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Cross-National Patterns in FCPA Enforcement

ABSTRACT. This Note undertakes an empirical examination of U.S. enforcement actions under the Foreign Corrupt Practices Act (FCPA) in order to explore the cross-national patterns associated with the United States' international antibribery enforcement. I investigate a number of possible determinants of FCPA enforcement, including variation in the level of U.S. foreign direct investment (FDI), cross-national variation in corruption levels, the level of foreign regulatory and enforcement cooperation with the United States, and U.S. foreign policy interests. I find that higher levels of U.S. FDI and higher levels of corruption are significantly associated with increased FCPA enforcement, as is the presence of bilateral mechanisms of enforcement cooperation. In contrast, other variables – including the level of foreign policy alignment between the host nation and the United States – do not appear to be associated with variation in FCPA enforcement. In addition, I find that cross-national variation in the number of FCPA cases in a given country is much more closely associated with actual recorded experience with corruption (as measured by cross-national survey instruments) than with more widely used measures of corruption perceptions. Finally, I employ data on past enforcement actions to generate a cross-national measure of the “FCPA enforcement-action intensity” of U.S. FDI, and I consider the potential use of such an index as a measure of FCPA country risk.

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* Accessible through *The Yale Law Journal's* website. See *Cross-National Patterns in FCPA Enforcement*, YALE L.J., http://www.yalelawjournal.org/images/documents/mclean_appendix.pdf.

INTRODUCTION

Corruption¹ has been described as “the single greatest obstacle to economic and social development” in the world.² Amid an emergent global consensus on the importance of combating international corruption,³ over the past decade, U.S. authorities have spearheaded a dramatic increase in the number of enforcement actions brought under the Foreign Corrupt Practices Act (FCPA).⁴

1. Academics and political actors have long recognized the difficulties associated with generating a robust, comprehensive, and workable definition of corruption. *See, e.g.*, Laura S. Underkuffler, *Defining Corruption: Implications for Action*, in CORRUPTION, GLOBAL SECURITY, AND WORLD ORDER 27, 41 (Robert I. Rotberg ed., 2009) (“Defining corruption is notoriously difficult to do.”); *see also, e.g.*, P. Morison, *The Prevention of Corruption Bill, and Insurance Through Solicitors*, 12 JURID. REV. 252, 252 (1900) (remarking on a proposed British anticorruption statute that eschewed any definition of corruption in favor of a brief memorandum attached to the bill simply stating that “[t]he reason why no attempt is made to define corruption is that the thing is so protean that to define it is almost impossible”). Nevertheless, the standard definition of corruption today is the “misuse of public power for private or political gain.” Susan Rose-Ackerman, *Governance and Corruption*, in GLOBAL CRISES, GLOBAL SOLUTIONS 301, 301 (Bjørn Lomborg ed., 2004).
2. WORLD BANK, A GUIDE TO THE WORLD BANK 112 (2003) (“The Bank Group has identified corruption as the single greatest obstacle to economic and social development. Through bribery, fraud, and the misappropriation of economic privileges, corruption taxes poor people by diverting resources from those who need them most.”); *cf.* President Barack Obama, Remarks by the President at the Millennium Development Goals Summit in New York, N.Y. (Sept. 22, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/09/22/remarks-president-millennium-development-goals-summit-new-york-new-york> (“[W]e are leading a global effort to combat corruption, which in many places is the single greatest barrier to prosperity, and which is a profound violation of human rights.”).
3. *See* David A. Gantz, *Globalizing Sanctions Against Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT’L L. & BUS. 457, 457 (1998); Roberta Gatti, *Explaining Corruption: Are Open Countries Less Corrupt?*, 16 J. INT’L DEV. 851, 851 (2004) (“Fighting corruption has progressively become an important item in many governments’ political agendas, as the adverse effects of corruption have been widely recognized in policymakers’ discussions as well as in academic fora.”). *But see* Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China’s New Laissez-Faire*, 59 UCLA L. REV. 354, 391-95 (2011) (suggesting that China’s lax enforcement of its antibribery prohibitions represents one aspect of an alternative “laissez-faire” model that competes with the U.S. international business law paradigm).
4. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1 to -3, 78ff (2006)), amended by Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff), and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff). Writers in the legal academy have taken note of this dramatic increase. *See, e.g.*, Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010) (“[D]uring the past decade, enforcement

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Recent FCPA enforcement efforts have ensnared large numbers of individuals and firms operating in a variety of foreign countries.⁵ These efforts have made headlines,⁶ prompted widespread changes to corporate practices,⁷ and resulted in the imposition of large criminal and civil penalties.⁸ Yet despite this surge in enforcement, FCPA charging decisions remain highly discretionary—indeed,

agencies resurrected the FCPA from near legal extinction.”); Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 439-40 (2010) (noting “an exponential increase” in FCPA enforcement actions). *But see* Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 354 (2010) (“Although the frequency of anti-bribery law enforcement has risen sharply, it has not yet produced a commensurate rise in legal scholarship.”).

5. See ORG. FOR ECON. CO-OPERATION & DEV., UNITED STATES: PHASE 3: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 10 (2010), <http://www.oecd.org/dataoecd/10/49/46213841.pdf> (“From 1998 to 16 September 2010, 50 individuals and 28 companies have been criminally convicted of foreign bribery, while 69 individuals and companies have been held civilly liable In addition, 26 companies have been sanctioned (without being convicted) for foreign bribery under non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs).”).
6. See, e.g., Diana B. Henriques, *F.B.I. Charges Arms Sellers with Foreign Bribes*, N.Y. TIMES, Jan. 20, 2010, <http://www.nytimes.com/2010/01/21/business/21sting.html>; Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES, Dec. 21, 2008, <http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html>; Dionne Searcey, *Watergate-Era Law Revitalized in Pursuit of Corporate Corruption*, WALL ST. J., Oct. 15, 2010, <http://online.wsj.com/article/SB10001424052748704634104575552583836621938.html>.
7. See PRICEWATERHOUSECOOPERS LLP, CORRUPTION CRACKDOWN: HOW THE FCPA IS CHANGING THE WAY THE WORLD DOES BUSINESS 32 (2009), available at <http://www.pwc.com/us/en/foreign-corrupt-practices-act/publications/assets/pwc-corruption-crackdown-fcpa-2009.pdf> (“Bribery wasn’t really a board-level priority until fairly recently. It was just one of a basket of risks, and with rare exceptions—usually some crisis—it rarely took valuable board time and resources The magnitude of recent impacts in Europe and the US has changed this” (quoting Michael Fine, Director of Private Sector Initiatives, Transparency International-USA)).
8. See, e.g., David Crawford & Mike Esterl, *Siemens Pays Record Fine in Probe*, WALL ST. J., Dec. 16, 2008, <http://online.wsj.com/article/SB122936135680907233.html>.

opaque—in a number of respects,⁹ and our understanding of the factors that influence FCPA charging decisions in practice remains incomplete.¹⁰

This Note examines one aspect of this issue: the cross-national patterns associated with U.S. enforcement actions under the FCPA. After years of aggressive enforcement, what conclusions can we draw regarding the cross-national distribution of FCPA cases? How closely does variation in the relative number of FCPA cases associated with different foreign nations track perceived cross-national variation in corruption levels? Do the data suggest the existence of a link between U.S. foreign policy considerations and FCPA charging decisions? Are countries that cooperate more closely with U.S. authorities more likely to be associated with FCPA enforcement actions?

This Note proceeds in five parts. In Part I, I provide an overview of the FCPA and briefly examine the law's enforcement history. In Part II, I present a number of hypotheses regarding possible cross-national influences on FCPA enforcement. In Part III, I introduce a new cross-national dataset of FCPA enforcement actions. I then propose and test a simple model to explain cross-national variation in FCPA enforcement actions, in which the number of FCPA cases associated with a given host country is a function of (1) the level of U.S. foreign direct investment (FDI) stock in the country and (2) the level of

9. See Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 910 (2010) (criticizing the “opaque nature of FCPA enforcement”); cf. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 15 (2010) (statement of Andrew Weissmann, Partner, Jenner & Block, LLP) (“The lack of judicial oversight, expansive government interpretation of the FCPA, and . . . increased enforcement . . . have led to considerable concern and uncertainty about how and when the FCPA applies to overseas business activities.”).

10. See Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 131-32 (2011). Koehler notes:

When agencies enforce a law outside an adversarial system, without appropriate checks and balances or judicial scrutiny, it leads to a framework of inconsistent fine and penalty amounts, inconsistent and opaque charging decisions, lack of consistency and transparency, and rhetoric not matching reality, all of which were hallmarks of FCPA enforcement in 2010.

Id. Beyond the FCPA context, legal scholars have noted over the past fifty years that the role of prosecutorial discretion in enforcement remains relatively underexplored. See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY*, at vi (1969) (“Writers about law and government characteristically recognize the role of discretion and explore all around the perimeter of it but seldom try to penetrate it.”); Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 395 (2010) (“Despite the essential role of the prosecutor in the criminal sanctioning process, research on their decision-making behavior remains remarkably limited. Prosecutorial discretion arguably represents the ‘black box’ of contemporary research on courts and sentencing.”).

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corruption in that country. Testing this model via multivariate regression analysis, I find that both of these factors are significantly associated with cross-national variation in FCPA enforcement levels, and that this relationship is robust to the inclusion of a number of controls (including GDP per capita and regional fixed effects). Moreover, I find that the presence of bilateral mechanisms of regulatory and enforcement cooperation between the United States and a given host country is strongly associated with increased FCPA enforcement in that country. In contrast, other variables—including foreign policy alignment between the host nation and the United States—do *not* appear to be associated with variation in FCPA enforcement levels. In addition, I find that cross-national variation in the number of FCPA cases in a given country is more closely associated with actual recorded experience with corruption (as measured by cross-national survey instruments) than with more widely used measures of corruption perceptions. This finding could provide some support to those who have questioned whether measures of corruption perceptions are truly successful in capturing underlying variation in corruption levels.

