruption

One of the business participants described a "Catch-22" faced by many U.S. firms.³ On one hand, corruption in overseas markets exposes firms to litigation risks and the pursuant costs of investigation, fines, and loss of reputation. On the other hand, emerging markets are essential to many companies' business models: Sales in global markets represent billions of dollars annually. Therefore, many U.S. companies have no choice but to engage in these markets and to invest heavily in safeguards to mitigate the risk of corruption.

The group discussed practical management approaches to combating corruption, such as formal risk assessment and triage (i.e., identifying and directing attention to the places and activities that are most vulnerable to corruption, and then looking for indicators that raise a red

³ A Catch-22 is an irresolvable dilemma, as described and portrayed in the novel of the same name by Joseph Heller.

flag). One participant explained that it can help to categorize the types of corruption that are prevalent in a specific business context and operating environment to try to anticipate where the corresponding vulnerabilities lie. He defined three basic types of corruption: regulatory, transactional, and day-to-day. *Regulatory corruption* arises from the regulatory environment of a particular country and can involve illicit fees requested for government permits, for inspection of goods or production operations, and in connection with tax liability disputes and customs (for both goods and people). The group discussed how, in one widely reported case, IKEA discovered that it could not obtain permits to open a completed retail outlet in Russia without paying bribes, so it walked away from its (substantial) Russian investment. Another participant provided the canonical example of a foreign inspector who cannot seem to find the right form to fill out, while a company's perishable items are sitting on a loading dock. Although no payment may be explicitly requested, the inspector's expectation is conveyed surreptitiously. If paid, the missing forms appear immediately and as if by magic. If not, delay is prolonged, the inspector appears helpless or apathetic, and the perishable items may simply rot on the dock.

The group also discussed *transactional corruption*, in which complex and high-value business dealings can make easy targets for corruption and demands for bribes, since it is often possible to "add a little bit on top" to cover payoffs and while maintaining healthy margins on the underlying deal. It was noted that some transactional corruption is institutionalized—for example, in state-owned stores, hospitals, and universities in some Asian countries.

Participants also commented on *day-to-day corruption*, which can involve requests for small bribes and extortion threats in connection with activities of daily living (e.g., driving, grocery shopping, arranging utilities for an apartment). Although such instances may appear to be mundane, they are nevertheless extremely important to the daily lives of employees. One participant gave the specific examples of the cop who pulls over a driver for a bogus infraction and then asks for money, and the utility technician who asks for money to hook up electricity or telephone services. These types of day-to-day corruption, although small, cannot be condoned, either: They create a slippery slope for corporate managers. The group noted that social science research has documented a normative shift of values among employees when they observe their manager colluding in the payment of bribes. When employees observe their managers paying or accepting bribes, even small ones associated with "day-to-day" instances of corruption, they will tend to conclude that it is acceptable for them to engage in bribery as well.

Another participant described the benefits, from his viewpoint, of adopting a zero-tolerance corporate policy toward corruption, under which anyone found by management to have engaged in an activity that compromises the integrity of the company can be dismissed. He suggested that where a corporation gives mixed messages about what is expected of employees, the risk of transgression is heightened. For this reason, he also advocated adopting a complete ban on facilitation payments. The group then discussed this participant's suggestion, concluding that how companies protect themselves and their employees from corruption is likely to vary by the type of business. Some companies, such as those involved in retail operations and manufacturing, have a long-term horizon and in-country presence, while others are much more project-focused—something that ties back to different sorts of corruption risks and vulnerabilities. With regard to a project-focused firm, it was argued that by establishing a track record for ethical conduct across a variety of projects over the long term, the result is a superior reputation, increased confidence in a firm's ability to achieve what it has agreed to do, and a reduced corruption risk. It was also noted that increased confidence and reduced risk are both very good for business, regardless of FCPA regulations.

Moving on, the group then discussed the fact that there are multiple international anti-corruption regulations to which companies in the global marketplace must respond, not just the FCPA. These include the UK's Anti-Bribery Act, Australia's Criminal Code Act, and Nigeria's Corrupt Practices and Other Related Offences Act, among others. In a different vein, another participant stated that uncertainties and corruption risks are also created by transitions in government in many parts of the world. When a new government comes in, it sometimes seeks to accuse the old government of corrupt practices, whether these claims are based in fact or put forward for purely political reasons. Instances like this can put U.S. firms at risk through no fault (or corrupt activity) of their own.

Finally, it was noted that, in some countries, almost every business contract requires entering a relationship with a local in-country partner. Careful due diligence is required to ensure that the local partner is indeed legitimate and not a front company for a third party (which, itself, might be involved in corrupt practices). In sum, the group agreed that U.S. firms need to be very careful about which countries and markets they enter. As one participant pointed out, there are jobs that his firm will simply not take on because of potential fiduciary and reputational risk to the firm.

