

**TRANSPARENCY AND BUSINESS  
ADVANTAGE: THE IMPACT OF  
INTERNATIONAL ANTI-CORRUPTION  
POLICIES ON THE UNITED STATES  
NATIONAL INTEREST**

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**INTRODUCTION**

What are the benefits and costs to the United States from statutes, treaties, and “soft-law” initiatives that seek to constrain bribery in international business transactions? Hard statistics are not available, but we argue that much of the debate has been overly focused on the possibility that U.S. firms will lose contracts and exports to corrupt competitors, especially ones from emerging economies such as China, Russia, or India.

Of primary importance is the United States Foreign Corrupt Practices Act (FCPA),<sup>1</sup> which prohibits firms from paying bribes for

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.), *amended by* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, tit. V, subtit. A, pt. 1, 102 Stat. 1415 *and* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

the purpose of “obtaining or retaining” business abroad.<sup>2</sup> The United States has been enforcing this statute quite aggressively of late, producing a backlash from portions of the business community. The United States Chamber of Commerce (the Chamber) titles its recommendation for amending the FCPA *Restoring Balance*, implying that the law is too stringent. The Chamber is careful to support the anti-bribery aims of the statute, but its proposed amendments would significantly weaken the law.<sup>3</sup> In its more polemical statements, the Chamber claims that the law is obsolete and “a stumbling block for America’s ability to compete in today’s global economy.”<sup>4</sup> In testimony before Congress, a lawyer representing the Chamber’s position stated that “there is reason to believe that the FCPA has made U.S. businesses less competitive than their foreign counterparts who do not have significant FCPA exposure.”<sup>5</sup> According to the Chamber, the FCPA is a “relic of a time before globalization transformed the U.S. economy and, until updated, it will continue to hurt U.S. businesses.”<sup>6</sup> To us, it is surprising to see the Chamber argue that aggressive enforcement is less important *because* of the globalization of business. We argue, in contrast, that enforcement has become more important as business globalizes, especially because the United States is no longer alone in penalizing overseas bribery. A treaty ratified by most major over-

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2. 15 U.S.C. § 78dd-1 (2006).

3. See ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, *RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 6-7* (Oct. 2010), available at [http://www.instituteforlegalreform.com/sites/default/files/restoringbalance\\_fcpa.pdf](http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf). For a response to this document that complements our own, see DAVID KENNEDY & DAN DANIELSEN, OPEN SOCIETY FOUNDATIONS, *BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 5-8* (Sept. 2011), available at [http://www.soros.org/initiatives/washington/articles\\_publications/publications/busting-bribery-20110916/Busting%20Bribery2011September.pdf](http://www.soros.org/initiatives/washington/articles_publications/publications/busting-bribery-20110916/Busting%20Bribery2011September.pdf) (going through the Chamber’s proposed amendments to the FCPA and offering a rebuttal to each one).

4. Press Release, U.S. Chamber Inst. for Legal Reform, U.S. Chamber Institute for Legal Reform: House Hearing is an Important Step Toward Modernizing FCPA (June 14, 2011), [http://www.instituteforlegalreform.com/component/ilr\\_media/30/pressrelease/2011/533.html](http://www.instituteforlegalreform.com/component/ilr_media/30/pressrelease/2011/533.html).

5. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the S. Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 88 (2010) (written testimony of Andrew Weissmann, Partner, Jenner & Block LLP), available at [http://judiciary.senate.gov/pdf/10-11-30\\_Weissmann\\_Testimony.pdf](http://judiciary.senate.gov/pdf/10-11-30_Weissmann_Testimony.pdf).

6. Harold Kim, *House Hearing: An Important Step Toward Fixing the FCPA*, CHAMBERPOST (June 15, 2011), <http://www.chamberpost.com/2011/06/house-hearing-an-important-step-toward-fixing-the-fcpa/>.

seas investors generalizes the principles behind the FCPA to multinationals around the world.<sup>7</sup>

The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act includes a section that requires firms in extractive industries—oil, gas, and mining—to report payments to governments where they operate.<sup>8</sup> It has generated similar criticisms. Firms claim that these provisions will harm U.S. firms operating in corrupt polities. For example, the American Petroleum Institute, an industry lobby group, argues that U.S.-listed companies will be placed at a competitive disadvantage if the new law causes host governments to “select business partners on future projects that do not have similar reporting requirements” or if non-reporting entities “utilize the . . . information to gain an advantage in future bidding and contract negotiations.”<sup>9</sup>

From the point of view of the U.S. national interest, these claims are overblown. Our aim is to shift the debate over the control of corruption toward the more comprehensive benefits that may result from a strong U.S. stance against foreign bribery. If a U.S. firm loses an individual contract to a corrupt competitor, the cost to American society is not the profits that would have been earned from the corrupt deal. Rather, we defend a more sophisticated view of the loss that recognizes both that the firm can usually shift its business elsewhere and that, even if the lost contract involves a resource at a fixed location, that resource will generally enter into international trade where it can be purchased by American customers.

Furthermore, even if some business is lost, there are long-term benefits to the United States from moving toward a more honest business environment. A strong U.S. policy against international corruption can encourage other countries to follow suit, with positive effects on the efficiency and fairness of global trade and investment, and can help support government reform efforts in host

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7. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 4, *available at* <http://www.oecd.org/dataoecd/4/18/38028044.pdf> [hereinafter OECD Anti-Bribery Convention].

8. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1504, 124 Stat. 1376, 2213, 2220 (2010) [hereinafter Dodd-Frank Act] (adding section 13(q) entitled “Disclosure of Payments by Resource Extraction Issuers” to the Securities Exchange Act of 1934).

9. Letter from Kyle Isakower, Vice President of Regulatory & Econ. Policy, Am. Petroleum Inst., & Patrick T. Mulva, Chairman of the Fin. Comm., Am. Petroleum Inst., to Div. of Corp. Fin., SEC (Oct. 12, 2010), *available at* <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf>.

countries. Overall, we believe that the benefits to the United States and its standing in the world outweigh the net costs associated with the possibility of lost contracts.

In Part I we introduce the basic legal framework that seeks to constrain corruption in international business. There are three basic sources of legal constraints. The first source derives its authority from the FCPA<sup>10</sup> and its generalization, the OECD Anti-Bribery Convention.<sup>11</sup> The second is the United Nations Convention Against Corruption, which covers a broader range of countries and corrupt activities.<sup>12</sup> Finally, one section of the Dodd-Frank Act<sup>13</sup> requires firms in extractive industries to report payments under rules similar to those governing the Extractive Industries Transparency Initiative, a voluntary effort.<sup>14</sup>

In Part II we make our basic argument concerning the proper way to compute the costs for the U.S. economy, as opposed to the costs only to U.S. firms. In Part III we discuss the potential long-term benefits of vigorous enforcement and of ongoing soft-law initiatives. Finally, we conclude in Part IV with a return to the Chamber's claims.

## I. THE LEGAL AND SOFT-LAW FRAMEWORK FOR U.S. BUSINESS

The United States Foreign Corrupt Practices Act was passed in the aftermath of the Watergate scandals, which revealed widespread payments by U.S. firms operating abroad to get and retain business.<sup>15</sup> It was amended in 1988 to exempt "facilitating payments" from the reach of the statute<sup>16</sup> and again in 1998 to make U.S. law

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10. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

11. Kim, *supra* note 6.

12. U.N. Convention Against Corruption, art. 15, Dec. 11, 2003, S. TREATY DOC. No. 109-06, at 33-34, 2349 U.N.T.S. 41, 154-55.

13. Dodd-Frank Act § 1504, 124 Stat. at 2220.

14. For more information on the Extractive Industries Transparency Initiative, see EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://eiti.org> (last visited Sept. 26, 2011).

15. Linda Chatman Thomsen, Director, SEC Division of Enforcement, Remarks Before the Minority Corporate Counsel 2008 CLE Expo (Mar. 27, 2008) (transcript available at <http://www.sec.gov/news/speech/2008/spch032708lct.htm>).

16. Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 446 (2010).

compatible with the OECD Anti-Bribery Convention.<sup>17</sup> The statute makes it an offense for U.S. firms to pay bribes to get business abroad, with both the corporation and its officers potentially subject to criminal liability.<sup>18</sup> Other provisions dealing with books and records apply only to firms listed on the stock exchanges.<sup>19</sup> Enforcement authority lies with both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Whereas the SEC may only pursue civil actions against issuers, that is, companies listed on U.S. stock exchanges, the DOJ may enforce criminal penalties under both the anti-bribery and accounting provisions against issuers and non-issuers.<sup>20</sup>

In the midst of the Watergate scandal it was difficult for businesses to oppose the proposed law. The Senate passed S. 3664 by a unanimous 86-0 vote on September 15, 1976.<sup>21</sup> The House of Representatives adjourned before completing work on this legislation,<sup>22</sup> but S. 305, identical to S. 3664, was introduced shortly after the 95th Congress convened in January 1977. The House passed accompanying bill H.R. 3815 by voice vote on September 20, 1977 with a quorum.<sup>23</sup> The House report noted,

More than 400 corporations have admitted making questionable or illegal payments. . . .

The payment of bribes to influence the acts or decisions of foreign officials . . . is unethical. . . . But not only is it unethical, it is bad business as well. . . . In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.<sup>24</sup>

Similarly, the Senate report stated, "The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered."<sup>25</sup> Once the law was in place, it would prove hard for business openly to oppose it because firms feared that they would suffer a public relations blow

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17. *Id.* at 447-48.

18. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3 (2006).

19. 15 U.S.C. § 78m(b)(2)(A)-(B).

20. *See infra* Part II.A.

21. S. REP. NO. 95-114, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4099, *available at* <http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf>.

22. *Id.*

23. H.R. REP. NO. 95-640, at 7 (1977), *available at* <http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf>.

24. *Id.* at 4-5.