Today, ascertaining and quantifying FCPA country risk is an important challenge facing multinational firms and legal practitioners. Although indices of corruption perceptions have been a traditional source of data for judging the level of enforcement risk, the efficacy of using perceptions-based measures has, in recent years, come under increasing criticism in the academic literature.¹¹ In Part IV, I suggest an alternative approach: I calculate a cross-national measure of the “FCPA enforcement-action intensity” of U.S. FDI.¹² Such a metric might be employed both as a way for private sector actors to quantify FCPA risk and, potentially, as a way to proxy cross-national variation in underlying corruption levels in the academic study of corruption.

I. THE FOREIGN CORRUPT PRACTICES ACT

The FCPA was enacted in 1977 following a series of investigations that uncovered widespread illicit payment of bribes to foreign officials by U.S.

11. See *infra* Section IV.A (collecting sources).

12. This effort is in some ways analogous to attempts to generate measures of the relative “pollution intensity” of trade and FDI. See, e.g., Bijit Bora, *FDI and the Environment: The Link Between FDI and the Environment*, in FOREIGN DIRECT INVESTMENT: RESEARCH ISSUES 211, 215-20 (Bijit Bora ed., 2002); Matthew E. Kahn & Yutaka Yoshino, *Testing for Pollution Havens Inside and Outside of Regional Trading Blocs*, 4 ADVANCES ECON. ANALYSIS & POL’Y, no. 2, art. 4, at 23-24 (2004), <http://www.bepress.com/bejeap/advances/vol4/iss2/art4>.

firms.¹³ Adopted as an amendment to the 1934 Securities Exchange Act, the FCPA itself was subsequently amended in 1988¹⁴ and 1998.¹⁵ The 1998 amendments established, *inter alia*, extraterritorial jurisdiction over violations of the FCPA by U.S. nationals.¹⁶

The provisions of the FCPA fall into two general categories. First, the FCPA's antibribery provisions criminalize the act of "corruptly" making an "offer, payment, promise to pay, or authorization of the payment of any money" to "any foreign official for purposes of . . . influencing any act or decision of such foreign official in his official capacity . . . or . . . inducing such foreign official to use his influence with a foreign government . . . in order to assist . . . in obtaining or retaining business."¹⁷ These provisions apply to three categories of persons: U.S. issuers,¹⁸ "domestic concerns,"¹⁹ and "any person other than an issuer . . . or a domestic concern" who acts "while in the territory of the United States."²⁰

Second, the FCPA imposes on U.S. issuers certain accounting requirements, which themselves fall into two categories. Issuers must "make

13. In response to allegations that emerged, in part, as a consequence of the congressional Watergate inquiry, the SEC initiated an investigation that exposed questionable foreign payments by more than four hundred U.S. firms. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 499-500 (2011).
14. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of U.S.C.). For a discussion of the substance of the 1988 amendments, see Daniel Pines, *Amending the Foreign Corrupt Practices Act To Include a Private Right of Action*, 82 CALIF. L. REV. 185, 190-92 (1994).
15. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006)).
16. See H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 288 (2001) ("Jurisdictionally, the amendments extended the assertion of nationality-based jurisdiction to reach acts committed by U.S. nationals outside the United States.").
17. 15 U.S.C. § 78dd-2(a)(1) (2006). Payments to foreign political parties for the same purposes are also prohibited. *Id.* § 78dd-2(a)(2).
18. *Id.* § 78dd-1. This category includes "any issuer which has a class of securities registered pursuant to section 78l . . . or which is required to file reports under section 78o(d)." *Id.*
19. *Id.* § 78dd-2. The term "domestic concern" encompasses "any individual who is a citizen, national, or resident of the United States" and "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." *Id.* § 78dd-2(h)(1).
20. *Id.* § 78dd-3(a).

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and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”²¹ Issuers must also “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” of compliance.²² Both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) are responsible for enforcing the antibribery provisions of the Act, while the SEC enforces the internal controls and the books and records provisions.²³

Enforcement of the FCPA during the Act’s first two decades was limited.²⁴ However, recent years have seen a dramatic surge in enforcement actions brought under the FCPA.²⁵ A number of reasons have been suggested for this rise in enforcement, including increased international trade and investment,²⁶

21. *Id.* § 78m(b)(2)(A).

22. *Id.* § 78m(b)(2)(B). Specifically, issuers are required to establish controls sufficient to provide reasonable assurances that

(i) transactions are executed in accordance with management’s general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management’s general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences

Id.

23. See Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 89 (2007); see also Thomas, *supra* note 4, at 446 n.36 (“[T]he DOJ . . . has jurisdiction to civilly enjoin domestic concerns under the anti-bribery provisions.”).

24. See Krever, *supra* note 23, at 93-94 (“In its first two decades, enforcement of the Act by the DOJ and SEC was, at best, sporadic, and limited to high profile investigations. . . . As of 1997, only seventeen companies and thirty-three individuals had been charged under [the] FCPA and numerous commentators were bemoaning the paucity of prosecutions.”); see also Henry H. Roszbacher & Tracy W. Young, *The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT’L L. 509, 524 (1997) (discussing reasons for the FCPA’s limited enforcement).

25. See, e.g., Thomas, *supra* note 4, at 450 (noting an “exponential” increase in the Act’s enforcement).

26. See Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 120 (2010); cf. Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT’L L. 257, 274 (1999) (“[R]eliable observations indicate that transnational bribery is widespread and that the incidence of transnational bribery is probably increasing. There are several possible reasons

the 1997 establishment of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,²⁷ and the impact of the Sarbanes-Oxley Act of 2002.²⁸ As an assistant U.S. attorney general recently observed, “[W]e are in a new era of FCPA enforcement; and we are here to stay.”²⁹

II. POSSIBLE DETERMINANTS OF CROSS-NATIONAL FCPA ENFORCEMENT PATTERNS

In recent years, the enforcement agencies have sought to increase the transparency of charging decisions by publishing memoranda outlining the

for the recent explosion in transnational bribery. Clearly, the offer of bribes and export of corruption by investors from Western countries is among those reasons.”)

27. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999) [hereinafter OECD Convention], available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.
28. Westbrook, *supra* note 13, at 515. As a consequence of the Sarbanes-Oxley Act, federal regulators require senior executives of firms subject to SEC reporting requirements personally to certify that the firms have met certain compliance and disclosure requirements. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of U.S.C.); see also Lisa M. Fairfax, *Form over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1 (2002) (describing the background and purpose of the certification requirements). Another, more cynical, reason for increased FCPA enforcement may be that settlements of criminal and civil corruption enforcement actions generate significant revenue for governments. See *Mitigating FCPA Risk and Issues To Consider in Conducting Investigations*, METRO. CORP. COUNS., May 2011, at 19 (“In the words of a former DOJ FCPA prosecutor ‘the government sees a profitable program, and it’s going to ride that horse until it can’t ride it anymore’”); Michael F. Perlis & Wrenn E. Chais, *Investigating the FCPA*, FORBES.COM (Dec. 8, 2009, 1:06 PM), <http://www.forbes.com/2009/12/08/foreign-corrupt-practices-act-opinions-contributors-michael-perlis-wrenn-chais.html> (“[G]overnments will keep pursuing corrupt business practices for one very simple reason—it’s lucrative.”). However, the fact that revenue raised from settlements goes to the general treasury rather than to the enforcement agencies directly may militate against this “cash cow” hypothesis as an account of stepped-up FCPA enforcement. See Ronald D. Orol, *House-Senate Panel Rejects SEC Self-Funding*, MARKETWATCH (June 24, 2010, 6:39 PM), <http://www.marketwatch.com/story/house-senate-panel-rejects-sec-self-funding-2010-06-24>. On the issue of SEC funding generally, see Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233 (2004).
29. Press Release, U.S. Dep’t of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010) [hereinafter DOJ National Conference Press Release], available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

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factors to be taken into account in deciding whether to bring charges.³⁰ Nevertheless, as noted above, charging decisions under the FCPA remain highly discretionary,³¹ and we lack a comprehensive account of the cross-national determinants of FCPA enforcement. When examining aggregate FCPA enforcement patterns, what factors might we expect to see associated with cross-national variation in enforcement levels? Although a number of different hypotheses might be suggested, four variables appear particularly relevant.

A. Investment

First, we might expect to see a greater number of FCPA cases associated with countries in which U.S. firms have more extensive investment. All else being equal, where the U.S. investment presence is greater, the likelihood that U.S. firms will become embroiled in FCPA violations should similarly be higher. Granted, employing U.S. FDI as an independent variable in explaining the distribution of FCPA cases is potentially problematic: several recent U.S. FCPA enforcement actions have involved foreign-headquartered entities—including, for example, the 2010 enforcement actions against Siemens AG of Germany and Alcatel-Lucent S.A. of France.³² Foreign corporations can be

30. For example, the DOJ's general policy on corporate charging decisions is set out in DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.300 (1997, rev. ed. Aug. 2008) [hereinafter U.S. ATTORNEYS' MANUAL], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm. This document establishes nine principles that inform the determination of whether to bring charges for corporate wrongdoing, including under the FCPA. The factors to be considered include "the nature and seriousness of the offense," the "pervasiveness of wrongdoing within the corporation," the "history of similar misconduct," whether "timely and voluntary disclosure of wrongdoing" was undertaken, the existence of satisfactory compliance programs, whether remedial actions were undertaken, the "collateral consequences" of a charging decision, the "adequacy of the prosecution of individuals," and the "adequacy" of "civil or regulatory enforcement actions." *Id.* Also noteworthy in this respect is the recent announcement by the DOJ that the organization will provide "detailed new guidance on the [FCPA's] criminal and civil enforcement provisions" in 2012. Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, Speech at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>.