Bridging Different Perspectives Concerning Anti-Corruption Law and Enforcement

The morning session of the symposium culminated with remarks from another participant, who sought to bridge the business, foreign policy, and legal perspectives on international corruption. He suggested that there is basic and widespread confusion over what the FCPA, the UK's Anti-Bribery Act, and other similar laws are really trying to accomplish. Is it simply to deter bribery, or is it instead to encourage the adoption and dissemination of ethical business practices worldwide? Legislative history for the FCPA was cited to suggest the latter. The purported intent behind the FCPA was for U.S. companies to participate in foreign markets, representing best business values, and helping to spread those values through their commercial activities. At the time the FCPA was conceived in the mid-1970s, experts testified before Congress that the legislation would not have a negative impact on U.S. competitiveness, in large part because of U.S. commercial dominance in the international landscape of that day. During the symposium, participants observed that the basic assumption of U.S. commercial dominance no longer holds true in the way it did decades ago.

The group considered some provocative data on the impact of the FCPA over the past 20 years, which suggest that as FCPA enforcement has increased, U.S. investment in developing countries may actually have decreased. Meanwhile, in its 2011 Global Anti-Bribery and Corruption Survey, KPMG reported that seven out of ten executives interviewed believed that there were places in the world where business simply cannot be done without engaging in bribery and corrupt conduct.⁴ The group reflected on these sorts of empirical findings, and on the related suggestion that the original aims of the FCPA have proven far more difficult and complex to achieve than was anticipated in the 1970s. During the Clinton administration, Paul Gerlach, associate director of the Division of Enforcement at the U.S. Securities and Exchange Commission, acknowledged in his testimony before Congress that FCPA enforcement "may

⁴ KPMG, *Global Anti-Bribery and Corruption Survey 2011*, 2011.

mean lost opportunities for American companies in the global marketplace, possibly affecting overseas procurements valued in the billions of dollars each year.”⁵ During the symposium, a participant asked whether the loss of U.S. business opportunities in recent decades had resulted in reasonable progress on the foreign policy and development goals that were the original lodestar of the FCPA?

Ultimately, the group was asked to consider a new approach to thinking about the FCPA and U.S. anti-corruption policy—one that does not “balance competing interests” but instead seeks to reconcile a strong anti-corruption agenda with empowering the competitiveness of U.S. firms. The focus of anti-corruption policy, it was suggested, ought to be on reforms and enforcement efforts that simultaneously promote ethical business behavior and help to strengthen U.S. businesses so that the latter can engage more effectively in developing countries. Participants argued, in particular, that the United States ought to reconsider the features of anti-corruption enforcement that have sometimes had a detrimental impact on U.S. firms, such as absence of foreign policy and judicial oversight, the absence of a compliance defense, and ambiguity surrounding issues of successor liability and parent/subsidiary liability. The group concurred that the focus of U.S. foreign policy, FCPA enforcement, and U.S. firms should be on adapting U.S. anti-corruption laws to encourage ethical business behavior while preserving and enhancing the global competitiveness of U.S. businesses.

⁵ Paul Gerlach, Associate Director, Division of Enforcement, U.S. Securities and Exchange Commission, testimony before the Subcommittee on Finance and Hazardous Materials, Committee on Commerce, U.S. House of Representatives, concerning H.R. 4353, The International Anti-Bribery and Fair Competition Act of 1998, September 19, 1998, p. 5.

Invited Lunchtime Remarks: The Challenges of Corruption in Developing Economies

Kaivon Saleh, Former Senior Advisor to the Special Inspector General for Afghanistan Reconstruction

There are different types of corruption. Petty corruption is often for basic survival, which is accepted to a degree. However, when police get involved in petty corruption, it creates a major problem, because they have guns. Grand corruption occurs at the level of senior government officials who make decisions on large public contracts. Most high-level corruption is driven by personal greed; funds are usually diverted to personal bank accounts or to political parties.

Experience with the Special Inspector General for Afghanistan Reconstruction demonstrated that enforcement alone is not going to work to eliminate entrenched corruption. Prevention might be more effective overall. If corruption in a country presents the promise of high profit and low risk, then there is bound to be a problem. The focus should be on the system, not on the individual, in addressing entrenched corruption. Transparency International ranked Afghanistan the third most corrupt country in the world in its 2011–2012 index. So, Afghanistan presents a good example of just how difficult the problems of entrenched corruption in a transitional state can really be.