25. S. REP. NO. 95-114, at 3, *reprinted in* 1977 U.S.C.C.A.N. at 4101.

from being labeled in favor of bribery. Nevertheless, some firms argued that they had lost contracts due to their compliance with the law.<sup>26</sup> However, the weakening of the law in 1988 to exclude facilitating payments was more a reflection of actual enforcement priorities and realities than a serious gutting of the law.<sup>27</sup>

Enforcement of the FCPA in the United States has had its ups and downs, but it has been relatively stringent in recent years.<sup>28</sup> However, few cases actually go to trial.<sup>29</sup> Therefore, the law has not benefitted from judicial efforts to elucidate vague aspects of the statute. Defendants prefer to settle, often to preserve their ability to bid on U.S. government contracts. Thus, settlements are announced with considerable fanfare, but the actual wrongdoing admitted by a firm and its officers may seem relatively trivial.<sup>30</sup> Many offenses involve only the books and records aspects of the law, which are not criminal violations.<sup>31</sup> Thus, the primary deterrent effect of the law may be the stigma attached to being penalized under

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26. See, e.g., Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 208 (1994) (citing U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS OF THE UNITED STATES: IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 59 (1981)) (reporting the results of a 1981 General Accounting Office (GAO) survey of 250 of the top 1000 corporations in the United States, which stated that “30% of the respondents claimed that the Act had caused a decrease in business”).

27. See, e.g., Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 257–58 (1997) (noting that the 1988 Amendments strengthened the FCPA because “the 1988 Amendments to the FCPA have reduced or eliminated the most troublesome sources of vagueness [in the law]”).

28. See, e.g., Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 90–91 (2010); Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 495–96 (2011).

29. Mark Brzenzinski & Alex Brackett, *Foreign Bribery and Illegal Exports*, PUB. INT. REP., Spring 2011, at 14, 16 n.8.

30. For example, U.K. firm BAE Systems agreed to pay a \$400 million fine to settle one charge of “conspiring to . . . make false statements.” Press Release, U.S. Dep’t of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>. See also Westbrook, *supra* note 28, at 530–31 (“The SEC Enforcement Division, in particular, has been described as being in a ‘hyper-aggressive phase,’ in which it applies existing laws in ‘novel and creative ways’ . . .”).

31. See Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78ff (2006). See also U.S. DEP’T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT: ANTIBRIBERY PROVISIONS, 2, 5, <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Sept. 27, 2011).

the statute. This may mostly deter large diversified firms that deal with the government as regulator, tax collector, and customer and also deter firms that depend upon a good reputation with private customers to sustain their business. It may be less effective against smaller or less diversified companies.

Over time, enforcement of the FCPA generated support in the U.S. business community for an international treaty to generalize the U.S. approach to other countries that are the major sources of overseas investment.<sup>32</sup> In the early nineties, Transparency International (TI) was founded by Peter Eigen, a retired World Bank official, and several colleagues.<sup>33</sup> TI has an anti-corruption mission that initially focused on limiting corruption in international business dealings. It represents a collaboration between business interests and international governance reformers that pushes for change in the practices of multinational firms and host governments. TI became an early supporter of an international treaty and, over several years, pushed for the drafting, signing, and ratification of what became the OECD Anti-Bribery Convention. A Swiss lawyer and professor, Mark Pieth, led the drafting process,<sup>34</sup> but the support of the U.S. government and the U.S. business community was politically crucial.<sup>35</sup>

The Convention tracks the FCPA, but it allows individual states to tailor their compliance to suit their own legal systems.<sup>36</sup> For example, not all countries permit corporations to be criminally liable, so enforcement in those cases focuses on individuals and, perhaps, on civil fines levied on firms.<sup>37</sup> Enforcement of the Convention relies on the initiative of signatories because its own enforcement mechanisms are weak. The OECD has a working group that meets periodically to assess progress, and it carries out country-level evalu-

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32. For a list of the major sources of FDI, see *infra* note 99.

33. *Advisory Council*, TRANSPARENCY INT'L, [http://www.transparency.org/about\\_us/organisation/adv\\_council](http://www.transparency.org/about_us/organisation/adv_council) (last visited Sept. 28, 2011).

34. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD WORKING GROUP ON BRIBERY ANNUAL REPORT 2007, at 2 (2008).

35. See David Metcalfe, *The OECD Agreement to Criminalize Bribery: A Negotiation Analytic Perspective*, 5 INT'L NEGOTIATION 129, 134–35 (2000).

36. See, e.g., OECD Anti-Bribery Convention, *supra* note 7, art. 2, at 4, 37 I.L.M. at 4–5 (“Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”).

37. *OECD Demands the Slovak Republic Establish Corporate Liability for Foreign Bribery*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Jan. 18, 2010), [http://www.oecd.org/document/61/0,3746,en\\_21571361\\_44315115\\_44419261\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/61/0,3746,en_21571361_44315115_44419261_1_1_1_1,00.html).

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ations required by the Convention.<sup>38</sup> Transparency International publishes its own reviews.<sup>39</sup> However, the treaty has no official sanctioning mechanisms. Some have proposed an international tribunal to deal with corporations that violate the treaty,<sup>40</sup> but actual enforcement has no such backup.

In 2000, shortly after the OECD Anti-Bribery Convention entered into force, the United Nations General Assembly established a committee to negotiate a convention against corruption. After several negotiating sessions, the General Assembly adopted the United Nations Convention Against Corruption in 2003.<sup>41</sup> Again, the United States supported this international effort and was among the first countries to sign and ratify the U.N. Convention. The U.S. permanent representative to the United Nations stated, "Ten years ago, bribes were still tax deductible in some countries and no international anti-corruption treaties existed. Today's resolution is therefore a milestone achievement in the global effort to ensure transparency, fairness and justice in public affairs."<sup>42</sup> The U.N. Convention entered into force in the United States in 2005 after the thirtieth country ratified it,<sup>43</sup> and 153 countries, in addition to the European Union, are now parties to the U.N. Convention.<sup>44</sup>

Although the U.N. Convention Against Corruption was developed in light of previous anti-corruption instruments, including the FCPA and the OECD Anti-Bribery Convention, it is broader in scope, extending beyond bribery of foreign public officials to ad-

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38. For OECD reports on the implementation of the OECD Anti-Bribery Convention, see *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, [http://www.oecd.org/document/24/0,3746,en\\_2649\\_34859\\_1933144\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/24/0,3746,en_2649_34859_1933144_1_1_1_1,00.html) (last visited Sept. 29, 2011).

39. *TI Progress Report: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials*, TRANSPARENCY INT'L, [http://www.transparency.org/global\\_priorities/international\\_conventions/projects\\_conventions/oecd\\_convention](http://www.transparency.org/global_priorities/international_conventions/projects_conventions/oecd_convention) (last visited Sept. 29, 2011).

40. See Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L LAW 129, 160 (2010).

41. U.N. Convention Against Corruption, *supra* note 12.

42. Sean D. Murphy ed., *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 169, 184 (2004) (quoting U.N. GAOR, 58th Sess., 50th plen. mtg. at 19, U.N. Doc. A/58/PV.50 (Oct. 31, 2003)).

43. Press Release, U.N. Office on Drugs & Crime, Convention Against Corruption Ratified by 30th State, Will Enter into Force 14 December 2005, U.N. Press Release L/T/4389 (Sept. 15, 2005), available at <http://www.un.org/News/Press/docs/2005/lt4389.doc.htm>.

44. *UNCAC Signature and Ratification Status as of 1 May 2011*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Sept. 29, 2011).

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dress other facets of corruption, including trading in influence, money laundering, and embezzlement.<sup>45</sup> It also covers countries that are not yet party to any other anti-corruption instrument.<sup>46</sup> In addition, the U.N. Convention supports the criminalization of corruption in the private sector.<sup>47</sup> It focuses on international cooperation, encouraging states to exchange information, and includes detailed provisions on cooperative law enforcement mechanisms like extradition.<sup>48</sup> However, similar to the OECD, the United Nations does not have the power to enforce compliance,<sup>49</sup> and the impact of the Convention is uneven across countries due to differing enforcement levels and because countries may ratify it with reservations.

In recent years several voluntary efforts have sought to increase transparency and to limit corruption, especially in the extractive industries. Two of the most significant initiatives are Publish What You Pay (PWYP),<sup>50</sup> a global coalition of civil society groups working to convince firms to publicize payments, and the Extractive Industries Transparency Initiative (EITI),<sup>51</sup> an international initiative comprising governments, firms, and civil society groups that works with governments to publish information on all types of payments connected to extractive companies' business activities. The idea is that even without strong prosecutorial efforts, information on payments, even legal ones, can help citizens and civil society groups to monitor the behavior of governments and firms.

Civil society organizations, such as PWYP, Revenue Watch, and Global Witness, lobby for transparency in the extractive industries and were key supporters of section 1504 of the Dodd-Frank Act, a provision requiring firms in extractive industries to publish what

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45. *International Trade Alert: The United Nations Convention Against Corruption*, AKIN GUMP STRAUSS HAUER & FELD LLP, 5–6 (Jan. 14, 2004), <http://www.akin.gump.com/files/Publication/eb85b0df-4b9d-49f2-bb83-0a19fa0e31a5/Presentation/PublicationAttachment/0ddf3ac5-050e-4e16-b3df-0bf9e32f5ad3/628.pdf>.

46. Lucinda A. Low, Thomas K. Sprange & Milos Barutciski, *Global Anti-Corruption Standard and Enforcement: Implications for Energy Companies*, 3 J. WORLD ENERGY L. & BUS. 166, 171–72 (2010). Russia, however, has been invited by the OECD to join their Working Group and to accede to the Convention. See *OECD Invites Russia to join Anti-Bribery Convention*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (May, 25, 2011), [http://www.oecd.org/document/24/0,3746,en\\_21571361\\_44315115\\_47983768\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/24/0,3746,en_21571361_44315115_47983768_1_1_1_1,00.html).

47. *International Trade Alert*, *supra* note 45, at 6.

48. *Id.* at 5, 7.

49. *Id.* at 7.

