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CONFERENCE PROCEEDINGS

Anti-Corruption Regulations in Emerging and Expeditionary Markets

New Markets, New Challenges

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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.