There are notably different types of corruption problems in each province of Afghanistan. Official positions are purchased because there is a profit in it. For example, if someone pays a \$200,000 bribe to become a customs inspector, he can make it back through bribes in less than a month. Judges also pay to be appointed and make money through taking bribes. The factors that contribute broadly to corruption in Afghanistan are complex and include that (1) Afghanistan consists of various tribes, each with its own rules and cultural norms; (2) over 80 percent of the population is uneducated; and (3) there is no effective judicial system or prosecution system for corruption. Moreover, more than 30 years of war in Afghanistan have eroded state institutions, which now must be rebuilt slowly.

Meanwhile, the Afghan economy is growing, but often through corrupt activities, which then produce more opportunities for corruption. For example, municipal authorities are all too often involved in corruption. Anyone can take land and claim it, by paying bribes. The opium economy in Afghanistan also fuels corruption. Thirty percent of Afghanistan's gross domestic product is attributable to drug trafficking. The United States has sent over \$73 billion to Afghanistan in aid, including millions to develop the rule of law in Afghanistan, but without result. The Special Inspector General for Afghanistan Reconstruction recently released a study that showed that approximately 70 percent of the money that the United States sent to Afghanistan was being wasted. Only 10 percent of the money found its way to Afghans for its intended purposes. This is of grave concern, because reducing corruption is a prerequisite to

the long-term sustainability of a democratic government. The impact on U.S. interests in the region has been clear and stark: Afghans are now turning to the Taliban because the Taliban is considered “cruel but just.”

In contrast to Afghanistan, Hong Kong has well-paid anti-fraud investigators and prosecutors and a well-functioning economy. Singapore used the model of Hong Kong and has a prime minister who is paid over \$1 million (recently reduced to \$800,000). He has been ruthlessly determined to get rid of corruption because he knows it is a barrier to the success of the country. These examples show that it is possible to undertake successful anti-corruption measures, at least under the right circumstances.

Afghanistan notably set up the High Office of Oversight and Anti-Corruption in the Office of the President, the same place where that authority is lodged in the Singapore government. The office created a civilian auditing agency, incorporating inspectors general and the military, following the model of Hong Kong. The initiative did not work in Afghanistan. All Afghan government officials were asked to identify their personal assets, but there was no independent verification, so the effort failed. The Afghan anti-corruption unit set up a fraud hotline all over the country and advertised it through a TV campaign and website. At first, there were thousands of calls per day. Since no results appeared to come from the reporting, the number of calls decreased. Afghans deemed the campaign as being merely lip service by government officials to anti-corruption efforts.

One anti-corruption measure that actually worked in Afghanistan involved reducing the number of steps to obtain a driver’s license from 51 to three. The 51 steps provided 51 opportunities for bribes. In this case, a prevention measure was successful. An anti-corruption measure that did not work was to pay Afghan army recruits via their mobile phones. Originally, the mobile phone payments obviated the need for the recruits to take their pay home to their families, since recruits did not trust banks. The payment was achieved by using the chips in mobile phones. The system failed when corrupt police officers took the recruits’ mobile phones, accessed the chips, and transferred the funds to senior police officials instead.

The National Solidarity Program is a positive example of what has worked in Afghanistan. Each village receives \$10,000–\$40,000 for a project, and the villages determine what the project will be. When the community agrees on the subject of the project, it selects the villagers to work on it. The transparency and sense of ownership have made those projects successful.

In summary, to be free of corruption, projects in transitional states need broad-based participation with local ownership. There needs to be accountability through transparency and a focus on results-oriented services (e.g., doctors and midwives). Access to information by everyone involved in the project will build capacity for future efforts. Finally, there needs to be administration of projects based on transparency and the rule of law.

The Honorable Bijan R. Kian, Former Member, Board of Directors, Export-Import Bank of the United States

In brief, tyranny sows the seeds of corruption. A corrupt system overpowers the behavior of the individual. The ease of corrupt practices can create powerful individual incentives to engage in corrupt behavior. Endemic corruption can change social norms, leading to the legitimization of corrupt practices. Institutionalized corruption then punishes individual honesty, sometimes

even rendering it impossible. Institutionalized corruption must be looked at from the prism of systemic complexity and lack of freedom and transparency.

For example, consider an individual in a certain country who pays a bribe to get a license for a used car. There are 120 steps to that process, which takes six months to accomplish. The regular cost to get a license for a used car is the equivalent of \$10. The usual illegal cost for getting an expedited license for a used car is the equivalent of \$300, which includes the legal costs plus illegal costs. Clearly, the incremental cost is enormous; the individual doesn't really want to pay it, but the corruption is institutionalized, and there's no easy way to get around it if you truly want to buy a used car.