50. For more information on PWYP, see PUBLISH WHAT YOU PAY, <http://www.publishwhatyoupay.org> (last visited Sept. 29, 2011).

51. See EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 14.

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they pay in an annual report under SEC oversight.<sup>52</sup> Senators Benjamin L. Cardin (D-Md.) and Richard G. Lugar (R-Ind.) introduced section 1504, also known as the Cardin-Lugar amendment.<sup>53</sup> In addition, section 1502 of the Dodd-Frank Act requires companies to which conflict minerals are “necessary to the functionality or production” of their products to disclose whether the minerals originated in the Democratic Republic of the Congo or a bordering country.<sup>54</sup> The final rules implementing these sections had not yet been issued at the time of publication, but, at the very least, they will provide information on contracting and sourcing practices in these sectors.

These initiatives in U.S. law and in international treaties and soft-law have produced a heightened interest in this aspect of corporate social responsibility and have led to the development of corporate compliance programs to signal a firm’s credible commitment to integrity. For example, General Electric (GE), which received the 2010 Transparency International-USA Corporate Leadership Award for a “sustained commitment to fostering a corporate culture of integrity,”<sup>55</sup> disseminates a Code of Conduct among GE employees requiring compliance with policies designed to promote high standards of integrity.<sup>56</sup> The hope of the firm’s management is that, even if an employee pays a bribe, prosecutors will view the employee as a solitary wrongdoer who is violating firm policy, not a faithful servant of superior officials who are willing to make payoffs in the name of profit. However, under the FCPA there is currently no formal “compliance defense,” that is, a U.S. firm is still liable even when an employee “circumvent[s] compliance measures that [are] otherwise reasonable in identifying and preventing such violations.”<sup>57</sup> In contrast, the recently enacted U.K. Bribery

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52. *Pushing for Probity*, 52 AFR. CONFIDENTIAL 6, 7 (2011), available at <http://www.africa-confidential.com/article/id/3884/Pushing-for-probity>.

53. *The Cardin-Lugar Amendment (Dodd-Frank 1504)*, PUBLISH WHAT YOU PAY, <http://www.publishwhatyoupay.org/about/stock-listings/cardin-lugar-amendment-dodd-frank-1504> (last visited Oct. 3, 2011).

54. Dodd-Frank Act, Pub L. No. 111-203, § 1502(b), 124 Stat. 1376, 2214 (2010).

55. Press Release, Transparency Int’l-USA, Transparency International-USA Honors Paul Volcker and GE at Integrity Awards Dinner (Dec. 9, 2010), <http://www.transparency-usa.org/news/documents/2010.12.9TI-USAPressRelease-IntegrityAwardsDinner.pdf>.

56. GENERAL ELECTRIC, THE SPIRIT AND THE LETTER 3 (2005), available at [www.ge.com/files\\_citizenship/pdf/TheSpirit&TheLetter.pdf](http://www.ge.com/files_citizenship/pdf/TheSpirit&TheLetter.pdf).

57. WEISSMANN & SMITH, *supra* note 3, at 11; see also Joe Palazzolo, *An FCPA Compliance Defense? No Way, Breuer Says*, WSJ BLOGS (Apr. 1, 2011, 2:11 PM), <http://blogs.wsj.com/corruption-currents/2011/04/01/an-fcpa-compliance-defense-no>

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Act of 2010 allows an “adequate procedures” defense,<sup>58</sup> which allows companies to prove that they “maintained ‘adequate procedures’ to prevent associated persons from committing bribery.”<sup>59</sup>

Not all firms oppose U.S. laws designed to limit overseas bribery. Although business firms generally resist government attempts to regulate their behavior, in some cases firms may support regulation. For example, small firms and potential entrants may support vigorous antitrust enforcement against entrenched monopolists. Firms producing potentially dangerous products may support government standards that permit the firms to overcome consumer worries and to limit their liability. Firms may support regulations that are relatively cheap for them but that raise rivals’ costs.<sup>60</sup> In the anti-corruption area, firm owners and managers that seek to operate honestly will benefit from efforts to constrain corrupt firms. GE and other firms with strong internal compliance systems may fall into that category. Being able to refuse a bribe demand by referring to legal constraints may help a firm’s bottom line if its product is so superior that a public official cannot turn to a corrupt competitor without arousing suspicion.

Nevertheless, under other conditions, firms may believe that they are losing business to corrupt competitors. This was, after all, much of the motivation for the strong U.S. government support of the OECD Anti-Bribery Convention,<sup>61</sup> and it is part of the debate over the rise of firms from China and other emerging economies, which lack similar constraints.<sup>62</sup> Despite these concerns, a new Chi-

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way-breuer-says/ (reporting that “[t]he chief of the Justice Department’s Criminal Division flatly rejected the need for a compliance defense in the FCPA”).

58. Bribery Act, 2010, c. 23, § 7 (Eng.).

59. F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT’L L.J. 1, 30 (2010).

60. See generally Steven C. Salop & David T. Scheffman, *Raising Rivals’ Costs*, 73 AM. ECON. REV. 267, 267 (1983).

61. See, e.g., Todd Swanson, Note, *Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law*, 35 GA. J. INT’L & COMP. L. 397, 401 (2007) (“This situation, where U.S. firms’ international competitors were not subject to the same criminal sanctions for bribery, put U.S. citizens and companies in a difficult competitive position in the ever growing global economy. This situation, along with the ill effects bribery has on states, particularly in the developing world, was to be rectified by the conventions, particularly the Organisation for Economic Co-operation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions . . .”).

62. See, e.g., Henry (Litong) Chen & Xiaosong Zhou, *Possible Impacts of the Dodd-Frank Act on U.S. Companies Doing Business in Asia*, BLOOMBERG L. REP. ASIA PAC. L., June 6, 2011, at 18–19, available at <http://www.mwechinalaw.com/uploads/doc/chenzhou-doddfrank.pdf> (“Some host countries, despite the exist-

nese law, which took effect in May 2011, suggests that emerging economies are also taking steps to tackle corruption. The amendment to China's criminal law prohibits bribery of foreign officials and helps to satisfy China's obligations under the U.N. Convention Against Corruption.<sup>63</sup>

In spite of such developments, the current difficult economic climate and the Republican control of the House of Representatives have encouraged efforts to limit the reach of anti-corruption laws. Those seeking to limit the FCPA see an opening. We turn now to arguments that can blunt the force of these arguments.

## II.

### THE COSTS TO THE UNITED STATES OF LIMITING CORRUPTION BY U.S. FIRMS

We argue that the claimed harm to U.S. interests from existing anti-corruption law is much exaggerated. Of course, individual contracts may have been lost because of refusals to pay bribes. Alternatively, multinationals may have developed ways to work around the law by providing extra benefits that are nominally legal, such as contributions to a charity associated with a politician's family or political allies, the use of local, well-connected suppliers, or the provision of local public goods.<sup>64</sup> However, assuming that workarounds

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tence of strict anti-bribery and -corruption laws, may not enforce their laws evenly. Therefore, a U.S. company would be made less competitive in the host country than a local company because the local company may obtain or retain business by paying bribes to officials (as well as to other bribe recipients).").

63. George J. Terwilliger III, Alistair Graham, Darryl S. Lew, Daniel Levin & Charlie Monteith, CHINA'S NEW ANTI-CORRUPTION LAW GOES INTO EFFECT MAY 1, 2011, WHITE & CASE LLP (Apr. 19, 2011), <http://www.whitecase.com/alerts-04202011/>.

64. For example, a 2006 survey of 350 international companies based in Brazil, Germany, France, Hong Kong, the Netherlands, the United Kingdom, and the United States commissioned by Control Risks and Simmons & Simmons found that almost "two-thirds of respondents believed that companies in their own country either 'regularly' or 'occasionally' seek to gain a business advantage through making donations to charities favored by decision-makers." CONTROL RISKS GROUP LTD. & SIMMONS & SIMMONS LLP, INTERNATIONAL BUSINESS ATTITUDES TO CORRUPTION—SURVEY 2006, at 4, 13 (2006), *available at* [http://www.control-risks.com/OurThinking/CRsDocumentDownload/International%20business%20attitudes%20to%20corruption%20survey\\_2006.pdf](http://www.control-risks.com/OurThinking/CRsDocumentDownload/International%20business%20attitudes%20to%20corruption%20survey_2006.pdf). Although charitable donations are not explicitly illegal under the FCPA, donations made for the "sole purpose of gaining political advantage could lead to legal hazards." JOHN BRAY, CONTROL RISKS, FACING UP TO CORRUPTION 2007: A PRACTICAL BUSINESS GUIDE 73 (2007), *available at* [http://www.control-risks.com/pdf/Facing\\_up\\_to\\_corruption.pdf](http://www.control-risks.com/pdf/Facing_up_to_corruption.pdf). For example, in 2004, the Schering-Plough Corporation paid a \$500,000 civil penalty to the SEC for violating the FCPA accounting provisions after it recorded payments made to a charity spe-

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are not always possible and that the law does, in fact, limit payoffs, we examine the law's potential consequences. We take up two concerns raised with respect to both the FCPA/OECD Convention and the Dodd-Frank/EITI initiatives.

First, in Part A we discuss coverage. How broadly does U.S. law reach? In other words, how serious is the concern that the home countries of other investors either do not enforce their own laws or are outside the international anti-corruption framework? Aspects of both the FCPA and the Dodd-Frank Act cover all firms listed on U.S. exchanges, and many major international firms list on U.S. exchanges. We look at a few specific national markets to highlight the relatively broad coverage of U.S. anti-corruption laws.

Second, in Part B we argue that, even if some U.S. businesses lose contracts abroad because of U.S. anti-corruption initiatives, the losses to the U.S. economy are less than has sometimes been claimed. There are two distinct cases: footloose firms and government contractors (Part B.1), on the one hand, and investments tied to the location of resources (Part B.2), on the other.