31. See Koehler, *supra* note 9, at 911.

32. See Press Release, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree To Pay \$92 Million To Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010) [hereinafter Alcatel-Lucent Press Release], available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html>; Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree To Pay \$450

subject to the FCPA either as a consequence of their status as U.S. issuers or if an “act in furtherance of . . . [a corrupt] payment” takes place “in the territory of the United States.”³³ Nevertheless, despite these recent high-profile enforcement actions against foreign-headquartered firms, over the broader history of FCPA enforcement, actions have predominantly targeted domestic U.S. firms.³⁴ Consequently, employing U.S. FDI as an independent variable here is appropriate.

Alternatively, there are also reasons to believe that an inverse relationship between investment and FCPA enforcement might exist: the possibility of becoming subject to an enforcement action under the FCPA may dissuade U.S. firms from investing in countries that exhibit (or are perceived to exhibit) high levels of corruption.³⁵ Thus, as U.S. FDI rises, we would expect FCPA

Million in Combined Criminal Fines (Dec. 15, 2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

33. 15 U.S.C. § 78dd-3 (2006). Indeed, we may be moving towards a new paradigm in international antibribery enforcement wherein international regulatory cooperation coexists with increased regulatory competition. The circumstances surrounding the United Kingdom’s enactment of the Bribery Act, 2010, c. 23 (U.K.), could be regarded as consistent with a “race to the top” competitive framework; aggressive U.S. enforcement actions against the U.K. firm BAE Systems plc “highlight[ed] the deficiencies in the U.K.’s anti-bribery and anti-corruption laws,” thus providing the impetus for the United Kingdom to develop improved antibribery legislation. 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, 4 (2010). More cynically, one could also imagine a scenario developing in which states ultimately elect to direct their enforcement efforts towards policing the extraterritorial behavior of each other’s national champions, rather than their own. Although such a dynamic would also share certain characteristics with a “race to the top,” it might raise normative and efficiency-related issues. For a discussion of analogous issues in the antitrust context, see Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1803-04 (2000).
34. See *Recent Trends and Patterns in FCPA Enforcement*, SHEARMAN & STERLING LLP 3 (Feb. 13, 2008), available at http://www.shearman.com/files/upload/FCPA_Trends.pdf (“Of the 22 investigations launched in 2004, 18 concerned U.S. companies, while only four concerned foreign corporations. The numbers have been similar in 2005-2007, with 45 of the 68 new investigations concerning U.S. companies and only 23 concerning foreign corporations.”).
35. Spalding suggests that anticorruption laws may simply encourage shifts in the composition of foreign investment toward firms that are less sensitive on issues of antibribery compliance. See Spalding, *supra* note 4; see also GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 46-47 (3d ed. 2007) (discussing the concept of “black knights” in the economic sanctions context). I would note, however, that consensus on the issue of whether—and, if so, to what extent—the FCPA deters investment remains somewhat elusive. See Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT’L BUS. STUD. 807, 809 (2006) (“It is not clear that the FCPA has been effective in deterring US investments in corrupt countries.”); Shang-Jin Wei, *How Taxing Is Corruption on*

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enforcement to increase, but as FCPA enforcement increases, we might expect U.S. FDI to fall. Although a full examination of this relationship is beyond the scope of this Note (it would likely require a multiperiod model), I nevertheless seek to address this issue of reverse causation by employing data on foreign investment *stock* (representing the accumulation of FDI in prior periods) as opposed to foreign investment *flows*.³⁶

B. Corruption

Second, we might expect to see a relationship between the number of FCPA cases involving a given country's government officials and the level of corruption in that country. The existence of such a relationship is, in a sense, intuitive: so long as we are willing to assume (1) that the probability that firm *X* becomes involved in an FCPA enforcement action associated with *X*'s involvement in country *Y* is not independent of the probability that *X* actually engaged in FCPA violations in country *Y*,³⁷ and (2) that the probability that *X* engaged in FCPA violations in country *Y* is at least in part a function of the general level of corruption in country *Y*, then, all else being equal, we might expect to see a positive association between corruption levels and relative numbers of FCPA enforcement actions.

Other relationships between corruption and FCPA enforcement might also exist. For example, as in the case of investment, a direct association between corruption and FCPA enforcement (if it exists) might have a tendency to break

International Investors?, 82 REV. ECON. & STAT. 1, 8 (2000) (finding little empirical evidence to support the hypothesis that investment from the United States is more sensitive to variation in corruption perceptions than that from other nations); see also Macleans A. Geo-Jaja & Garth L. Mangum, *The Foreign Corrupt Practices Act's Consequences for U.S. Trade: The Nigerian Example*, 24 J. BUS. ETHICS 245 (2000) (concluding, on the basis of an analysis of micro-level survey data in Nigeria, that the need to comply with the FCPA had not resulted in a significant competitive disadvantage for U.S. multinationals). *But see* Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634 (2008) (finding empirical support for the notion that antibribery laws increase investor sensitivity to host-country corruption).

36. See discussion *infra* Section IV.A.

37. If, for example, enforcement of the FCPA were highly selective or if corrupt practices by U.S. firms were essentially endemic, this condition would presumably not be met. It could be that corruption is sufficiently widespread, even in relatively "low-corruption" countries, that cross-national variation in corruption levels has at best only a marginal effect on relative numbers of FCPA violations. It bears remembering that even in the United States—a country that tends to score relatively well on most cross-national corruption measures—over 10,000 government officials were convicted on corruption-related charges in federal court during the 1990-2002 period. See Edward L. Glaeser & Raven E. Saks, *Corruption in America*, 90 J. PUB. ECON. 1053, 1053 (2006).

down over multiple periods. Indeed, if FCPA enforcement actions are effective in promoting host country reforms, then we might well see an inverse relationship between FCPA enforcement and corruption (or, more specifically, a positive relationship between FCPA enforcement and declines in corruption).³⁸ In my analysis, I seek to mitigate the endogeneity issue by using a measurement period (2000) for corruption perceptions that predates the recent surge in FCPA enforcement (2000-2011).

C. Foreign Policy

Third, a link between FCPA enforcement and American foreign policy interests may exist. While the FCPA focuses exclusively on the “supply side” of bribery—its enforcement punishes those who offer bribes, not the foreign government officials who take them³⁹—we might expect to see more FCPA cases associated with countries whose governments are less friendly (or less strategically important) to the United States. By their nature, FCPA investigations and enforcement actions bring to light allegations of

38. As in the case of economic sanctions, this is a highly debatable proposition. See Spalding, *supra* note 4, at 396. As Spalding notes:

If current enforcement trends continue, any of three aggregate outcomes might result, none of which is satisfactory. The first is that targeted countries will respond to the economic withdrawal by implementing domestic reforms. While this might be the most desirable outcome, it is certainly not the most likely. Indeed, economic sanctions literature casts substantial doubt on whether this can ever be a realistic foreign policy goal: it is at best uncertain whether these sanctions can succeed in effecting reforms in emerging markets.

Id. Moreover, even if such a relationship existed, it remains an open question whether indices of corruption perceptions would successfully capture these kinds of changes—perceptions, after all, might well have a tendency to persist over time. See *infra* Section IV.A (collecting sources and discussing critiques of corruption-perceptions measures); cf. Majken Schultz, Jan Mouritsen & Gorm Gabrielsen, *Sticky Reputation: Analyzing a Ranking System*, 4 CORP. REPUTATION REV. 24 (2001) (concluding that corporate reputations are “sticky” over time). In any event, as with the issue of possible reverse causation in the investment context, a full exploration of this relationship is beyond the scope of this Note.

39. See *United States v. Blondek*, 741 F. Supp. 116, 119 (N.D. Tex. 1990), *aff'd sub nom.* *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (refusing to permit prosecution of foreign government officials for conspiracy to violate FCPA in light of “overwhelming evidence of a Congressional intent to exempt foreign officials from prosecution for receiving bribes”); see also Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 588 (2008) (“[F]oreign officials who receive bribes from U.S. companies cannot be prosecuted under the FCPA. Similarly, foreign officials cannot be prosecuted for conspiracy to violate the FCPA.” (footnote omitted)).

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government corruption that have the potential to be deeply embarrassing⁴⁰ (and even potentially destabilizing⁴¹) to the foreign governments involved. Courts⁴² and commentators⁴³ alike have noted that FCPA investigations and prosecutions can implicate issues of foreign policy. Indeed, the United States Attorneys' Manual emphasizes the need to coordinate with the State Department, noting that "[c]lose coordination of [FCPA] investigations and prosecutions with the Department of State, the United States Securities and Exchange Commission (SEC) and other interested agencies is essential."⁴⁴

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40. See *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 557 (S.D.N.Y. 2002) ("[E]very investigation of a suspected violation of the FCPA has the potential to impugn the integrity of the officials of foreign sovereigns.").
41. One need look no further than recent events in the Middle East to observe the salience of allegations of official corruption in galvanizing antigovernment protest. See, e.g., *Revolution Spinning in the Wind*, ECONOMIST, July 14, 2011, <http://www.economist.com/node/18958237>.
42. For example, in the context of an analysis of the relationship between the act of state doctrine and the FCPA, the Ninth Circuit has commented on the foreign policy implications of FCPA enforcement actions in the following terms:

There is also no question . . . that any prosecution under the [FCPA] entails risks to our relations with the foreign governments involved.

The Justice Department and the SEC share enforcement responsibilities under the FCPA. They coordinate enforcement of the Act with the State Department, recognizing the potential foreign policy problems of these actions. Executive bodies have discretion in bringing any action. Therefore, any governmental enforcement represents a judgment on the wisdom of bringing a proceeding, in light of the exigencies of foreign affairs.

Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408-09 (9th Cir. 1983) (footnotes and citations omitted).