We need to focus on new types of anti-corruption policies. Crowdsourcing is working in some countries. No government agency trying to root out corruption can be as effective as ipaidabribe.com. This online bribery reporting website is producing results. Shame is evidently an effective punishment and deterrent. A similar corruption reporting site is legacy.ushahidi.com. *Ushahidi*, which means "witness" in Swahili, was a key website in helping to chronicle the acts of violence that resulted from the contested Kenyan presidential election in 2007.

Please consider three basic insights about fighting corruption: (1) corruption is not easy to tackle; (2) when we want to tackle corruption, we need to rely on people; and (3) we need to understand the supply-demand equation. Technology is providing us with new tools we can use to involve more people in detection, exposure, deterrence, and punishment so that anti-corruption efforts become common practice. The most successful scenario is one in which everyone in a society is included in fighting corruption. Education is a crucial element for making that scenario happen. In many parts of the world, we really need to go after the "supply side" of corruption. It is futile to pursue the "demand side" of corruption because there are so many people lined up to pay bribes. And, in contrast to individuals, shame has little effect on institutionalized corruption and corporate corrupt practices. We see huge fines and penalties imposed by the courts and yet no solid gains in setting back corruption. In summary, prevention measures that reduce process complexity (e.g., streamlining the 120 steps needed to get a license for a used car in country X), that engage everyone in a society (e.g., ipaidabribe.com), and that increase freedom and transparency are likely to be the most successful ways to combat corruption.

Afternoon Breakout Sessions: Strategies to Optimize the Anti-Corruption Landscape

In the afternoon, the symposium participants divided into three smaller working groups designed to facilitate deeper conversation while tackling several different questions and problems related to corruption and anti-corruption efforts. All three working groups were asked to identify the top risks to businesses with regard to corruption in overseas markets. Significantly, all three groups identified similar, major categories of risks: (1) those related to business revenue, (2) those related to personnel safety, and (3) those related to the erosion of corporate values.

Top Corruption Risks to Business

The top risk identified by all participants involved the basic business uncertainty associated with corruption and its ultimate impact on operating margins, return on investment, and the bottom line. It was noted that corruption can impose direct costs on businesses in many different forms, including via compliance efforts and related expenses, illicit payments, lost opportunities, and diminished international competitiveness. Paying bribes to get things done or refusing to pay bribes and dealing with delays both cut into margins in ways that are difficult to anticipate when a project is in the planning stage and when threshold decisions to proceed are based on projected returns on investment. Corrupt environments make it much more difficult to plan and execute on budget and on time. More importantly, it was also noted that corruption can impose major costs on corporations through a lack of clarity in the “rules of play,” a lack of transparency in the behavior of foreign governments and regulators, and basic uncertainty in contracting and enforceability in a corruption-prone environment. The latter problems were cited as a major drawback for corporations seeking to operate in emerging market settings.

Next, the groups identified corruption-related threats to the safety and security of overseas employees as another serious problem—and one that sometimes forces corporations to make very difficult choices (e.g., in an extreme case, choosing to pay ransom to retrieve employees held hostage, despite the fact that such payments might be construed as colluding in corrupt activity). Corruption is often linked to other forms of illicit activity, including human trafficking, drug trafficking, organized crime, and even nuclear proliferation. By paying bribes to corrupt officials, companies expose themselves and their employees to criminal activity that can easily cross the line into kidnapping and other forms of extortion and coercion. Participants also noted that related safety risks can contribute to the difficulty of recruiting U.S. nationals to work in some foreign settings, which then exacerbates corruption risk by compelling a

greater reliance on local workers and affiliates who are not indoctrinated in the ethical values and practices of the parent corporation.

Another identified area of corruption risk involves the potential erosion of corporate values when operating in corruption-prone environments overseas. Specifically, exposure to such environments can sometimes dilute the commitment of executives and managers to high standards of conduct while attenuating employee perceptions of that commitment. In turn, the erosion of corporate values can then be associated with serious secondary problems, as in maintaining product quality standards or protecting against corporate reputational risk. In particular, participants suggested that where corruption and erosion of corporate values become associated with a visible negative impact on product quality, and where harm to people follows as a result, the likely detrimental impact on a firm's corporate reputation and business interests can be very problematic.