A firm in a footloose manufacturing sector may lose a contract in one country and then turn to another or even invest inside the United States. A firm that loses a government contract may bid on another one elsewhere in the world. The loss to the firm is then not the value of the lost contract but only the marginal loss from operating in or selling to a somewhat less profitable and less corrupt location, taking into account the benefit of not paying a bribe. Furthermore, if a firm's management condones bribery to get business, it may create a culture of illegality inside the firm that encourages the firm's own employees and suppliers to steal from it, thus reducing the benefits of overlooking payoffs. Furthermore, the loss to the U.S. economy is considerably less than the loss to the firm so long as the firm is not 100 percent U.S.-owned or so long as some firms that lose contracts abroad invest at home instead.

In contrast, investors in the petroleum industry or in the hard rock mineral sector are limited to countries where these resources are located, and many deposits are in countries that rank highly on

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cializing in historic preservation as "medical donations." *Id.*; see also John P. Giraudo, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 *BUS. LAW.* 135, 148-49 (2005) (describing the SEC complaint against Schering-Plough Corporation "for violating the books and records and internal controls provisions of the FCPA" based on incorrectly recording "charitable contributions").

corruption indices.<sup>65</sup> Firms may have several choices, but no potential investment site may seem particularly “honest.” As resources are exhausted in relatively honest countries, firms will move elsewhere. To take an example from outside the United States, as the North Sea field moves towards depletion, Statoil, the largest Norwegian oil and gas producer, is seeking investments elsewhere in less honest countries, such as Angola.<sup>66</sup> In the case of the U.S., the cost to the economy, not just to U.S. firms and business owners, is not the value of the lost deal so long as the resource enters into the international market where it can be purchased by U.S. customers. The firm’s U.S. shareholders may suffer a marginal loss of profit, but if prices are determined internationally, the identity of the firm that obtains the contract or concession will have little impact on U.S. citizens and firms that use the resource.

#### A. Coverage

In considering any costs that U.S. transparency laws may impose on U.S. firms, it is important to keep in mind that the scope of U.S. anti-corruption law is broad. For example, the jurisdiction of the FCPA extends beyond U.S. companies and citizens. The anti-bribery provisions of the FCPA prohibit, in addition to U.S. companies and citizens, “foreign companies with shares listed on a U.S. stock exchange . . . or any person while in U.S. territory from: (i) corruptly paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or anything of value; (ii) to a foreign official; (iii) in order to obtain or retain business.”<sup>67</sup> The accounting provisions of the FCPA cover SEC issuers, i.e., “publicly-held companies with shares traded on a U.S. exchange.”<sup>68</sup> Therefore, the DOJ and the SEC may enforce penalties against both U.S. and foreign issuers; the DOJ may also enforce civil penalties under the anti-bribery provisions with respect to non-issuers covered by the

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65. For example, out of 178 countries, Russia ranks 154th, the Democratic Republic of the Congo ranks 164th, Angola ranks 168th, and Iraq ranks 175th. TRANSPARENCY INT’L, CORRUPTION PERCEPTIONS INDEX 2010, at 3 (2010), [http://www.transparency.org/content/download/55725/890310/CPI\\_report\\_ForWeb.pdf](http://www.transparency.org/content/download/55725/890310/CPI_report_ForWeb.pdf).

66. On Transparency International’s corruption index, Norway ranks 10th while Angola ranks 168th. *Id.* at 2–3. Statoil has publically announced plans in Angola. Press Release, Statoil, Statoil Identified for Pre-salt Operatorships in Angola (Jan. 26, 2011), [http://www.statoil.com/en/NewsAndMedia/News/2011/Pages/24Jan\\_Angola.aspx](http://www.statoil.com/en/NewsAndMedia/News/2011/Pages/24Jan_Angola.aspx).

67. Koehler, *supra* note 28, at 389–90 (paraphrasing the language of FCPA, 15 U.S.C. § 78dd-1, to clarify its meaning).

68. *Id.* at 395.

FCPA; and the DOJ may pursue action against both U.S. and non-U.S. citizens. In fact, following the 1998 amendment to the FCPA, the DOJ may prosecute non-U.S. citizens who neither reside nor do business in the United States based solely on territorial jurisdiction.<sup>69</sup>

Although the jurisdiction of the FCPA is expansive, traditionally the DOJ and the SEC have taken action primarily against “U.S. publicly traded companies or U.S. companies doing business abroad.”<sup>70</sup> However, enforcement of the FCPA has increased enormously in recent years,<sup>71</sup> and the DOJ and the SEC are more frequently “assert[ing] jurisdiction over a foreign company based on its status as an Issuer.”<sup>72</sup> This occurred for the first time in 2006 when the DOJ pursued criminal actions against Statoil, the Norwegian oil company, “for improper payments to Iranian officials.”<sup>73</sup> By 2010, such actions had become more commonplace. Ten out of the twenty-three enforcement actions resolved that year were settlements with non-U.S. companies; eight of these ten settlements ranked among the largest in the history of the FCPA.<sup>74</sup> To date, the largest FCPA settlement was made by the German company Siemens, which paid \$800 million in 2008.<sup>75</sup>

The FCPA provisions are also enforced against non-U.S. citizens. Ten such actions were resolved or pending in 2010.<sup>76</sup> Many of these cases involve actions taken against non-U.S. agents of U.S. companies.<sup>77</sup> The DOJ and the SEC have also pursued actions

69. Westbrook, *supra* note 28, at 553–54.

70. Daniel Margolis & James Wheaton, *Non-U.S. Companies May Also Be Subject to the FCPA*, 1 FIN. FRAUD L. REP. 168, 168 (2009), available at [www.pillsburylaw.com/siteFiles/Publications/961FAE6040BDB25EB4E6C63B250A3AAE.pdf](http://www.pillsburylaw.com/siteFiles/Publications/961FAE6040BDB25EB4E6C63B250A3AAE.pdf).

71. “During the first twenty-eight years that the FCPA was in force, the SEC and the DOJ typically initiated just two or three cases a year. . . . Fines, when assessed, seldom exceeded \$1,000,000. . . . [Now] the SEC and DOJ are bringing ten times as many cases as in prior years. There are estimated to be a record 140 open FCPA investigations. Fines are also increasing dramatically.” Westbrook, *supra* note 28, at 495–96 (internal footnotes and citations omitted).

72. Margolis & Wheaton, *supra* note 70, at 170.

73. Westbrook, *supra* note 28, at 551–52.

74. See *2010 FCPA Enforcement Index*, THE FCPA BLOG (Jan. 3, 2011, 7:02 AM), <http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html>.

75. See *id.*; *Japan’s JGC Makes Top Ten*, THE FCPA BLOG (Apr. 7, 2011, 6:38 AM), <http://www.fcpablog.com/blog/2011/4/7/japans-jgc-makes-top-ten.html>.

76. See *2010 FCPA Enforcement Index*, *supra* note 74.

77. For example, in 2009 the DOJ took action against Ousama Naaman, a Canadian citizen, because he was considered to have been acting “on behalf of a publicly traded U.S. chemical company and its subsidiary.” Westbrook, *supra* note 28, at 552 (quoting Press Release, U.S. Dep’t of Justice, Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil for Food Pro-

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against non-U.S. individuals based on broader claims of jurisdiction. For example, in the BAE investigation, “the DOJ asserted jurisdiction based on the suspicion that the bribes had been routed through U.S. banks.”<sup>78</sup>

Active enforcement of the FCPA is expected to continue. A generous provision rewarding whistleblowers was included in the Dodd-Frank Act,<sup>79</sup> with final rules issued by the SEC on May 25, 2011.<sup>80</sup> The final rules state that a whistleblower who provides “original information” leading to “a monetary sanction in excess of \$1,000,000” will receive “10 to 30 percent of the total monetary sanctions collected in those proceedings.”<sup>81</sup> For example, in 2010, an employee of GlaxoSmithKline received \$96 million as a reward for reporting FCPA violations at one of the company’s facilities in Puerto Rico.<sup>82</sup> It is claimed that the SEC has received at least one FCPA tip a day following the enactment of section 922.<sup>83</sup>

Furthermore, other American statutory provisions that deal with corruption have a broad reach. For example, section 1504 of the Dodd-Frank Act, titled “Disclosure of Payments by Resource Extraction Issuers,” imposes new financial disclosure requirements on all resource extraction companies listed on a U.S. stock exchange.<sup>84</sup> It requires such resource extraction issuers to disclose: “(i) the type and total amount of . . . payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government.”<sup>85</sup> This statutory provision is unprecedented in requiring such disclosure at the project-

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gram (July 31, 2009), <http://www.justice.gov/opa/pr/2009/July/09-crm-757.html>).

78. *Id.* at 552–53.

79. Dodd-Frank Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010).

80. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,384 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240 & 249), *available at* <http://www.sec.gov/rules/final2011/34-64545.pdf>.

81. *Id.* at 34,328.

82. Richard Levick, *A Whole New Ballgame: Dodd-Frank’s Whistleblower Provisions*, THE COMMUNICATORS BLOG (Nov. 2, 2010 1:53 PM), <http://blogs.forbes.com/richardlevick/page/10/>.

83. Westbrook, *supra* note 28, at 525.

84. Dodd-Frank Act § 1504, 124 Stat. at 2220 (defining a “resource extraction issuer” as an issuer that “(i) is required to file an annual report with the SEC, and (ii) engages in the commercial development of oil, natural gas, or minerals” (internal quotation marks omitted)).

85. Dodd-Frank Act § 1504, 124 Stat. at 2221.

level, as opposed to data aggregated at the country- or continent-level.<sup>86</sup>

The American Petroleum Institute claims that such disclosures will render U.S. companies less competitive vis-à-vis their non-SEC-registered peers. However, to take one example, a preliminary analysis of the impact of the new financial disclosures required by section 1504 on oil companies operating in Angola suggests that these concerns are overstated, at least in that country.<sup>87</sup> Angola is a representative oil market because of its reputation for corruption,<sup>88</sup> its importance as a supplier of oil to the United States,<sup>89</sup> and its efforts to promote new oil exploration in which foreign oil companies are invited to participate.<sup>90</sup> Currently, Sonangol, the Angolan national oil company, and foreign oil companies BP (U.K.), Chevron (U.S.), Eni (Italy), ExxonMobil (U.S.), Statoil (Norway), and Total (France) dominate upstream exploration and production activities in Angola.<sup>91</sup> All of the foreign companies, including Statoil, are registered with the SEC and will be subject to the disclosure requirements of section 1504.<sup>92</sup> Sonangol is a non-issuer, but as the state oil company and sole concessionaire with a stake in all upstream

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86. EITI, for example, requires “regular publication of all material oil, gas and mining payments by companies to governments,” i.e., country-level disclosures. *The EITI Principles and Criteria*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://eiti.org/eiti/principles> (last visited Sept. 30, 2011).