43. See Kate Gillespie, *Middle East Response to the U.S. Foreign Corrupt Practices Act*, CAL. MGMT. REV., Summer 1987, at 9, 10 ("On numerous occasions, the U.S. State Department attempted to convince the SEC or the Justice Department to refrain from disclosing the names of states or foreign officials involved in their investigations. The State Department feared such revelations could create internal political troubles for U.S. allies and, at best, result in strained relations between the United States and these allies."). Indeed, Gillespie notes that "[a]n informal procedure was established between the Justice and State departments to deal with questions of foreign-policy consequences of FCPA investigations." *Id.* at 10-11; see also Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1851-52 (2011) (discussing potential foreign policy-related influences on prosecutorial decisionmaking); Margaret A. Niles, Note, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327, 359 (1983) ("[FCPA prosecution] implies an executive decision that the interest against allowing United States parties to bribe a foreign government's officials outweighs the interest against possibly offending that government . . .").
44. U.S. ATTORNEYS' MANUAL, *supra* note 30, § 9-47.110.

There are several mechanisms through which a relationship between U.S. foreign policy and FCPA enforcement might operate. First, given that tips from United States embassies in foreign jurisdictions are one potential source of information that can result in investigations, it may be that those nations whose governments are more closely aligned with the United States are more likely to generate actionable information relating to potential FCPA violations.⁴⁵

Selective FCPA enforcement also could theoretically be employed as a foreign policy tool to disproportionately target regimes that are hostile to the United States.⁴⁶ Likewise, countries that are favored by the United States or are important to America's strategic interests may tend to be more successful in exerting pressure to have an investigation discontinued. As one author has noted:

[T]he *interests* of the foreign sovereign are very much in play, even though the foreign sovereign him or herself can never personally become a defendant or target in an FCPA criminal investigation in the United States. Loyalty to the U.S. business partner and alleged bribe-supplier is one potential interest of the foreign sovereign. Of course the real interest of the foreign sovereign is to avoid public disclosure of his or her own secrets about how he or she has amassed and hidden the allegedly ill-gotten wealth.⁴⁷

The extent to which a foreign sovereign might seek to exert influence over the enforcement process is dramatically underscored by events surrounding an early-2000s federal grand jury investigation. During the course of litigation associated with the grand jury investigation—which involved allegations of foreign bribery associated with the government of a then-unnamed foreign

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45. Mike Koehler, *World Bribery & Corruption Compliance Forum—Comments by U.S. Officials*, FCPA PROFESSOR (Sept. 16, 2010), <http://www.fcpaprofessor.com/world-bribery-corruption-compliance-forum-comments-by-u-s-officials> (reporting comments from Charles Duross, Deputy Chief of the Fraud Section at the Department of Justice, at the World Bribery & Corruption Compliance Forum that “tips from U.S. embassies around the world” represent one source of information that can prompt an FCPA investigation).
 46. For an example of how such “politicized” enforcement might operate (and how it might be rationalized), see Michael Jacobson, *Increasing the Focus on Iran’s Corruption*, POLICYWATCH No. 1587 (Wash. Inst. for Near E. Policy, Washington, D.C.) Sept. 24, 2009, <http://www.washingtoninstitute.org/templateCo5.php?CID=3125>.
 47. Elizabeth Spahn, *Discovering Secrets: Act of State Defenses to Bribery Cases*, 38 HOFSTRA L. REV. 163, 178 (2009).

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nation (subsequently revealed to be the Republic of Kazakhstan⁴⁸) – the district court judge noted a variety of attempts by the foreign government to influence the proceedings:

[T]he Republic made efforts to persuade the United States Government to stop the investigation, including a personal appeal from high officials of the Republic to the United States Department of State. The Corporation and the Republic also sought, and were denied permission, to disclose the Government's motion papers in this case as part of an existing effort to lobby other executive agencies to halt the investigation.⁴⁹

The circumstances associated with a United Kingdom investigation into the Saudi Arabian operations of the defense contractor BAE Systems plc (BAE) provide a further case study of such a dynamic. In late 2006, the British Government surprised many observers by abruptly terminating an investigation into allegations of corruption associated with the sale to Saudi Arabia of weapons built by BAE.⁵⁰ Then-Prime Minister Tony Blair appeared to confirm press reports that pressure from Saudi Arabia may have played a

48. *See id.* at 195.

49. *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 549 (S.D.N.Y. 2002). For an in-depth discussions of this case, see Spahn, *supra* note 47, at 169-96; and Matthew G. Yeager, *The CIA Made Me Do It: Understanding the Political Economy of Corruption in Kazakhstan*, 56 CRIME L. & SOC. CHANGE (forthcoming 2012), available at <http://www.springerlink.com/content/84r3n778231326mm>. As Spahn observes:

The request from the Republic of Kazakhstan for respect and deference under international comity doctrines is contrasted with Kazakhstan's lack of respect for the United States. The foreign government intervened in a U.S. judicial proceeding against a U.S. person. Not content with intervening in the legal proceeding, the foreign government then attempted to subvert the prosecution by political lobbying inside the U.S. government.

Spahn, *supra* note 47, at 195.

50. David Leigh & Rob Evans, "National Interest" Halts Arms Corruption Inquiry, *GUARDIAN* (London), Dec. 14, 2006, <http://www.guardian.co.uk/uk/2006/dec/15/saudi-arabia.armstrade>. Leigh and Evans outline the context of the decision to close the investigation:

In recent weeks, BAE and the Saudi embassy had frantically lobbied the government for the long-running investigation to be discontinued, with the company insisting it was poised to lose another lucrative Saudi contract if it was allowed to go on. . . . [The attorney general] consulted the prime minister, the defence secretary, foreign secretary, and the intelligence services, and they decided that "the wider public interest" "outweighed the need to maintain the rule of law."

Id.

role in the decision to discontinue the investigation when he stated that electing to move forward with a prosecution in the case would have resulted in “the complete wreckage of a vital strategic relationship and the loss of thousands of British jobs.”⁵¹

D. Enforcement Cooperation

Fourth, we might expect to see more FCPA prosecutions in those countries that most closely cooperate with U.S. enforcement agencies. By their nature, FCPA investigations and prosecutions raise a number of issues associated with international coordination and cooperation between enforcement agencies. Reflecting the salience of these issues in the FCPA context, the United States Attorneys’ Manual notes the following:

The investigation and prosecution of particular allegations of violations of the FCPA will raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction. For example, part of the investigation may involve interviewing witnesses in foreign countries concerning their activities with high-level foreign government officials. In addition, relevant accounts maintained in United States banks and subject to subpoena may be directly or beneficially owned by senior foreign government officials.⁵²

In fact, the DOJ has gone so far as to characterize “the lack of cooperation in obtaining evidence located outside the United States” as “[t]he chief difficulty in investigating and prosecuting foreign bribery cases.”⁵³ Nevertheless, as cross-border investigations have increased in number and complexity, U.S. authorities have responded to these challenges by entering into a growing—although incomplete—network of agreements designed to promote

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51. George Jones, *Blair Fends Off Row ‘To Press for Saudi Deal,’* DAILY TELEGRAPH (London), Jun. 9, 2007, <http://www.telegraph.co.uk/news/uknews/1554002/Blair-fends-off-row-to-press-for-Saudi-deal.html>. Although a subsequent U.S. investigation was launched, which BAE ultimately resolved via a \$400 million settlement, no FCPA charges relating to BAE’s Saudi Arabian activities were brought. This decision led one author to question whether, “contrary to rule of law principles, certain companies in certain industries are essentially immune from FCPA anti-bribery charges.” Koehler, *supra* note 9, at 990. This issue is discussed further in Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big To Debar?*, 80 FORDHAM L. REV. 775 (2011).
 52. U.S. ATTORNEYS’ MANUAL, *supra* note 30, § 9-47.110.
 53. U.S. DEP’T OF JUSTICE, RESPONSE OF THE UNITED STATES: QUESTIONS CONCERNING PHASE 2, at § 9.2 (undated), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response2.pdf>.

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information-sharing and other forms of international enforcement cooperation.⁵⁴ Two categories of agreement are particularly relevant in the FCPA context.

First, the DOJ may make a request for evidence or other assistance under a mutual legal assistance treaty (MLAT), a type of bilateral intergovernmental agreement that obliges foreign jurisdiction authorities to render assistance.⁵⁵ The DOJ's reliance on MLATs has been readily apparent in the FCPA context; in 2009, a senior official noted "at least twenty-five cooperation requests to foreign governments pursuant to mutual legal assistance treaties over the past twelve months."⁵⁶ Regarding the outcomes of its requests for legal cooperation, the DOJ "has experienced the gamut of cooperation – from full-scale sharing of domestic investigative files on short notice to outright non-compliance."⁵⁷

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54. Intergovernmental and transnational regulatory networks are the focus of a significant and growing body of scholarship. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113 (2009); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998); see also Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61 (1999) (highlighting strategic barriers to international regulatory cooperation in the securities context).
55. See James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way To Pierce Bank Secrecy*, 20 CASE W. RES. J. INT'L L. 405, 405 (1988) ("[An MLAT] is a treaty which typically provides for the direct exchange of information between two 'central authorities' – the U.S. Department of Justice and its foreign counterpart, bypassing both normal diplomatic channels and the involvement of a U.S., though not always a foreign, court in the making of a request."); Caroline A.A. Greene, Note, *International Securities Law Enforcement: Recent Advances in Assistance and Cooperation*, 27 VAND. J. TRANSNAT'L L. 635, 640 (1994) ("[MLATs], negotiated through formal diplomatic channels, have the force of law and oblige signatories to provide assistance in a broad range of criminal matters. Under such treaties, parties may obtain information either in preparation for or during trial, regardless of whether charges have been filed in the requesting state." (citation omitted)). See generally Michael D. Mann, Joseph G. Mari & George Lavdas, *International Agreements and Understandings for the Production of Information and Other Mutual Assistance*, 29 INT'L LAW. 780 (1995) (outlining the history and development of MLATs and other forms of international enforcement cooperation).
56. F. Joseph Warin, John W.F. Chesley & Patrick F. Speice, Jr., *Nine Lessons of 2009: The Year-in-Review of Foreign Corrupt Practices Act Enforcement*, 38 SEC. REG. L.J. 19, 45 (2010) (quoting Mark F. Mendelsohn, Deputy Chief, Fraud Section, Criminal Div., U.S. Dep't of Justice, Comments at the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009)).
57. U.S. DEP'T OF JUSTICE, RESPONSE OF THE UNITED STATES: QUESTIONS CONCERNING PHASE 3 OECD WORKING GROUP ON BRIBERY § 10.2 (2010), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3.pdf>.