Top Anti-Corruption Risks to Business

Working group participants were then asked to identify the top risks to businesses with regard to the enforcement of anti-corruption legislation (including, but not limited to, the FCPA). Across the groups, the top concern identified was disproportionate reputational risk: The notion that relatively small-scale instances of foreign corruption or bribery, sometimes perpetrated by in-country affiliates without the knowledge or control of the parent company, could result in both prosecution and a massive reputational injury to the company. A second (and related) issue identified was waste. Here, it was again observed that enforcement of anti-corruption statutes can sometimes focus on small-scale putative offenses, drawing on unreliable sources and tips, but nevertheless compelling large-scale compliance investigations and driving up costs for companies as they attempt to respond to allegations. The disproportionate expenditure of resources (both within specific companies and for society as a whole) in connection with low-level allegations of non-systematic corruption was cited as a major source of concern. The third priority issue identified by all groups was the lack of a level playing field in anti-corruption law and enforcement. Several participants noted that an obvious drawback to strong enforcement of the FCPA targeting U.S. business defendants is the likelihood that foreign competitors not subject to the same oversight would operate at a substantial advantage. Despite the efforts of the Organisation for Economic Co-operation and Development and others to promote stronger anti-corruption laws and enforcement efforts in other parts of the world, it was observed that many other countries significantly lag behind the United States in this regard.

Avenues for Improving Anti-Corruption Efforts While Leveling the Competitive Playing Field

Each working group also considered a specific topic that had emerged during the morning discussion. Group 1 addressed the problem of leveling the competitive playing field internationally, while Group 2 considered how to clarify the rules pertaining to anti-corruption enforcement, and Group 3 discussed potential risk-mitigating strategies for businesses.

Leveling the Competitive Playing Field

The first group began by discussing several factors that might already be contributing to a more level international playing field with regard to anti-corruption risk and compliance efforts. In particular, it was noted that the lure of listing on U.S. exchanges to raise capital through American depository receipts might be motivating some non-U.S. multinationals to comply with anti-corruption legislation. Another factor potentially contributing to a more level playing field involves several recent incidents in which non-U.S. companies, such as Siemens, have been heavily fined for infringement of the FCPA. It was suggested that foreign firms are now taking notice. Another factor identified as potentially helping to level the playing field involves the increasing number of international anti-bribery conventions and laws, as well as increasing public recognition and enforcement efforts tied to those laws.

Next, the group discussed new and additional ways to help level the competitive playing field and to energize anti-corruption efforts in the face of in-country inertia and active resistance in some emerging market settings. Conversation focused on three approaches: (1) amplifying efforts to develop internationally focused (and consistent) anti-corruption standards; (2) enhancing corruption prevention efforts, as opposed to prosecution efforts; and (3) leveraging public opinion in emerging-market countries to motivate and sustain change on the ground.

There was strong consensus within the group that a critical goal for the future is to improve international cooperation and dispel the perception that anti-corruption regulations are primarily in the interest of the United States. Participants observed that the FCPA is perceived by some European and Asian businesses as a tool designed to serve narrow U.S. interests. This is potentially a perverse and self-defeating result. In a related vein, the view that the United States is playing the role of a global cop does not help build a consensus for anti-corruption action among other countries. Perhaps the path of generating a truly international anti-corruption effort might serve U.S. interests better, as compared to the status quo FCPA approach with the United States unilaterally making and enforcing its own law.

There was also substantial agreement that global corruption problems cannot be solved through prosecution alone. Finding new ways to prevent or foreclose corrupt activities offers an important and complementary avenue for future reform. For example, working group participants observed that diamond-producing nations in Africa have long sought to mark all rough diamonds to prevent corruption and to limit the sale of conflict or “blood” diamonds. In principle, similar anti-corruption prevention strategies might be developed and implemented on a much larger scale. The group discussed the prospects for a system of internationally recognized prevention and anti-corruption standards, as well as an independent certification and recertification framework, that might be used to increase transparency and lessen opportunities for corruption. This kind of framework could plausibly be applied to large infrastructure projects, generally funded by international banks, and help guide the lending institutions in their assessment of the risks associated with specific projects.

The group also discussed the importance of bringing public pressure to bear on corrupt officials and businesses to reduce corruption. It was noted that the media and civil society groups in emerging-market countries and transitional states can play an important role here—both in shaming corrupt public officials and in informing the public about corrupt business practices. Social media websites, such as ipaidabribe.com, were identified as an intriguing example of a new technology solution that has emerged to empower individuals in emerging-

market countries, and one that powerfully taps public sentiment in combating corruption and shaming corrupt actors.

The group concluded that there is currently a dearth of knowledge available to help inform policymakers in the area of corruption prevention. The group identified a series of specific research topics that might help governments and businesses develop better strategies for preventing corruption, which are summarized in Appendix C of these proceedings.

Clarifying and Streamlining Anti-Corruption Enforcement

Group 2 was composed predominantly of the lawyers from the symposium. Conversation focused on the ways in which FCPA and anti-corruption enforcement could be “fine-tuned” to reduce costs to firms while enhancing impact. The group first discussed how DOJ might be able to help U.S. companies with third-party FCPA clearances, given that DOJ maintains an extensive foreign corrupt practices database. A publicly available database of known “bad actors” could be very helpful to U.S. industry in avoiding or mitigating corruption risks. The group recognized that there might be diplomatic or privacy concerns with DOJ undertaking this kind of activity, but participants nevertheless thought that the information gathered by DOJ through investigations should be leveraged to assist corporate compliance prevention efforts. Alternately, the establishment of a private system to collect and distribute similar information on in-country “bad actors” might be extremely useful to firms.