87. See Sinéad Hunt, *Refining Black Gold: The Dodd-Frank Act and Corruption in the Oil Industry*, 16 UCLA J. INT’L L. & FOREIGN AFF. (forthcoming 2011) (manuscript at 27, 31).

88. Angola was ranked 168th out of 178 countries in Transparency International’s 2010 Corruption Perception Index. TRANSPARENCY INT’L, *supra* note 65, at 3. R

89. U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: ANGOLA 2 (2010), available at <http://www.eia.gov/EMEU/cabs/Angola/pdf.pdf>.

90. See, e.g., Wendell Roelf, *Angola Sees Next Offshore Bid Round in 2011*, REUTERS, Sept. 3, 2010, available at <http://af.reuters.com/article/investingNews/idAFJ0E6820BP20100903>.

91. See U.S. ENERGY INFO. ADMIN., *supra* note 89, at 3–5. R

92. See Dodd-Frank Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220–21 (2010). Section 1504 covers specifically “a subsidiary of the resource extraction issuer.” *Id.* Moreover, all of these companies perform their upstream activities in Angola through subsidiaries of which the parent company has 100% ownership. Eni SpA, Annual Report (Form 20-F), at E-9 (Apr. 7, 2011); Statoil ASA, Annual Report (Form 20-F) 89 (Mar. 25, 2011); BP p.l.c., Annual Report (Form 20-F) 220 (Mar. 2, 2011); Exxon Mobil Corp., Annual Report (Form 10-K) Ex. 21 (Feb. 25, 2011); Chevron Corp., Annual Report (Form 10-K), at E-4 to -5 (Feb. 24, 2011); CHEVRON, ANGOLA FACT SHEET 4 (2011) (noting Cabinda, Chevron’s wholly owned subsidiary, operates in Angola).

activities it will not gain a greater market share due to section 1504—it is already the key actor in the Angolan oil sector.<sup>93</sup>

The comparative advantage that U.S. oil companies and other SEC-registrants enjoy in terms of expertise and experience in the new frontiers of oil exploration will likely mitigate any disadvantages that section 1504 imposes. Angola is not unique in this respect. As global oil reserves decrease, oil exploration will be pushed to new limits, and the same factors that mitigate the potentially disadvantageous effects of section 1504 can be expected to hold true in other oil markets. As oil exploration continues into riskier environments, technological capacity will remain a critical factor for winning bids.

The general organization of this sector, i.e., national companies dominant within their own boundaries and SEC-registered companies holding the majority of the remaining market share, appears to be prevalent in other extractive industries. In the gas sector, for example, major gas-producing countries, such as Algeria, Indonesia, and Qatar, are structured in this way.<sup>94</sup> In other cases, such as Russia and China, a national gas company dominates without significant international presence.<sup>95</sup> But there is only one prominent case in which foreign state-owned gas companies, in addition to the host country national gas company, dominate the gas sector. This is the case in Iran, but this situation is due primarily to Iran's unfavorable investment climate, which led to voluntary divestments by major international gas companies. This opened up

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93. While the main oil companies operating currently in Angola, apart from Sonangol, are equally subject to the new disclosure requirements, it is feasible that they may become less competitive with respect to non-SEC registrants. In a 2011 bidding round for new licenses, however, the government selected seven companies, all SEC-registrants, to operate new deepwater blocks. *See Angola Takes Pre-salt Plunge*, PETROLEUM ECONOMIST, Mar. 2011, at 37. The more important factor in granting these new licenses appears to be the extensive experience and technological capacity of these companies that is critical for exploration in more challenging environments. *See id.*

94. For Algeria, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: ALGERIA 4–5 (2009), <http://www.eia.gov/EMEU/cabs/Algeria/pdf.pdf>. For Indonesia, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: INDONESIA 3–4 (2011), <http://www.eia.gov/EMEU/cabs/Indonesia/pdf.pdf>. For Qatar, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: QATAR 5 (2011), <http://www.eia.gov/EMEU/cabs/Qatar/pdf.pdf>.

95. For China, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: CHINA 12 (2011), <http://www.eia.gov/EMEU/cabs/China/pdf.pdf>. For Russia, see U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: RUSSIA 7 (2011), <http://www.eia.gov/EMEU/cabs/Russia/pdf.pdf>.

the market for foreign companies with large government stakes, such as Russia's Gazprom.<sup>96</sup>

More generally, within the extractive industries that are prone to corruption,<sup>97</sup> a high proportion of multinational firms list on the U.S. exchanges or have agreed voluntarily to provide most of the information required by the new U.S. statute.<sup>98</sup> It seems unlikely that firms will withdraw from the U.S. exchanges to avoid the reports required under the statute. Such actions are especially unlikely if withdrawals are publicized by watchdog groups and raise suspicion that the firms are engaged in corrupt dealings. Because most such firms are located in countries that have ratified the OECD Anti-Bribery Convention and/or the U.N. Convention Against Corruption, withdrawing from the U.S. stock market would be unattractive if it sends a signal to home country or host country prosecutors to look closely at the firm's international business dealings.

Additionally, United Nations Conference on Trade and Development statistics for foreign direct investment (FDI) document that the bulk of FDI flows are between countries that are party to the OECD Anti-Bribery Convention.<sup>99</sup> Transparency International

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96. U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: IRAN 8 (2011), <http://www.eia.gov/EMEU/cabs/Iran/pdf.pdf>.

97. According to the Transparency International Bribe Payers Index, the five most corrupt industries in the world are (1) public works contracts and construction, (2) real estate and property development, (3) oil and gas, (4) heavy manufacturing, and (5) mining. TRANSPARENCY INT'L, BRIBE PAYERS INDEX 2008, at 11 (2008), <http://www.transparency.org/content/download/39275/622457>.

98. *Questions and Answers: Extractive Industry Payment Disclosure Provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, PUBLISH WHAT YOU PAY, <http://www.pwypusa.org/sites/default/files/Q%20%26%20A%20on%20Disclosure%20Provision%20in%20Dodd-Frank%20WSR%20%26%20CPA.pdf> (last visited Sept. 30, 2011) ("The provision covers 90% of the major internationally operating oil and gas companies."). In addition, some major oil companies like Rosneft (Russia) also file reports with the SEC voluntarily. See Isakower & Mulva, *supra* note 9, Attach. B.

99. In 2008, the top ten countries in terms of inward FDI stock were: (1) United States, (2) China, (3) United Kingdom, (4) France, (5) Belgium, (6) Germany, (7) Netherlands, (8) Spain, (9) Switzerland, (10) Canada. See U.N. Conference on Trade & Dev., *World Investment Report Annex Table 3*, U.N. CONFERENCE ON TRADE & DEV. (July 26, 2011), [http://www.unctad.org/sections/dite\\_dir/docs/WIR11\\_web%20tab%203.pdf](http://www.unctad.org/sections/dite_dir/docs/WIR11_web%20tab%203.pdf) (listing FDI inward stock, by region and economy, from 1990 to 2010). In 2008, the top ten countries in terms of outward FDI stock were: (1) United States, (2) United Kingdom, (3) Germany, (4) France, (5) China, (6) Netherlands, (7) Switzerland, (8) Japan, (9) Belgium, (10) Spain. See U.N. Conference on Trade & Dev., *World Investment Report 2011*, Annex tbl.4 (July 26, 2011), [http://www.unctad.org/sections/dite\\_dir/docs/WIR11\\_web%20tab%204.pdf](http://www.unctad.org/sections/dite_dir/docs/WIR11_web%20tab%204.pdf). The only country among these top ten that is not party to the OECD Conven-

monitors enforcement of the OECD Convention among member countries, and its latest report indicates that the main countries that supply FDI are already enforcing anti-corruption laws, though some less well than others.<sup>100</sup> Moreover, one of the main sectors with a high volume of trade between OECD and non-OECD countries, the extractive industries, is targeted directly by section 1504 of the Dodd-Frank Act.

Therefore, U.S. anti-corruption laws are unlikely to impose significantly higher costs on U.S. companies compared with their competitors because many international companies and individuals fall within the jurisdiction of the FCPA. In addition, many of the largest countries in terms of FDI are already enforcing anti-corruption laws. Concerns about U.S. companies becoming less competitive vis-à-vis multinational firms based in emerging economies are more compelling, but ultimately not wholly convincing. China, a major source of both outward and inward FDI, is not party to the OECD Convention, and many Chinese state-owned companies operating abroad are not subject to U.S. anti-corruption laws because they are non-issuers. However, as emerging economies like China begin to participate more strongly in international markets, they may seek to maintain high standards of transparency to attract foreign capital. This will help to limit corruption as these new and powerful actors enter the international marketplace. The United States is still the dominant actor in global international trade, and it can help to establish an international marketplace with strong standards against corruption. Weakening U.S. anti-corruption laws, such as by constraining the scope of the FCPA or section 1504 of the Dodd-Frank Act, may set the opposite trend in motion. China's new and unprecedented anti-corruption law will cover companies otherwise not covered by prevailing anti-corruption instruments. To help make such laws meaningful, prosecutors in emerging economies need to be able to reference prevailing norms in the international marketplace, norms that can be credible only if the United States plays a key role.

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tion is China, which is a party to the U.N. Convention Against Corruption. U.N. Convention Against Corruption, *supra* note 12, 2349 U.N.T.S. at 342.