Nevertheless, the “vast majority” of requests to foreign jurisdictions pursuant to MLATs in FCPA investigations have been granted.⁵⁸

Second, the SEC has entered into a network of memoranda of understanding (MOUs) with foreign securities regulators.⁵⁹ These agreements, according to the SEC, “delineate the terms of information-sharing between and among MOU signatories and create a framework for regular and predictable cooperation in securities law enforcement.”⁶⁰ As one author has noted:

The use of MLATs and MOUs has been particularly effective in international SEC investigations to assist the SEC in circumventing foreign secrecy and “blocking” statutes to trace the flow of funds through foreign banks and trusts. Thus, bribes paid through secret foreign bank accounts in FCPA cases may be uncovered by the SEC Staff through MLAT and MOU requests to foreign governmental authorities.⁶¹

Of course, it is also possible that an alternative relationship between regulatory and enforcement cooperation may exist: perhaps when the United States has a strong enforcement relationship with the host country, U.S. authorities are more willing to defer to foreign prosecutors in the interests of international comity.⁶²

58. *Id.*

59. The SEC may also utilize MLATs by coordinating a request with the DOJ. See Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 Nw. J. INT'L L. & BUS. 303, 415 (1998) (“When an MLAT is used, the SEC’s request for evidence from abroad must be processed through the DOJ; when an MOU is used the SEC Staff deals directly with foreign authorities.”).

60. *International Enforcement Assistance*, U.S. SEC. & EXCH. COMM’N., http://www.sec.gov/about/offices/oia/oia_crossborder.shtml (last visited Sept. 6, 2011). Conceptually, the difference between MLATs and MOUs has been characterized as one of “hard” versus “soft” law:

Non-legally binding “Memoranda of Understanding” (MOUs) structure much of transgovernmental cooperation. While regulators occasionally employ Mutual Legal Assistance Treaties (MLATs), binding treaties that may address a wide array of legal issues, MOUs are frequently used to create a loose and adaptable framework in which to share information, ideas, and resources. MOUs are soft law agreements: non-binding as a legal matter but, at least in the view of many regulators, highly effective and far more flexible.

Raustiala, *supra* note 54, at 22 (footnote omitted).

61. Mathews, *supra* note 59, at 415 (footnote omitted).

62. See Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT’L L. 563, 566 (2000) (“Today it is clear that both the Justice Department and the Federal Trade

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III. DATA AND ANALYSIS

A. Data Sources

In order to systematically evaluate the potential influence that these four factors might have on cross-national patterns in FCPA enforcement, I construct a new dataset covering of all civil and criminal FCPA cases initiated between January 1, 2000, and July 1, 2011. The dataset includes 127 foreign countries— all countries with populations of at least 500,000 for which basic country-level data (including data on U.S. FDI stock) were available. I construct the dataset by examining all releases from the DOJ⁶³ and SEC⁶⁴ that reference the FCPA.⁶⁵ I exclude enforcement actions relating solely to payments to Iraqi government officials, reflecting the unique history of the anticorruption investigations associated with the United Nations' Oil-for-Food Program.⁶⁶ I include all

Commission (FTC) routinely consider comity factors in the exercise of their prosecutorial discretion.”); see also Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 848-57 (2009) (discussing enforcement comity in both the U.S. and international contexts).

63. *Office of Public Affairs*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/opa> (last visited Sept. 6, 2011).
64. *Litigation Releases*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/litigation/litreleases.shtml> (last visited Nov. 15, 2011).
65. To augment this dataset of enforcement actions, I also undertake a search of FCPA investigations based on news releases, public SEC filings by U.S. issuers, the Foreign Corrupt Practices Act Reporter (a publication of the West Publishing Company that aggregates information on FCPA enforcement actions), and the reports of the U.S. government to the OECD pursuant to the OECD Convention. See FOREIGN CORRUPT PRACTICES ACT REPORTER (2d ed. 2008); U.S. DEP'T OF JUSTICE, *supra* note 57, at app. c, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-appx-c.pdf>; *Filings & Forms*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/edgar.shtml> (last visited Nov. 1, 2011).
66. The Oil-for-Food Program (OFP) was established by the United Nations in 1995 pursuant to Security Council Resolution 986, S.C. Res. 986, U.N. Doc. S/RES/986 (Apr. 14, 1995). Intended as “a temporary measure to provide for the humanitarian needs of the Iraqi people,” *id.*, following the imposition of economic sanctions on Iraq, the program would eventually administer approximately \$65 billion in oil sales from 1996 until its termination in 2003. See SUBCOMM. ON OVERSIGHT & INVESTIGATIONS OF THE H. COMM. ON INT'L RELATIONS, 109th CONG., THE OIL-FOR-FOOD PROGRAM: THE SYSTEMIC FAILURE OF THE UNITED NATIONS, 2 (2005) [hereinafter HOUSE OFP REPORT]. On the history of the OFP generally, see JEFFREY A. MEYER & MARK G. CALIFANO, GOOD INTENTIONS CORRUPTED: THE OIL-FOR-FOOD SCANDAL AND THE THREAT TO THE U.N. (2006). When allegations of corruption associated with the administration of the program came to light following the Iraq War, the OFP became the subject of extensive national and international investigations. See, e.g., *The United Nations Oil for Food Program, Hearing Before the Subcomm. on Energy &*

antibribery violations involving a foreign government official;⁶⁷ violations of the books and records and internal controls provisions were also included if the disclosure of an allegation or internal investigation included specific details regarding improper payments to foreign officials. (If the complaint related only to general weaknesses in corporate controls, or if the nationality of foreign officials was not disclosed, the observation was excluded.) Between January 1, 2000, and July 1, 2011, I estimate that, of the 127 countries in this dataset, FCPA enforcement actions have been associated with 57 different nations.

In Part II, I outlined several possible factors that might influence observed cross-national variation in relative numbers of FCPA cases. I operationalize these variables as follows. For U.S. foreign investment, I employ total U.S. FDI stock as of 2000.⁶⁸ For cross-national variation in corruption levels, I employ two different measures as a robustness check. First, I use a measure of corruption perceptions developed by the World Bank. This measure, called the

Air Quality of the H. Comm. on Energy & Commerce, 108th Cong. (2003); HOUSE OF REPRESENTATIVES, OFFICE OF INSPECTION AND REPORTS, *REPORT OF THE COMMITTEE ON THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME, MANIPULATION OF THE OIL-FOR-FOOD PROGRAMME BY THE IRAQI REGIME* (2005), available at <http://www.iic-offp.org/documents/IIC%20Final%20Report%2027Oct2005.pdf>; INDEPENDENT INQUIRY COMMISSION, *REPORT OF THE COMMITTEE ON THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME, 1 THE MANAGEMENT OF THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME* (2005), available at http://www.iic-offp.org/documents/Sept05/Mgmt_V1.pdf; see also JAMES DOBBINS ET AL., *OCCUPYING IRAQ: A HISTORY OF THE COALITION PROVISIONAL AUTHORITY 185-86* (2009) (describing the role of the Coalition Provisional Authority in assisting with OFP investigations during the postwar period). Reflecting the fact that the OFP investigations (and the post-2003 U.S.-Iraq relationship more generally) are sui generis, I exclude allegations of bribery of Iraqi government officials from this dataset.

67. I exclude cases that did not involve any actual foreign government officials, such as the “SHOT show” FBI sting case. See Press Release, U.S. Dep’t of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html> (“The indictments allege that the defendants engaged in a scheme to pay bribes to the minister of defense for a country in Africa. In fact, the scheme was part of the undercover operation, with no actual involvement from any minister of defense.”).
68. This set of data on U.S. foreign investment abroad is compiled by the U.S. Department of Commerce’s Bureau of Economic Analysis (BEA) and is available at *U.S. Direct Investment Abroad: Balance of Payments & Direct Investment Position Data*, U.S. DEP’T OF COMMERCE BUREAU OF ECON. ANALYSIS, <http://www.bea.gov/international/diiusdbal.htm> (last modified Dec. 15, 2011). By adopting a measure of U.S. FDI that is long-term in nature (measuring accumulated FDI stock rather than FDI flows) and by measuring FDI as of the year 2000, I seek to mitigate potential endogeneity issues associated with the relationship between FDI and FCPA enforcement. The year 2000 predates the recent surge in FCPA prosecutions.

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Control of Corruption Indicator (CCI),⁶⁹ “captur[es] perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as ‘capture’ of the state by elites and private interests.”⁷⁰ It aggregates “governance perceptions as reported by survey respondents, nongovernmental organizations, commercial business information providers, and public sector organizations worldwide.”⁷¹ I use the CCI measure as of the year 2000.