Next, the group discussed the desire of many firms for DOJ to provide better and more specific guidance on successor and parent/subsidiary liability under the FCPA—for example, clarifying the circumstances under which an acquiring company may become liable for past acts of bribery committed by an acquired overseas affiliate. Currently, U.S. companies interpret DOJ enforcement actions to mean that if a company is U.S.-based, it is liable for anyone who does business on its behalf, anywhere in the world. It was observed that expansive and poorly defined liability in connection with successors and subsidiaries makes it risky and difficult to undertake many kinds of transactions and commercial ventures. U.S. companies would ideally like to better understand how and when liability may apply under the FCPA, as well as to identify ways to ensure that their own practices are lawful and fully compliant.

In a related vein, it was suggested that even where a U.S. company has a corporate anti-corruption program that meets the “gold standard,” a single rogue employee or contractor in far-flung international operations can nevertheless expose the company to DOJ prosecution and tremendous risk. The lack of clarity and congruence in prosecution risk, where internal compliance efforts are strong and a putative FCPA violation is not systematic within the firm, has the potential to sabotage anti-corruption efforts and undermine stringent compliance programs. It was suggested that this is a potentially counterproductive result, and one that DOJ could help to alleviate through better guidance and a more calibrated process for prioritizing FCPA prosecutions.

Next, the group discussed the plight of small and medium enterprises (SMEs) that would like to compete in emerging markets but for which FCPA risk is currently prohibitive. It was suggested that SMEs generally cannot afford the legal and other expenses associated with establishing a major corporate compliance program. This, in turn, implies that they cannot operate without high risk in emerging and developing markets, which are often rife with corruption. The group discussed whether there is a case for developing an “FCPA lite” approach to regulating SMEs, if indeed the U.S. government wants SMEs to participate in developing markets. The group concluded that in order for SMEs to be competitive in, and attracted to,

emerging-market opportunities, they may need to be able to manage FCPA risks with a much simpler compliance apparatus than would be appropriate for a large multinational company. Absent corresponding standards for SME compliance under the FCPA, the group discussed whether SMEs have been disincentivized from participating in emerging markets, in a manner not consistent with U.S. foreign policy and economic interests.

Finally, the group considered the potential for establishing a new, voluntary global standard and certification program on anti-corruption compliance. Such a program could be modeled on existing International Standards Organization standards, which are administered and audited by credible third parties. The key idea is that development banks, which provide the major funding internationally for large infrastructure projects, would likely prefer to lend to countries—and companies—that have obtained an anti-compliance certification based on a formal and widely accepted international standard. Such a certification could help the lending institutions to reduce their own risk. If, in turn, access to development financing becomes contingent on certification, then that could press the governments of emerging-market countries to meet related standards and to demand the same from the companies and contractors that work on major development projects. In short, a hypothetical certification scheme might be the initial lever for driving a cascade of new compliance and anti-corruption efforts, in part by empowering development banks to make their lending contingent on verifiable good practices.

Development projects funded by international lending institutions are a huge source of revenue in emerging economies and hence a major target for corruption. In principle, a voluntary certification scheme could help protect development banks, enhance the transparency of anti-corruption efforts in firms and in governments, and level the development playing field among countries that are competing for scarce international financing. The discussion group concluded that the idea of international standards and certification was worth investigating as a strategic method to prevent or reduce corruption in emerging economies.

Mitigating Strategies for Business and Policy Communities

Group 3 began its discussion with a pragmatic, business-oriented perspective on questions about corruption and anti-corruption regulation. In addition to identifying the three top corruption risks (outlined earlier), the group considered a series of other related elements of corruption risk. These included being outbid by corrupt competitors, an inability to identify competent (noncorrupt) counterparties and contractors in overseas markets, a lack of transparency that compromises corporate governance or finance practices for the parent corporation, and reductions in business stability.

In the second part of its deliberations, the group articulated ideas for mitigating corruption-related risks. Strongest consensus was expressed for the notion of implementing a “safe harbor” from anti-corruption prosecution to reward strong compliance programs and efforts within firms. The leniency provisions in the Federal Sentencing Guidelines for Organizational Crime were cited as a potential model, and discussion ensued about what the appropriate contours of a safe harbor might be. One participant observed that a legislative amendment to the FCPA seems unlikely in the near future and that a safe harbor established through DOJ prosecutorial guidance was a more promising avenue to pursue. Another suggested that the terms of a safe harbor ought to promote more effective corruption prevention efforts within firms. “To the extent that a company has a strong compliance program and can show appropriate due diligence in connection with specific foreign counterparties and transactions, then that ought substantially to limit the scope of any related FCPA investigation,” one participant said.