100. Transparency International classifies Germany, Switzerland, the United Kingdom, and the United States as active enforcers; Belgium, France, Japan, the Netherlands, and Spain as moderate enforcers; and Canada as a country with little to no enforcement. TRANSPARENCY INT'L, PROGRESS REPORT 2011: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 5 (2011), <http://www.transparency.org/content/download/61106/978536>.

*B. Harm to United States Interests*

Even though the coverage of U.S. anti-corruption law is broad, it will not extend to all firms or to all international contracts. Thus, U.S. firms may be correct when they claim that they suffer harm from American efforts to limit corruption in international business. However, the harm to U.S. firms has been exaggerated by the way the issue is framed, and, more importantly, U.S. policymakers need to distinguish between costs suffered by multinational firms headquartered in the United States and harms imposed on U.S. citizens and to the U.S. national interest.

*1. Costs for Footloose Firms and Government Contractors*

We begin with two related cases. The first is a firm (called a footloose firm) that can locate in many different jurisdictions depending upon labor conditions and transport costs, as well as the level of corruption. The second is a firm that seeks government contracts, for example, to provide infrastructure, to build and operate public utilities, or to provide defense equipment and support. The debate in the United States has focused on the claim that these types of U.S. firms may lose business if the FCPA is vigorously enforced.

Our central point in this section is that if a U.S. firm loses a contract or a business opportunity in one country, the cost to that firm is not the gross value of the contract or the profits that the firm would have earned on that contract or business deal. Rather, it is the difference in profits between those that would have been earned on the corrupt deal and those earned on the honestly obtained contracts and business deals that the firm takes on instead. Of course, firms are not limited to a fixed number of contracts or deals, but if we assume, realistically, that each contract or deal imposes costs, then managers will make judgments about which contracts are worth bidding on and which investment projects are worth pursuing. If they withdraw from countries where bribes are routine, they will shift business on the margin to more honest jurisdictions, including, perhaps, the United States itself.

Of course, U.S. firms might have invested in relatively clean countries even if paying bribes abroad were not illegal. A firm may choose to avoid corrupt jurisdictions as the result of a purely self-interested calculation. It may earn more profits in an honest country. However, one can assume that this will not always be the case. Some firms have enough bargaining power vis-à-vis host governments so that their bribe payments permit them to earn superior

profits. They may be able both to prevent competitors from investing and also to gain favorable tax and regulatory treatment. Then the FCPA can constrain a firm's choices. A firm faces a restrictive range of investment options, even if that law induces some formerly corrupt jurisdictions to shift to bribe-free deals. Because certain countries are off-limits, the firm may have a somewhat reduced level of bargaining power versus host countries that hold themselves out as honest. However, the impact is not likely to be very large. Consider both government contracts and private business deals.

For government contracts, suppose that all firms have upward sloping marginal cost curves and operate in oligopolistic markets where excess profits are routine. These are plausible assumptions that make the problem interesting while keeping the analysis fairly simple. The first assumption implies that several firms would likely divide the business in an efficient global market. If marginal costs were constant or falling, the firm with the lowest marginal costs at the point where supply equals demand could most efficiently supply the entire market. Corruption could still occur, but it would be relatively easy to detect if the firm that is the low cost supplier loses a contract.<sup>101</sup> The second assumption means that there are excess profits available to be divided between firms and officials, with bribes reducing the firms' profits. We assume the existence of excess profits here, but, of course, they may be created through collaboration between firms and the officials who determine procurement specifications.

Firms seek contracts in both corrupt and honest countries. To keep things simple, suppose that countries fit easily into one or the other category with no gray areas—a country is either corrupt or honest. Firms tailor their behavior to the nature of the host country. Because bribes are not a part of the firms' underlying production cost, we need to consider how they might be determined.

Suppose that all countries want to sign exactly one contract for the same type and scale of infrastructure, for example, a road of a particular type and length over similar terrain. Suppose that all firms are equally able to complete the contract to a high standard and that fixed and marginal costs are equivalent for all firms. Then, with several firms competing for a contract, a corrupt official can demand a bribe just high enough to keep at least one firm in the market. If there were only one contract on offer in the world, all

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101. Of course, in practice, the market is divided between suppliers in other ways as countries demand tailor-made goods, sometimes to favor a corrupt supplier. The basic argument in the text can be extended to cover that case.

the excess profits would flow to the corrupt official in the form of a bribe. In contrast, in an honest competition between firms, excess profits are competed away, and all the excess benefits flow to the state.<sup>102</sup> Now suppose that there are alternative locations to seek contracts. Firms have no absolute capacity constraints, but as they add more contracts, marginal costs rise. Thus, in an honest market, the business will be spread among the firms in a way that equalizes their marginal costs.

To fix these ideas, consider an industry marginal cost curve that sums those of the individual firms. It too is obviously upward sloping overall. Suppose that there are four countries and that each state demands, at most, one contract. Then, consider the level of marginal cost that corresponds to a world where each country signs one contract. Assume that at that level of marginal cost, no country drops out if it pays the total cost of the project (including the fixed cost). How will the contracts be allocated?

Suppose there are two firms, firms 1 and 2. Then, because the firms have identical increasing marginal cost curves, two contracts will be awarded to each firm in an honest competitive market where firms compete to supply the good. Now suppose that two states have corrupt officials who demand bribes, and that firm 1 is a U.S. firm subject to the FCPA and not willing to break U.S. law. Firm 2 is from a country that is not a party to the OECD Anti-Bribery Convention, and it is willing to pay bribes. Then, if the same four contracts are on offer, firm 2 signs two contracts with the corrupt states, and firm 1 signs with the honest states. Firm 2 shares some of the rents from the contracts with the corrupt officials. This might be done by increasing the nominal contract price, a strategy that can work because firm 1 will not make a counter offer because it knows that corruption is the cost of participation. The ultimate price in the corrupt countries and the division of the rents between firm profits and bribes would depend upon whether information about honest contract terms constrains corrupt firms and officials. Firm 1 has “lost” the two contracts in the corrupt countries, but even in an honest world it would never have signed more than two contracts because its marginal costs increase as the size of its business increases. It has exactly the same number of contracts as in an honest world. The price is indeterminate but is bounded by the cost to firm 2, the corrupt firm, of supplying the needs of an honest state, given that it is already supplying the corrupt states. If the corrupt

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102. For a detailed treatment and analysis of the dynamics of corruption, see SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 111–20 (1978).

firm has lost its credibility with the honest state, however, this gives the honest firm more bargaining power because dealing with firm 2 is not an option for honest country officials.

Hence, corruption in part of the market may simply rearrange who is dealing with whom. The corrupt firm may be earning more profits than the honest firm, but the honest firm has not lost any business. The extra profits for the corrupt firm, if any, are pure rents or excess profits.<sup>103</sup>

Now suppose that the honest firm is more efficient than the corrupt firm so that in an honest world it would obtain three of the four contracts before its marginal cost exceeds that of firm 2. In that case, corruption in half of the market would lead the efficient, honest firm to lose business. However, we should not exaggerate the loss. It has lost one contract, not two. The key variable is the ratio between the number of corrupt contracts (obtained by the corrupt firms) and the number of contracts the honest firm would obtain in an honest world. In the first example, the ratio is one, implying no loss in contracts for the honest firm. In the second example, it is  $2/3$ , implying a loss of  $1/3$  of its contracts. In our simple model, the maximum number of contracts firm 1 could earn in an honest world is four, if it were very much more efficient than firm 2 and if diseconomies of scale are small. In that case, the ratio is  $2/4$ , or  $1/2$ . Firm 1 loses half of its contracts, but the conditions for such a result seem quite extreme. This model is very simple, but it serves to illustrate the point that the loss to an honest firm that is also efficient will not generally equal the market share of corrupt states. There will simply be some rearranging of the contractual landscape reflecting firms' relative willingness to bribe.

Bribes are a cost to the firms that pay them, but they may be profit maximizing. Bribery in part of the market may even help increase contract prices in honest states by reducing market competition. The corrupt officials want to extract as much of the contract rent as possible, but their bargaining power is limited by the existence of other states. The market will become segmented in the sense that corrupt countries have fewer firms to choose from, while honest countries can do business with anyone, so long as they can prevent corrupt firms from undermining the honesty of their officials. Under the assumptions of our simple case, honest countries

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103. Presumably if the corrupt firm earned less money in corrupt countries than in honest ones, it would bid on the honest contracts as well. This would leave the corrupt countries with no contracts. If that happened, one can assume that corrupt officials would modify their demands to be sure that they are not shut out of the market.

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will always sign contracts with firm 1, the honest firm, because the marginal cost to that firm of signing these contracts is below the corresponding marginal cost for firm 2 that has already locked in two corrupt contracts.

Major simplifications in the above model are the fixed number and size of contracts demanded by host countries. Suppose, instead, that each country can decide the scale of the project it wants to obtain. Assume that there are project-level economies so that each country will select only one firm to carry out its project. Bribery has an ambiguous impact on scale. On the one hand, it will generally increase the overall cost of the project as the firm incorporates the bribery cost into the price. This may lead the state to reduce the scale of the project compared to an honest world. Bribery acts like a tax that increases the per unit price.<sup>104</sup> On the other hand, corruption at the very top in a kleptocratic system may lead to excessive public spending as the ruler and his cronies try to maximize their bribery revenues at the expense of their own population.<sup>105</sup>

In the former case where project scale falls, the loss to an honest, efficient firm is less than when contract sizes are fixed. It does not obtain corrupt contracts, but these are smaller than honest contracts, and the honest firm faces less aggressive competition for honest business. In the latter case where project scale increases, the corrupt firm and a country's leaders collude to maximize their rents. The honest firm obtains the same benefits as above, but the divergence between the profits of honest and corrupt firms may be larger because project scales are larger. However, the corrupt firm's gains may be squeezed out as the country's rulers extort higher payoffs over time. Contracts may be large in scale, but they may not provide many profits. At the same time, the firm may also lose a reputation for probity and may find it hard to compete honestly in other venues. It can be caught in a trap where contractual relationships that look lucrative at first deteriorate over time. It is also, of

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104. See Eric Friedman, Simon Johnson, Daniel Kaufmann & Pablo Zoido-Lobaton, *Dodging the Grabbing Hand: The Determinants of Unofficial Activity in 69 Countries*, 76 J. PUB. ECON. 459, 481 (2000) (using cross-country data to show that greater corruption correlates with smaller government size and lesser official economic activity).