Second, I employ a measure of actual experience with corruption, the International Crime Victims Survey (ICVS). The ICVS is a global survey conducted by the United Nations Interregional Criminal Justice Research Institute (UNICRI).⁷² This measure is based on survey responses to standardized questions regarding personal experience with corrupt

69. The CCI is one of the World Bank’s six Worldwide Governance Indicators (WGI). See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *The Worldwide Governance Indicators: Methodology and Analytical Issues* (World Bank Dev. Research Grp., Policy Research Working Paper No. 5430, 2010), available at <http://ssrn.com/abstract=1682130>. My analysis employs the CCI country data for the year 2000, per the 2010 edition of this data series. Another well-known measure of corruption perceptions is the Corruption Perceptions Index (CPI), produced by the NGO Transparency International. For background on this measure, see TRANSPARENCY INT’L, CORRUPTION PERCEPTIONS INDEX 2010, available at http://www.transparency.org/content/download/55725/890310/CPI_report_ForWeb.pdf. I employ the CCI here rather than the CPI because the CCI covers a broader range of countries for the year 2000 and consequently the use of the CCI permits a more comprehensive cross-national analysis during the time period in question. I employ a measure of corruption perceptions associated with a period that predates the measurement period of my dependent variable (the number of FCPA cases associated with a given country). This is important because if I attempt to proxy corruption by using, for example, a measure of corruption perceptions from the year 2010, then variation in numbers of FCPA cases—the variable I am seeking to explain—may itself skew relative perceptions of corruption. My dependent variable (i.e., observed FCPA cases) has a measurement period of January 1, 2000 to July 1, 2011. In any event, the CCI and the CPI indicators are highly correlated with each other. See Daniel Treisman, *What Have We Learned About the Causes of Corruption from Ten Years of Cross-National Empirical Research?*, 10 ANN. REV. POL. SCI. 211, 213, 215 (2007) (noting that the CCI and CPI are “extremely highly correlated” and that “[t]he main difference in early years was the far broader country coverage in the [CCI] data”).

70. Kaufmann et al., *supra* note 69, at 4.

71. *Id.* at 2.

72. For general background on the ICVS, see JOHN VAN KESTEREN, PAT MAYHEW & PAUL NIEUWBEERTA, CRIMINAL VICTIMISATION IN SEVENTEEN INDUSTRIALISED COUNTRIES: KEY FINDINGS FROM THE 2000 INTERNATIONAL CRIME VICTIMS SURVEY (2000). See also Naci Mocan, *What Determines Corruption? International Evidence from Microdata*, 46 ECON. INQUIRY 493 (2008) (applying the ICVS data to the cross-national study of corruption).

government officials.⁷³ These surveys reflect data gathered during multiple years in the late 1990s.⁷⁴

I employ several variables to proxy for possible U.S. foreign policy influences. First, as a general measure of countries' foreign policy alignment with the United States, I examine the aggregate percentage of positions taken by each country in contested votes in the U.N. General Assembly that match the U.S. position over the 2000-2010 period (excluding abstentions).⁷⁵ Second, I employ a dummy variable capturing whether or not each country had a military alliance in place with the United States as of the year 2000.⁷⁶ Third, I

73. Mocan, *supra* note 72, at 496. Specifically, the metric is the percentage answering affirmatively to the following question: "In some areas, there is a problem of corruption among government or public officials. During [the past year] has any government official, for instance a customs officer, police officer or inspector in your own country, asked you or expected you to pay a bribe for his services?" *Id.* The ICVS data, which are also analyzed in Treisman, *supra* note 69, is available at http://www.sscnet.ucla.edu/polisci/faculty/treisman/Papers/what_have_we_learned_data.xls.
74. See Mocan, *supra* note 72, at 497-98 tbl.1.
75. The analysis of U.N. General Assembly voting patterns—and the use of voting patterns as indicia of foreign policy alignment—has a long history in the literature on international relations and international institutions. See, e.g., Charles W. Kegley, Jr. & Steven W. Hook, *U.S. Foreign Aid and U.N. Voting: Did Reagan's Linkage Strategy Buy Deference or Defiance?*, 35 INT'L STUD. Q. 295 (1991); Hanna Newcombe, Michael Ross & Alan G. Newcombe, *United Nations Voting Patterns*, 24 INT'L ORG. 100 (1970); Niklas Potrafke, *Does Government Ideology Influence Political Alignment with the U.S.? An Empirical Analysis of Voting in the UN General Assembly*, 4 REV. INT'L ORG. 245 (2009); Kul B. Rai, *Foreign Policy and Voting in the UN General Assembly*, 26 INT'L ORG. 589 (1972); Erik Voeten, *Clashes in the Assembly*, 54 INT'L ORG. 185 (2000); T. Y. Wang, *U.S. Foreign Aid and UN Voting: An Analysis of Important Issues*, 43 INT'L STUD. Q. 199 (1999). Annual reports on U.N. voting patterns are produced by the U.S. State Department pursuant to 22 U.S.C. § 2414a (2006) ("[T]he Secretary of State shall transmit to [Congress] . . . a full and complete annual report which assesses . . . the voting practices of the governments of such countries at the United Nations . . ."). These reports, which are available at *Reports*, U.S. DEP'T OF STATE, <http://www.state.gov/p/io/rls/rpt> (last visited Dec. 1, 2011), provide the raw data used to generate the first proxy variable in my analysis.
76. This data is per the Correlates of War (COW) formal alliances dataset (v3.03). See DOUGLAS M. GIBLER, INTERNATIONAL MILITARY ALLIANCES 1648-2008 (2009); Douglas M. Gibler & Meredith Reid Sarkees, *Measuring Alliances: The Correlates of War Formal Interstate Alliance Dataset, 1816-2000*, 41 J. PEACE RES. 211 (2004). The dataset is available at http://www.correlatesofwar.org/COW2%20Data/Alliances/Alliance_v3.03_dyadic.zip, and the coding manual is available at Douglas M. Gibler & Meredith Reid Sarkees, *Coding Manuals for Version 3.0 of the Correlates of War Formal Interstate Alliance Data Set, 1816-2000*, CORRELATES OF WAR, http://www.correlatesofwar.org/COW2%20Data/Alliances/Alliance_v3.03_Coding_Manual.rtf (last visited Dec. 1, 2011). I set this value to 1 if a military alliance of any kind (defense pact, entente, or neutrality pact) exists between the United States and the foreign nation in question. The COW datasets are widely used in social science research. See, e.g.,

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employ a dummy variable indicating whether or not each country was a democracy as of the year 2000.⁷⁷

Finally, as proxies for the level of regulatory and enforcement cooperation with U.S. authorities, I examine whether each country in the dataset had in place with the United States (1) a mutual legal assistance treaty or (2) a bilateral enforcement cooperation or technical assistance memorandum of understanding between the SEC and that country's securities regulators.⁷⁸ These two dichotomous variables are set to one if such an agreement was in

MICHAEL C. HOROWITZ, *THE DIFFUSION OF MILITARY POWER: CAUSES AND CONSEQUENCES FOR INTERNATIONAL POLITICS* 114 (2010); Anessa L. Kimball, *Alliance Formation and Conflict Initiation: The Missing Link*, 43 J. PEACE RES. 371, 379 (2006); Edward D. Mansfield, Jon C. Pevehouse & David H. Bearce, *Preferential Trading Arrangements and Military Disputes*, in *POWER AND THE PURSE: ECONOMIC STATECRAFT, INTERDEPENDENCE, AND NATIONAL SECURITY* 92, 109 n.69 (Jean-Marc F. Blanchard, Edward D. Mansfield & Norrin M. Ripsman eds., 2000); Zeev Maoz, *Alliances: The Street Gangs of World Politics – Their Origins, Management, and Consequences, 1816-1986*, in *WHAT DO WE KNOW ABOUT WAR?* 111, 139 (John A. Vasquez ed., 2000); Curtis S. Signorino & Jeffrey M. Ritter, *Tau-b or Not Tau-b: Measuring the Similarity of Foreign Policy Positions*, 43 INT'L STUD. Q. 115, 117 (1999). The COW Formal Alliances dataset currently terminates at the year 2000. Consequently, it is not possible to determine how changes over the past ten years may have affected the extent to which this data accurately serve as a proxy for the bilateral relationship during the observation period. Moreover, certain nations that are currently regarded as somewhat hostile to U.S. interests (e.g., Venezuela, Bolivia, and Nicaragua) are recorded as U.S. allies as a consequence of these countries' membership in the Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 21 U.N.T.S. 77. As a robustness check, I reran the relevant regressions on military alliance status (see *infra* Section III.B) with the alliance status dummy variable for these three nations set to zero (no alliance). The results of these regressions, which are not shown, were similar.

77. This data is per the Polity IV dataset. See Monty G. Marshall & Keith Jaggers, *Polity IV Project: Political Regime Characteristics and Transitions, 1800-2010*, POLITY IV, <http://www.systemicpeace.org/polity/polity4.htm> (last updated Dec. 1, 2011) (“The Polity conceptual scheme . . . envisions a spectrum of governing authority that spans from *fully institutionalized autocracies* . . . to *fully institutionalized democracies*. The ‘Polity Score’ captures this regime authority spectrum on a 21-point scale ranging from -10 (hereditary monarchy) to +10 (consolidated democracy).”). My approach—employing a dummy variable set to one if the country scores at least six on the Polity scale and set to zero otherwise—is consistent with widely-accepted practice. See, e.g., Bruce Bueno De Mesquita et al., *Thinking Inside the Box: A Closer Look at Democracy and Human Rights*, 49 INT'L STUD. Q. 439, 443 (2005) (“Many researchers define a state as democratic if its democracy–autocracy score is at least 6 out of a non-normalized upper bound of 10 . . .”).
78. For a list of all bilateral MOUs with the SEC and the dates on which each agreement came into force, see *Cooperative Arrangements with Foreign Regulators*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml (last modified Nov. 14, 2011). For information on MLATs in force as of January 1, 2000, see U.S. DEP'T OF STATE, *TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2000* (2000).

effect as of January 1, 2000 (the beginning of the observation period). Descriptive statistics and a correlation matrix are set out below in Tables 1 and 2, respectively.