The group discussed several other ideas for mitigating risk and improving anti-corruption efforts. The question was broadly raised whether the private sector might be able to play a stronger self-regulatory role in connection with anti-corruption efforts and, if so, what might that look like? Several participants also spotlighted a major self-protective step that firms could take to limit corruption risk—namely, ensuring that key managers overseas have been appropriately trained in the ethical values and compliance procedures of the parent company. This was cited as an example of something that a corporation can do on its own and an area in which many firms could potentially improve their practices. On a different and more systemic note, others in the group suggested that government sanctions and enforcement efforts targeting foreign violators of the FCPA could be another positive step in more broadly combating corruption risk and in helping to level the playing field for U.S. corporations. In contrast, the group expressed some skepticism about the enactment of new (and potentially inconsistent) anti-corruption legislation in other parts of the globe, as well as the possibility that corporations might become subject to a multiplicity of local anti-corruption enforcement authorities and inconsistent standards.

Conclusions

The symposium was designed to elicit a fact-based dialog and to surface new approaches and solutions for dealing with the challenges posed by corruption in emerging markets and transitional states. Broadly, these environments are crucial to U.S. foreign policy and economic interests, but they are often places where the rule of law is weak, where rival foreign governments favor their own companies to the detriment of others, and where U.S. companies face profoundly difficult anti-corruption compliance burdens when supervising local partners and responding to local conditions.

Several major themes emerged during the symposium. First, participants agreed that punitive measures alone are not a panacea for corruption. Many of the participants agreed that the FCPA has had positive effects on corporate ethics and integrity. Major U.S. corporations have heeded the message sent by DOJ investigations and prosecutions, and they have devised rigorous corporate compliance programs in response. This being said, the participants also broadly agreed that punitive measures and enforcement efforts targeting U.S. and UK companies address, at best, only one facet of a much deeper-seated problem.

Risk was another theme that emerged during the discussions. Many participants expressed concern that both anti-corruption legislation and enforcement, as well as corruption itself, increase uncertainty in business operations. Uncertainty, in turn, contributes to greater risk in operations overseas, and to a reluctance among firms to engage in certain markets. Symposium participants described multiple ways in which uncertainty can magnify the risks firms face when seeking to assess the true cost of doing business in emerging and expeditionary markets. FCPA compliance costs, threats to employee safety and corporate reputation, and related forms of competitive disadvantage were all cited as examples of this kind of uncertainty and risk.

A third theme was the importance of prevention as a complementary strategy in fighting corruption in emerging and expeditionary markets. Prevention efforts can take several forms, including promoting public awareness of corruption and its effects using new social media technologies, such as ipaidabribe.com. Other potential prevention efforts could focus on education and training for corporate and government officials. Such education and training could emphasize positive incentives for integrity, such as improved access to U.S. capital markets. In principle, establishing international, audited standards for transparency in dealings between government officials and U.S. firms, or between governments and international development banks, could also play an important role in future corruption prevention efforts.

Symposium participants concluded that a balance between policing and preventive measures could help reduce uncertainty while opening more emerging and expeditionary markets to U.S. businesses. Although corruption overseas (and at home) is unlikely to ever be fully eliminated, there was nevertheless consensus around the need for new efforts to stem the

occurrence of major forms of corruption while simultaneously empowering the competitiveness of U.S. firms operating overseas.

This proceedings report summarized a dynamic symposium discussion that considered the challenges faced by U.S. businesses operating in emerging and expeditionary markets. Further, it conveyed several recommendations put forward by symposium participants that could move the policy and regulatory agenda toward innovative corruption prevention strategies, leading to transparent and accountable relationships between government and businesses.

Symposium Agenda

New Markets, New Challenges: Dealing with Anti-Corruption Regulation in Emerging and Expeditionary Markets

Roundtable Symposium
RAND Center for Corporate Ethics and Governance
Thursday, January 12, 2012
Washington, D.C.