105. There is evidence that fully kleptocratic states overspend on at least some aspects of government. See SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM 115–16, 119 (1999); Jacqueline Coolidge & Susan Rose-Ackerman, *Kleptocracy and Reform in African Regimes: Theory and Cases*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE STUDIES (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 1999) (providing African case studies).

course, at risk of regime change that undermines the value of lucrative corrupt relationships.<sup>106</sup>

A similar analysis can be carried out for investment deals where the foreign firm seeks permission to open a manufacturing or sales facility and needs government approval. Again, start with equally efficient firms, but assume that approvals are granted to any firm that fulfills certain qualifications. The state does not impose a fixed limit on entry; market pressures take care of the volume of business. Then, so long as honestly administered registration programs are not characterized by stifling red tape, firms are distributed as the market dictates. Corruption then skews firm locations so corrupt firms locate in corrupt jurisdictions, but the existence of honest jurisdictions limits the bargaining power of corrupt officials. The resulting location patterns may impose some costs on honest firms as they give up certain markets and accept longer transport routes for export goods. However, the costs to these firms are just the *marginal* profits lost from locating in a somewhat less profitable venue, not the total profits they could have earned in the corrupt location. One should only consider the difference between profits at the alternative locations.

If honest registration systems are riddled with red tape and delay that corruption can cut through, then the costs will be higher for honest firms, but they still must be measured in terms of opportunity costs, not the profits earned by the corrupt. Furthermore, entrenched corruption can itself lead to heightened red tape as corrupt officials create more and more problems in their efforts to extract bribes.<sup>107</sup> Once again, the investor may be stuck in a vicious spiral of bribery, extortion, and escalating bureaucratic demand that can lead to worse results than a clear stand against payoffs.<sup>108</sup>

Of course, in both cases the impact of corrupt systems depends upon the existence of honest alternatives. Honest firms have op-

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106. For examples from Tunisia and Egypt, see Issandr El Amrani, *Probes Spread Alarm in Egypt's Businesses*, FIN. TIMES, Apr. 20, 2011, <http://www.ft.com/intl/cms/s/0/ee4fa8ec-6b75-11e0-a53e-00144feab49a.html#axzz1Zj0o5uvY>. See also Bill Waite & Martin Stone, *Regime Change in Tunisia, Egypt and Libya: A Stimulus for the Prosecutorial Authorities*, RISK ADVISORY GROUP (Feb. 24, 2011), <http://www.riskadvisory.net/analysis/story/regime-change-in-tunisia-egypt-and-libya-a-stimulus-for-the-prosecutorial-a> (explaining why regime change stimulates anti-corruption activity and describing the situation in Egypt and Tunisia).

107. ROSE-ACKERMAN, *supra* note 105, at 16–17, 34–35.

108. For example, corruption may have detrimental effects on privatization. See ROSE-ACKERMAN, *supra* note 105, at 38. For a more detailed treatment of corruption in regulatory programs and competitive bureaucracies, see ROSE-ACKERMAN, *supra* note 102, at 137–66.

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tions that give them bargaining power to resist corruption and to exit to an alternative location. However, outside options do not always exist. In the next section, we consider cases where exit is not possible, unless one simply exits the business entirely.

## 2. Extractive Industries

The extraction of petroleum and hard rock minerals is particularly subject to corruption.<sup>109</sup> Much development depends upon joint ventures or concession agreements with host governments or state-owned firms. Firms must sign long-term contracts to justify their investments, and revenue from these investments is a significant source of income for host countries. The main feature that distinguishes this sector from government procurement and from investments in footloose industries is the fixed and limited location of the raw materials. Investors are forced to deal with certain governments if the firms are to remain in the industry. This fact gives government officials considerable bargaining power that can be used for illicit gain. However, if U.S. firms refuse to deal with corrupt governments, the impact on the U.S. economy is likely to be small. The officials will turn to other less scrupulous firms, and corrupt kickbacks will harm the citizens of mineral-rich countries who share little in the gains. These citizens bear most of the losses. So long as the resources enter the global marketplace, corruption will have little impact on the world economy beyond a possible increase in price if kickbacks increase the costs of exploring for and developing these resources.

The serious harm imposed on citizens of resource-rich countries has led to specialized civil society efforts such as the Extractive Industries Transparency Initiative that seeks to encourage firms and states to reveal payments made in connection with contracts and concessions, and to a section of the Dodd-Frank Act that codified a version of this initiative into U.S. law. Firms that refrain from bribery or that simply agree to report payments complain that their behavior will cost them lucrative deals. Even though the coverage of these anti-corruption and transparency initiatives includes all firms listed on the U.S. exchanges, some U.S.-based firms may lose contracts to those not subject to U.S. law.

However, the harm to the interests of the United States is not the net profits of the lost deals. Like all primary products, minerals enter into international commerce and their prices depend upon

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109. See, e.g., TRANSPARENCY INT'L, *supra* note 97 (ranking oil and gas as the third most corrupt sector and mining as the fifth most corrupt sector).

the operation of the global market, not the home countries of the firms that extract the minerals or drill for the oil and gas.<sup>110</sup> It seems unlikely that the name of the firm that signs a deal with a corrupt government will affect the global price and distribution system in any of these markets. If corruption is very widespread, it may act like a tax on the resource that raises global prices somewhat, but by less than the total bribery bill. If that happens, the bribes paid by some will benefit honest firms from the United States and elsewhere, which can sell their product at higher prices. Assuming that the world market for the resource is competitive, the world price is determined by the marginal cost of extraction at the point where supply equals demand.

In contrast, if corrupt states produce resources that are relatively cheap to extract, bribery will not affect the quantity of output. Hence, the world price will be unaffected. For example, if kickbacks are common for oil concessions in the Gulf States where production costs are very low, they will not affect the global price. The result will be higher gains for corrupt top officials compared to the owners of multinational firms.

In the case of the oil industry, of course, a group of producers, the Organization of Petroleum Exporting Countries (OPEC), does influence world prices and quantities. The existence of OPEC is an additional reason why corruption in a subset of countries is unlikely to have much effect on the price of petroleum in the United States.

Hence, if world prices are not affected, the cost of a lost contract to U.S. interests is only the marginal cost to the firm from investing elsewhere, if that is possible, or reducing operations, if not, multiplied by the share of profits that flow to U.S. investors. Very few U.S. jobs will be lost, and there may even be some job gains if the industry turns to U.S. sources or seeks synthetic or natural substitutes in the United States. The basic point is that the products of extractive industries are of no value if they are not eventually exploited, so it does not matter much to the U.S. economy overall which firm exploits the resource. If corruption is very widespread or is concentrated in states with high cost marginal producers, world prices might be higher when corrupt deals exist, but market pressures from substitutes are likely to limit that effect. Of course, the cost to the corrupt host country's citizens can be severe, and we discuss that below. Our point is simply that even if U.S. policymak-

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110. See Angus Deaton & Ronald Miller, *International Commodity Prices, Macroeconomic Performance, and Politics in Sub-Saharan Africa*, 79 PRINCETON STUDIES IN INT'L FIN. 1 (1995), available at [http://www.princeton.edu/~deaton/downloads/International\\_Commodity\\_Prices.pdf](http://www.princeton.edu/~deaton/downloads/International_Commodity_Prices.pdf).

ers ignore these broader public interest concerns, the net costs to U.S. economic interests are much less than the rhetoric coming from critics of a strong U.S. policy would have us believe.<sup>111</sup>

### III. BENEFITS

So far, we have argued that the claimed costs to American business from limiting corruption in international business deals are often exaggerated. We now turn to consider the countervailing benefits. Three types of potential benefits are most important.

First, in some situations U.S. firms will find it profit maximizing to oppose payoffs and to monitor the behavior of their managers and sub-contractors even without outside enforcement or pressure. A firm with low costs or high quality may gain leverage with its buyers or suppliers by taking a strong stand against corruption. Then individual profit-maximization and the avoidance of corruption go together. This optimistic scenario does describe certain situations, but it is unlikely to be widespread enough to eliminate the need for action at the national and international levels to discourage payoffs in international business.

Second, corruption is costly to host countries, and these costs can harm U.S. interests broadly understood.<sup>112</sup> Firms pay bribes to get favored treatment on contracts, concessions, and privatization deals.<sup>113</sup> Managers justify their behavior as a means to create economic value and as a necessary, if unpleasant, response to the weakness and venality of governments. However, high-level corruption is very harmful in the countries where it is pervasive, especially for the

111. See, e.g., WEISSMANN & SMITH, *supra* note 3, at 5–6 (“The current FCPA enforcement environment has been costly to business. . . . There is also reason to believe that the FCPA has made U.S. businesses less competitive than their foreign counterparts who do not have significant FCPA exposure.”). R

112. See generally ROSE-ACKERMAN, *supra* note 105, at 18–23, 35–38 (describing generally corrupt payments made to avoid regulation and lower taxes). The evidence is summarized and relevant literature cited in Susan Rose-Ackerman, *Governance and Corruption*, in GLOBAL CRISES, GLOBAL SOLUTIONS 301, 303–10 (Bjørn Lomborg ed., 2004). For a useful aggregation of cross-country data, see Daniel Kaufman, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators, 1996–2006* (World Bank, Working Paper No. 4280, 2007). See also Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, *Why Is Rent Seeking So Costly to Growth?*, 83 AM. ECON. REV. PAPERS & PROC. 409, 412–13 (1993) (demonstrating that corruption and other measures of poor governance harm growth and reduce income levels). Of course, there may be a vicious cycle where corruption retards growth, and low growth and income levels fuel corruption. R

113. See generally ROSE-ACKERMAN, *supra* note 105, at 27–38 (describing the abundant corruption opportunities associated with privatization). R

poor.<sup>114</sup> Corruption can introduce inefficiencies that reduce competitiveness.<sup>115</sup> It may limit the number of bidders, favor those with inside connections, limit the information available to participants, and introduce added bargaining costs. Corrupt officials may favor an inefficient level, composition, and time path of investment. Government produces too many of the wrong kinds of projects. It over-spends even on projects that are fundamentally sound and receives too little from privatizations and the award of concessions. Buyers that obtain privatized firms through bribery often gain monopolies that undermine the efficiency benefits of private ownership.<sup>116</sup> If corruption distorts the business environment and retards growth, then corruption in government contracts and concessions can slow down economic growth and limit the future opportunities for investment and trade that would arise from better economic conditions.<sup>117</sup> It can also harm U.S. firms in other industries that might have been able to take advantage of some of those business opportunities. Thus, industries, including those based in the United States, that benefit from strong private sectors in emerging economies worldwide ought to support efforts to limit corruption that can distort and slow host country growth.