Before turning to the results of the analysis, a discussion of the mechanisms through which FCPA cases come to light is appropriate. Violations of the FCPA come to the attention of the SEC and DOJ from a wide variety of sources, including routine compliance checks, audits, due diligence associated with transactions, tips to U.S. authorities from competitors or employees, and private lawsuits that reference violations of the FCPA.⁷⁹ Many violations are also self-reported by firms.⁸⁰ The Federal Sentencing Guidelines favor disclosure to the authorities of any possible violations of the FCPA,⁸¹ providing firms with an incentive to self-report to the SEC and DOJ.

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79. The FCPA does not provide for a private right of action and courts have declined to infer a private right of action. *See, e.g.,* *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1030 (6th Cir. 1990). *But cf.* 6 ALAN R. BROMBERG & LEWIS D. LOWENFELS, *BROMBERG AND LOWENFELS ON SECURITIES FRAUD* § 18:13 (2d ed. 2011) (“A more fruitful avenue for potential private plaintiffs seeking to assert actions under the FCPA might be to attempt to sustain claims arising from violations of the FCPA under other statutes. There is some precedent for such actions under [Securities Exchange Act] § 10(b) and Rule 10b-5.”); Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT’L L. 385 (2010) (suggesting that bribery of foreign government officials may constitute a cognizable tort under the Alien Tort Statute, 28 U.S.C. § 1350 (2006)); Jason E. Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, *ADVOCATE*, Mar./Apr. 2009, at 20, 20, available at <http://www.stoel.com/files/09MarAprAdv.pdf> (“Plaintiffs are increasingly making an end-run around the FCPA’s lack of a private right of action through an array of FCPA-inspired civil suits. The plaintiffs . . . rely on such causes of action as violation of the Racketeer Influenced and Corrupt Organizations Act (‘RICO’), common law fraud, and violation of federal securities law.”). For an argument that the FCPA should be amended to permit a private right of action, see Pines, *supra* note 14.
80. *See* Sue Reisinger, *Why Are More Companies Self-Reporting Overseas Bribes?*, *CORP. COUNS.* (July 16, 2007), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1184231196297>.
81. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1) (2010), available at http://www.uscc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf (identifying as a criterion for determining an organization’s “culpability score” whether it “reported the offense to appropriate governmental authorities”); *see also* Reisinger, *supra* note 80 (“[S]elf-reporting is a crucial factor in cutting a business a break in an international bribery case. It will earn a corporation a ‘real, tangible benefit,’ such as a reduced fine or deferred prosecution, or both”); DOJ National Conference Press Release, *supra* note 29 (“[T]here is no doubt that a company that comes forward [with a violation of the FCPA] on its own will see a more favorable resolution than one that doesn’t.”). *But see* Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. 393 (2011) (concluding, on the basis on an analysis of recent FCPA cases, that self-reporting may not necessarily result in more favorable settlement terms).

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Table 1.
DESCRIPTIVE STATISTICS

VARIABLE	MEAN	STANDARD DEVIATION	MAX	MIN	OBSERVATIONS
Total number of associated FCPA enforcement actions (Jan. 1, 2000-July 1, 2011) (FCPA_CASES)	1.44	2.89	21.00	0.00	127
log((Total U.S. FDI stock) (2000, \$US)) (LOG_US_FDI)	8.55	1.40	11.36	5.70	127
Control of Corruption Indicator (2000) (COR)	0.01	1.02	2.37	-1.70	127
log((Per capita income (2000, \$US)) (LOG_GDP_PC)	3.33	0.70	4.57	1.93	127
MLAT in force as of January 1, 2000 (MLAT)	0.18	0.39	1.00	0.00	127
Bilateral MOU with SEC in force as of January 1, 2000 (SEC_COOP)	0.21	0.41	1.00	0.00	127
Formal U.S. military alliance (ALLY)	0.33	0.47	1.00	0.00	127
Percent voting with U.S. in contested UN General Assembly votes, 2000-2010 (GA_VOTES)	0.28	0.15	0.91	0.09	127
Democracy as of 2000 (DEMOC)	0.55	0.50	1.00	0.00	127
UNICRI-ICVS survey (% reporting experience with corruption during prior year) (UNICRI)	9.57	9.30	31.11	0.04	41

Table 2.
CORRELATION MATRIX

	FCPA CASES	LOG_US _FDI	COR	LOG GDP_PC	MLAT	SEC COOP	ALLY	GA VOTES	DEMOC	UNICRI
FCPA CASES	1.00									
LOG_US _FDI	0.29	1.00								
COR	-0.19	0.51	1.00							
LOG GDP_PC	-0.08	0.69	0.82	1.00						
MLAT	0.05	0.45	0.34	0.40	1.00					
SEC COOP	0.25	0.60	0.49	0.45	0.26	1.00				
ALLY	0.03	0.55	0.28	0.41	0.41	0.33	1.00			
GA VOTES	-0.13	0.41	0.62	0.60	0.40	0.39	0.36	1.00		
DEMOC	0.00	0.44	0.45	0.48	0.38	0.35	0.57	0.64	1.00	
UNICRI	0.57	-0.40	-0.78	-0.73	-0.35	-0.12	-0.24	-0.67	-0.23	1.00

In my dataset, however, I aggregate all FCPA violations. In other words, I assume for the purposes of my analysis that the possible cross-national determinants of FCPA enforcement patterns outlined above are applicable to all categories of FCPA cases. First, on a practical level, such an assumption is rendered necessary by the fact that the original source of the information that

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results in an FCPA investigation is often not disclosed. Second, to the extent that the operation of prosecutorial discretion may influence cross-national patterns in FCPA enforcement, it is important to recognize that the capacity of prosecutors to exercise discretion exists regardless of the ultimate source of the information regarding the violation: in other words, the enforcement agencies may elect not to pursue a given case regardless of whether information on an alleged violation comes to the attention of the authorities during the course of an investigation, as a result of a tip, or as a consequence of a firm's decision to self-report.⁸² Third, in the case of self-reported violations, the likelihood of a violation's discovery by other means has long been recognized to play a key role in the corporate decision to self-report a violation.⁸³ Thus, the same factors which influence the likelihood of detection probably also increase the

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82. For a discussion of FCPA prosecutorial declinations, see James G. Tillen & Marc Alain Bohn, *Declinations During the FCPA Boom*, BLOOMBERG L. REP.—CORP. COUNS., Aug. 1, 2011, at 3, available at http://www.millerchevalier.com/portalresource/lookup/poid/Z1tOl9NPloLTYnMQZ56TfzcRVPMQiLsSwOZDm83!/document.name=/miller_chevalie_tillen_bohn_article.pdf. Although FCPA declinations are not published and the declination decision lacks transparency, Tillen and Bohn speculate that reasons for DOJ and SEC declinations may include “insufficiency of evidence, the absence of jurisdiction, or a lack of actionable misconduct,” as well as possible “benefit from a voluntary self disclosure or from extraordinary cooperation.” *Id.* at 5. On the prosecutorial declination decision generally, see Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008); and Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221 (2003).
83. See RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING 927 (1994) (identifying the issue of whether “the situation [is] one that the government is likely to discover eventually anyway” as a relevant consideration in making the decision to report an offense); Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 191 (2010) (“[C]orporate decision makers examine and estimate both the respective magnitudes of liability in the scenarios of reporting and declining to report misconduct, as well as the likelihood that . . . law enforcement will detect misconduct absent self-reporting by the corporation.”); Richard Marshall, *Uuuuhhh, Look, We Messed Up Here: When It’s Time for GCs To Just ‘Fess Up*, CORP. COUNS., Jan. 28, 2010, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202439516493> (“[A] key consideration will be whether the government is likely to find out about the problem in any event.”); 2009 Year-End FCPA Update, GIBSON, DUNN & CRUTCHER LLP (Jan. 4, 2010), <http://www.gibsondunn.com/publications/pages/2009Year-EndFCPAUpdate.aspx> (“Because voluntary disclosure makes the government aware of alleged improper conduct that it otherwise may have never discovered on its own, the likelihood of the government uncovering the misconduct through other means . . . is a critical factor in determining whether to make a voluntary disclosure.”). The theoretical relationship between the likelihood of detection and self-reporting behavior is discussed in Louis Kaplow & Steven Shavell, *Optimal Law Enforcement with Self-Reporting of Behavior*, 102 J. POL. ECON. 583, 602-03 (1994), and developed further in Robert Innes, *Self-Reporting in Optimal Law Enforcement When Violators Have Heterogeneous Probabilities of Apprehension*, 29 J. LEGAL STUD. 287 (2000).

likelihood that an infraction will be self-reported. (Alternatively, certain mechanisms through which cases come to light, such as tips to authorities from disgruntled employees, may simply constitute random noise.)

I further assume that observations of my dependent variable (FCPA enforcement actions) are independent of one another. There are two potential problems associated with this assumption, both of which relate to the presence of multinational firms. First, the detection of an FCPA violation in one country may increase the likelihood of a discovery of further FCPA violations in a firm's operations elsewhere in the world; having begun an inquiry into one violation, the government may discover subsequent violations during the course of its investigations. Second, the detection of an FCPA violation in one country may increase the likelihood that a firm may elect to self-report other violations to the authorities.⁸⁴ Although admittedly not unproblematic, this assumption is nevertheless justified for several reasons. First, even assuming that, all else being equal, the discovery of a violation in one country makes discovery of additional violations elsewhere in the world more likely, the same factors that influenced the likelihood of the initial detection may also (at least at the margins) influence the likelihood of the detection of additional violations.⁸⁵ Second, even if a discovery by the authorities of a multinational firm's FCPA violation in one country does increase the probability of discovering further violations (whether via self-reporting or government detection), the analysis

84. The case of Alcatel-Lucent is illustrative in this respect. In that case, an initial investigation into improper payments associated with the company's operations in Costa Rica ultimately led to a broader settlement with U.S. authorities involving FCPA violations associated with the company's operations in several other countries. See *ALCATEL-LUCENT S.A.*, 2009 ANNUAL REPORT (FORM 20-F), at 72-73 (2010); Alcatel-Lucent Press Release, *supra* note 32.