- 8:15 a.m. Continental Breakfast
- 8:30 a.m. Welcome and Introduction of Participants
Michael Greenberg, Director, RAND Center for Corporate Ethics and Governance
Elvira Loreda, Operations Researcher, RAND Corporation
- 9:00 a.m. Panel Presentation and Participant Discussion: Business, Legal, and Foreign Policy Perspectives
Alan Larson, Senior International Policy Advisor, Covington & Burling, LLC; Chairman, Transparency International/USA
Jeremy Maltby, Partner, O'Melveny & Myers LLP
Jim Portnoy, Chief Counsel, Corporate and Government Affairs, Kraft Foods Global
Robert H. Rubenstein, Principal Counsel and Vice President, Bechtel Corporation
Andrew Spalding, Visiting Assistant Professor, Chicago-Kent College of Law
- 11:30 a.m. Form Working Groups
- 12:00 p.m. Lunch, Guest Speakers
The Honorable Bijan R. Kian, Former Member, Board of Directors, Export-Import Bank of the United States
Kaivon Saleh, Former Senior Advisor to Special Inspector General for Afghanistan Reconstruction (SIGAR)
- 1:15 p.m. Breakout Sessions
Issue 1: Competitiveness and Leveling the Playing Field
Moderator:
Cheryl Benard, Senior Political Scientist, RAND Corporation
Issue 2: Critical Impediments to U.S. Business in Emerging Markets
Moderators:
Karlyn D. Stanley, President, Stanley Consulting, LLC
Andrew Spalding, Visiting Assistant Professor, Chicago-Kent College of Law
Issue 3: Collaboration Between U.S. Government and Business
Moderators:
Jill A. Goldy, Corporate Vice President, Motorola Solutions, Inc.
Michael Greenberg, Director, RAND Center for Corporate Ethics and Governance

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3:30 p.m. Discussion of Findings and Recommendations

4:30 p.m. Wrap-Up and Next Steps

4:45 p.m. Reception

Symposium Participants

James Anderson

Behavioral and Social Scientist, RAND Corporation

Cheryl Benard

Senior Political Scientist, RAND Corporation

George Foote

Partner, Dorsey & Whitney LLP; General Counsel, United States Institute of Peace

Jill A. Goldy

Corporate Vice President, Motorola Solutions

James Greenall

Director, STEELE

Michael Greenberg

Director, RAND Center for Corporate Ethics and Governance

Jerry Hyman

President, Hills Program on Governance, Center for Strategic and International Studies

The Honorable Bijan Kian

Former Member, Board of Directors, Export-Import Bank of the United States

Harold Kim

Senior Vice President, Legal Reform Initiatives, U.S. Chamber Institute for Legal Reform

Brian Kirchhoff

Senior Research Analyst, D3 Systems, Inc.

Oksana Krylova

Senior Counsel—Anti-Corruption Law, General Electric

Alexandra R. Lajoux

Chief Knowledge Officer, National Association of Corporate Directors

Alan Larson

Senior International Policy Advisor, Covington & Burling, LLP; Chairman, Transparency International/USA

Elvira Loreda

Operations Researcher, RAND Corporation

Jeremy Maltby

Partner, O'Melveny & Myers

Jamie Morikawa

Director of Development, RAND Law, Business, and Regulation

Lester A. Myers

Professional Lecturer, Georgetown University

Jim Portnoy

Chief Counsel, Corporate and Government Affairs, Kraft Foods Global

Mario Rebello

Managing Director, CREATE.org

Charles Ries

Senior Fellow, RAND Corporation; Director, RAND Center for Middle East Public Policy

Mike Ring

Business Development Finance Manager, Chevron

Robert H. Rubenstein

Principal Counsel and Vice President, Bechtel Corporation

Kaivon “Peter” Saleh

Former Senior Advisor, Special Inspector General for Afghanistan Reconstruction (SIGAR)

John Schultz

Vice President and Deputy General Counsel, Litigation, Hewlett-Packard Company

Andy Spalding

Visiting Assistant Professor, Chicago-Kent College of Law

Karlyn D. Stanley

President, Stanley Consulting, LLC; Adjunct, RAND Corporation

Topics in Anti-Corruption for Future Research and Investigation

In the culminating session of the symposium, participants discussed ideas for future policy-related research that RAND might undertake, addressing key aspects of the corruption and anti-corruption issues discussed at the meeting. The following list captures the ideas that generated the greatest interest and discussion among the participants:

- Develop a framework for voluntary global standards and anti-corruption certifications, modeled on the International Standards Organization approach. Assess the potential utility and cost-benefit trade-offs embedded in such standards and certifications. Evaluate the outcome of a pilot project to institute related certification requirements, fielded by one or more of the international development banks.
- Assess the link between foreign direct investment and the effectiveness of anti-corruption initiatives.
- Investigate the perceptions of major hedge funds and multinational investment banks regarding levels of corruption in emerging economies. Explore how these perceptions translate into the quantification of risk and investment decisions.
- Conduct survey research among multinational and Indian businesses on the key “hassle factors” for doing business in India (particularly including factors related to corruption).
- Quantify which approaches to preventing corruption have been most effective (e.g., public shaming versus regulatory approaches). Conduct case studies to examine which practices are most successful and under what conditions.

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