A myopic, inward-looking United States might ignore these costs of corruption, but if we take a broader, more long-term view of our role in the world and of the value of preventing unrest, limiting corruption globally can have important benefits. Anti-corruption policies will, of course, have to extend beyond efforts to deter U.S. firms from paying bribes, but a reduction in payoffs from U.S.

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114. See generally Sanjeev Gupta, Hamid Davoodi & Rosa Alonso-Terme, *Does Corruption Affect Income Inequality and Poverty?*, 3 *ECON. GOVERNANCE* 23, 40 (2002) (arguing that high levels of corruption increase income inequality and poverty).

115. See, e.g., Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 *REV. ECON. & STAT.* 1, 8 (2000) (analyzing corruption as a tax on investors).

116. See generally ROSE-ACKERMAN, *supra* note 105, at 35–38, 42–44 (explaining how privatizations in certain contexts may be corrupt transactions that ultimately defeat the efficiency rationale for privatization).

117. See Toke S. Aidt, *Corruption and Sustainable Development*, in 2 *INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION* 3, 37, 40 (Susan Rose-Ackerman & Tina Søreide, eds., forthcoming 2011); Toke S. Aidt, *Corruption, Institutions, and Economic Development*, 25 *OXFORD REV. ECON. POL'Y* 271, 285–88 (2009); Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 *J. ECON. LITERATURE* 1320, 1327–28 (1997). Aidt argues that even if corruption may seem to further growth in the short run, it is likely the result of too much investment for short-run corrupt gain that is not sustainable in the long run and can harm environmental and other values.

firms is a necessary if not a sufficient condition. If the United States sets a strong example, other countries can be encouraged to follow.

Third, market actors benefit from the overall integrity of the international marketplace. Even if an individual corrupt deal is profit-making, pervasive corruption undermines the legitimacy of the international marketplace and raises the risks of doing business. Widespread unscrupulous behavior can erode public confidence in the market and seriously affect the performance of honest entrepreneurs. Hence, firms ought to support international anti-corruption efforts when the global situation is a “coordination game.” Although bribe payments may be profit-maximizing in the existing business context, if corruption could be limited, all firms would benefit and none would have an incentive to defect. In contrast, the strategic situation among competitors may resemble a “prisoner’s dilemma” where voluntary agreements to refrain from corruption will be unstable. Each firm has an incentive to defect. Even if one argues that firms have an obligation to act consistently with the efficient functioning of the market, they are caught in a prisoner’s dilemma, and global initiatives are needed to keep firms from acting unilaterally.<sup>118</sup> Once again, the role of U.S.-based multinationals as leaders in international trade and investment can help set a standard for multinationals generally.

Hence, although no one has put a solid dollar number on either the costs or the benefits of the U.S. policy against corruption in international business, the net benefits, understood broadly, appear substantial. The benefits are not just gains in the efficiency and fairness of the international marketplace, but also increased pressures on corrupt states and large firms to move in a more honest direction.

## CONCLUSIONS

On balance, an aggressive and clearly articulated position against international corruption is in the U.S. national interest. Critics of the current law have exaggerated the costs and underappreciated the benefits. Given the apparent scale of the problem of corruption in international business dealings and the harm caused by seeming to pull back, recent efforts to weaken the law are unwarranted.

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118. This paragraph summarizes the arguments in Susan Rose-Ackerman, “Grand” *Corruption and the Ethics of Global Business*, 26 J. BANKING & FIN. 1889, 1904–07 (2002).

The U.S. Congress should resist supporting the Chamber of Commerce's entire wish list of amendments to the FCPA. Although some respond to valid concerns, most would weaken the law. At the top of the Chamber's list is allowing a company to raise a compliance defense, similar to that included in the new U.K. Bribery Act.<sup>119</sup> Other desired amendments include clarifying and narrowing the definition of a "foreign official," particularly with respect to state-owned companies; imposing a "willfulness" requirement for criminal liability; and limiting a company's liability for both the previous actions of an acquired company as well as for the actions taken by subsidiaries.<sup>120</sup> The Chamber does have a valid point when it observes that few cases are resolved by judicial opinions because the incentive to settle is so strong. This means that courts have not defined vague terms. Perhaps the DOJ and the SEC should carry out rulemakings to fix definitions more clearly. However, it does not follow from these complaints that the government's response should be to weaken the legal standards.

The Chamber argues that its suggested amendments will contribute to American economic recovery.<sup>121</sup> As we noted above, the Chamber's argument is based on the growing importance of international trade,<sup>122</sup> surely an odd reason to be *less* concerned with corruption unless one is completely indifferent to the costs imposed on people in corrupt countries and to the harm to the reputations of the United States and its multinational firms. The Chamber claims that the FCPA forces many companies to change how and where they are doing business. For example, the Chamber argues that "[t]he uncertainty about how much due diligence is sufficient, coupled with the threat of successor liability even if thorough due diligence is undertaken, have in recent years had a significant chilling effect on mergers and acquisitions,"<sup>123</sup> and it

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119. Lisa A. Rickard, *The Ambiguous FCPA: In Need of Updates and Clarifications*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 5, 2011), [http://www.instituteforlegalreform.com/component/ilr\\_president\\_corner/66/article/74.html](http://www.instituteforlegalreform.com/component/ilr_president_corner/66/article/74.html).

120. *Id.*

121. The Chamber claims that its proposals "will help grow jobs during a time when millions of U.S. citizens are looking for one." Kim, *supra* note 6.

122. *Id.*

123. WEISSMANN & SMITH, *supra* note 3, at 15. See also *The Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 22 (2011) (written testimony of Michael B. Mukasey, Partner, Debevoise & Plimpton LLP), available at <http://judiciary.house.gov/hearings/pdf/Mukasey06142011.pdf> ("[T]he FCPA, as it is currently written and enforced, leaves corporations vulnerable to civil and criminal penalties for a wide variety of conduct that is in many cases beyond their control or even their knowledge."); *Can We Sue Our Way to Prosperity?: Litigation's Effect on*

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claims that “many companies have ceased foreign operations rather than face the uncertainties of FCPA enforcement.”<sup>124</sup> However, even if this does sometimes occur, it is not a good measure of the costs of the FCPA. Rather than being a critique of the law, this statement indicates that the FCPA is having an impact and may lead countries that wish to do business with U.S. firms to crack down on domestic corruption. Furthermore, as we have argued, even if the law does lead some U.S. firms to rearrange their business dealing, they are likely to end up almost as well off as before, and for extractive industries the impact on prices and quantities in the United States is likely to be small.<sup>125</sup> Some jobs that might otherwise have gone abroad may even remain in the United States where corruption is less pervasive.

Chamber criticisms of the vague language and lack of decided court cases have more merit. However, their solutions would mostly weaken the law. Particularly troubling is the Chamber’s proposal to introduce a relatively narrow definition of a “foreign official,”<sup>126</sup> which could create a major loophole. In general, the Chamber seeks to limit a firm’s liability in various ways by, for example, adding a willfulness requirement for criminal liability, a compliance defense, and limiting liability for the actions of a subsidiary.<sup>127</sup> All of the proposed changes would make it marginally easier to pay bribes abroad and to avoid liability under the FCPA. Given the difficulty of bringing cases under the current law, the relatively limited nature of the harm to U.S. interests broadly understood, and the need for the United States to lead in this area of global concern, acting on proposals to weaken the FCPA would be a serious mistake. If clarity is deemed valuable to limit transaction costs for

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*America’s Global Competitiveness: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 40 (2011) (written testimony of John H. Beisner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP), available at <http://judiciary.house.gov/hearings/pdf/Beisner05242011.pdf> (“Companies going through DOJ or SEC FCPA enforcement proceedings often spend tens of millions of dollars, if not more, on attorneys and forensic accountants—on top of potentially multimillion-dollar criminal and civil fines and disgorgement—in order to determine whether their employees (often at a relatively low level) acted improperly.”).

124. WEISSMANN & SMITH, *supra* note 3, at 6.

125. See *supra* Part II (arguing that the costs to a U.S. firm from losing a contract or business opportunity is limited to the difference in profits between a corrupt deal and an honest contract. In extractive industries so long as the resource enters into the international market, the U.S. economy will not be significantly affected).

126. WEISSMANN & SMITH, *supra* note 3, at 24.

127. *Id.* at 7. See also KENNEDY & DANIELSEN, *supra* note 3.

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firms, it can be achieved consistent with strong enforcement of the law through agency interpretations or amendments that clarify firm liability without weakening the law's incentive to institute internal controls and carry out comprehensive due diligence. Those who think that the law is too strongly enforced neglect the fact that FCPA cases are difficult and costly for the DOJ. Hence, many transactions and deals are never examined. Firm compliance depends on the signals sent by settlements and decided cases that keep the business community alert to the costs of violating the law. Enforcement needs to be credible and effective, not hedged about with new constraints.