85. For example, in the case of the decision to self-report additional violations following the discovery of a violation in one country, this dynamic might be expressed more formally in the following way. For any ongoing FCPA violation at a given firm, let the probability (p) that the violation will be detected by the government equal:

$$aF + bD$$

where F represents the set of factors that influence the likelihood of the government's detecting the violation assuming that no other violation had already been detected, and D equals a dichotomous variable set to one if the government has detected a violation elsewhere in the firm's worldwide operations. Moreover, let a be some coefficient in the range $[0, (1-bD)/F]$, and let b be some coefficient in the range $[0, (1-aF)/D]$. Assume that a firm will self-report an infraction to the U.S. authorities if and only if the probability of detection exceeds a certain threshold (p'). It is true that there may exist some set of cases such that $p' > aF + b(0)$ and $p' < aF + b(1)$. Yet even assuming that this is the case—assuming, in other words, that there exist certain cases in which the government's discovery of a violation by the firm elsewhere in the world is a but-for cause of the decision to self-report—as long as we posit that $p' > b(1)$ for at least some subset of cases, we might continue to expect variation in F to be associated with self-reporting decision outcomes.

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below nevertheless seeks to control for cross-national variation in the concentration of multinational firms (and thus for any potential inflation of the dependent variable caused by the greater presence of multinational firms in a given country) by holding constant the level of U.S. FDI.⁸⁶

B. Results and Analysis

In order to explain cross-national variation in FCPA enforcement, I begin by proposing a simple model in which the number of FCPA enforcement actions associated with a given country is a function of (1) the level of U.S. FDI stock and (2) the level of corruption. The econometric specification of the basic model is as follows:

$$\text{FCPA_CASES}_i = \alpha + \beta_1 \log(\text{US_FDI})_i + \beta_2 \text{COR}_i + X'_i \gamma + \varepsilon_i$$

where FCPA_CASES is the total number of FCPA enforcement actions in a given country, US_FDI represents the total amount of U.S. FDI stock,⁸⁷ COR represents the level of corruption, X represents a vector of other covariates, α is the constant, and ε is the error term. In Table 3, I perform a series of Ordinary Least Squares (OLS) regression analyses to examine this relationship (regressions one and two). I explore the effects of regulatory and enforcement cooperation, military alliance status, and foreign policy proxies in regressions three through nine. In regressions ten through twelve, I explore the impact of adopting the ICVS data as my proxy for corruption levels. In Table 4, I repeat these analyses, with additional controls for regional fixed effects.⁸⁸ I set out the results of these analyses below.

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86. Cf., e.g., WILLIAM H. MEYER, HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS: MULTINATIONAL CORPORATIONS, FOREIGN AID, AND REPRESSION 99-100 (1998) (employing foreign investment data to measure cross-national variation in multinational firm presence); Laura Alfaro & Andrew Charlton, *Intra-Industry Foreign Direct Investment*, 99 AM. ECON. REV. 2096, 2096 (2009) (discussing scholarly reliance on FDI data to proxy multinational firm presence).
87. A logarithmic transformation of this data is necessary given the wide disparity in levels of U.S. FDI stock. *U.S. Direct Investment Position Abroad on a Historical-Cost Basis: Country Detail by Industry, 2000*, U.S. DEP'T OF COMMERCE BUREAU OF ECON. ANALYSIS, http://www.bea.gov/international/xls/17_00.xls (last visited Feb. 28, 2012).
88. Adopting North America as my baseline, I employ the following regional dummies: Asia, Central and Eastern Europe, the Middle East, South America, Scandinavia, and Western Europe.

Table 3.⁸⁹

OLS REGRESSION (WITHOUT CONTROLS FOR REGIONAL FIXED EFFECTS)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
LOG OF U.S. FDI (2000)	1.068*	1.272**	0.970*	1.458**	1.140**	1.277**	0.947**	1.283**	0.969*	1.045**	1.040*	0.762*
	(0.23)	(0.34)	(0.29)	(0.43)	(0.33)	(0.35)	(0.26)	(0.38)	(0.29)	(0.25)	(0.25)	(0.31)
CORRUPTION PERCEPTIONS (CPI) (2000)	-	-	-	-	-	-	-	-	-			
	1.291**	0.806*	1.136**	0.849**	1.190**	0.728*	1.046**	0.790*	1.121**		0.223	
	(0.30)	(0.32)	(0.28)	(0.32)	(0.30)	(0.36)	(0.29)	(0.35)	(0.29)		(0.66)	
LOG OF GDP PER CAPITA (2000)		-1.119	-0.737	-1.02	-0.638	-1.05	-0.627	-1.106	-0.718	-1.09	-1.387	-1.075
		(0.86)	(0.73)	(0.81)	(0.69)	(0.83)	(0.70)	(0.83)	(0.70)	(0.74)	(1.30)	(0.75)
REGULATORY COOPERATION (SEC)			1.763**		1.792**		1.854**		1.793**			0.986
			(0.84)		(0.84)		(0.90)		(0.88)			(0.75)
MUTUAL LEGAL ASSISTANCE TREATY (MLAT)			-0.151									
			(0.56)									
U.S. MILITARY ALLIANCE				-1.095	-1.116*							
				(0.67)	(0.66)							
UN GA VOTING ALIGNMENT						-1.323	-1.909					
						(1.50)	(1.69)					
DEMOCRACY								-0.138	-0.227			
								(0.61)	(0.61)			
ICVS										0.140*	0.147*	0.131*
										**	**	**
										(0.04)	(0.05)	(0.04)
OBSERVATIONS	127	127	127	127	127	127	127	127	127	41	41	41
R-SQUARED	0.24	0.25	0.29	0.27	0.31	0.25	0.29	0.25	0.29	0.58	0.58	0.60

89. White-corrected for heteroskedasticity (robust t-statistics in parentheses). *** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$.

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Table 4.⁹⁰
OLS REGRESSION (WITH CONTROLS FOR REGIONAL FIXED EFFECTS)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
LOG OF U.S. FDI (2000)	1.190 ***	1.390 ***	1.068 ***	1.400 ***	1.110 ***	1.378 ***	1.071 ***	1.338 ***	1.053 ***	1.148 ***	1.150 ***	0.885 **
	(0.27)	(0.36)	(0.33)	(0.40)	(0.33)	(0.36)	(0.30)	(0.38)	(0.32)	(0.33)	(0.33)	(0.38)
CORRUPTION PERCEPTIONS (CPI) (2000)	-1.467 ***	-0.977 ***	-1.265 ***	-0.958 ***	-1.262 ***	-0.844 **	-1.138 ***	-1.013 ***	-1.289 ***		0.0792	
	(0.35)	(0.36)	(0.33)	(0.36)	(0.34)	(0.38)	(0.34)	(0.37)	(0.33)		(0.63)	
LOG OF GDP PER CAPITA (2000)		-1.25	-0.909	-1.228	-0.87	-1.139	-0.758	-1.267	-0.92	-1.129	-1.228	-1.274
		(0.85)	(0.77)	(0.84)	(0.74)	(0.82)	(0.73)	(0.83)	(0.74)	(0.90)	(1.28)	(0.90)
REGULATORY COOPERATION (SEC)			1.609**		1.680*		1.723**		1.608*			0.953
			(0.81)		(0.85)		(0.86)		(0.88)			(0.63)
MUTUAL LEGAL ASSISTANCE TREATY (MLAT)			-0.131									
			(0.53)									
U.S. MILITARY ALLIANCE				-0.577	-0.738							
				(0.73)	(0.80)							
UN GA VOTING ALIGNMENT						-3.068	-3.628					
						(2.27)	(2.26)					
DEMOCRACY								0.265	0.11			
								(0.72)	(0.75)			
ICVS										0.172***	0.173***	0.154***
										(0.04)	(0.04)	(0.04)

90. White-corrected for heteroskedasticity (robust t-statistics in parentheses). *** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$.

Table 4.
OLS REGRESSION (WITH CONTROLS FOR REGIONAL FIXED EFFECTS) (CONT'D)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
AFRICA		-0.929	-1.237	-0.92	-1.417	-1.093	-1.443	-1.098	-1.206	-0.866	0.081	0.13	-0.106
		(1.19)	(1.25)	(1.10)	(1.27)	(1.12)	(1.23)	(1.06)	(1.22)	(1.10)	(1.05)	(1.04)	(1.14)
ASIA		0.582	0.32	0.614	0.167	0.468	0.118	0.433	0.32	0.65	2.159**	2.198**	2.127**
		(1.44)	(1.43)	(1.31)	(1.37)	(1.29)	(1.33)	(1.22)	(1.41)	(1.37)	(0.92)	(1.00)	(0.97)
C. & E. EUROPE		-0.292	-0.161	0.096	-0.286	-0.0137	0.197	0.577	-0.265	0.0896	1.627	1.685*	1.673
		(1.10)	(1.21)	(1.06)	(1.21)	(1.07)	(1.17)	(1.07)	(1.31)	(1.24)	(0.98)	(0.98)	(1.01)
MIDDLE EAST		-0.581	-0.164	0.174	-0.397	-0.072	-0.558	-0.231	-0.0633	0.251	0	0	0
		(1.10)	(1.28)	(1.13)	(1.26)	(1.12)	(1.26)	(1.06)	(1.20)	(1.08)	0.00	0.00	0.00
SOUTH AMERICA		-1.78	-1.747	-1.317	-1.455	-0.892	-1.938	-1.478	-1.865	-1.334	-0.0672	0.0018	0.182
		(1.13)	(1.22)	(1.05)	(1.37)	(1.27)	(1.17)	(0.95)	(1.26)	(1.17)	(1.10)	(1.28)	(1.03)
SCANDINAVIA		-0.164	-0.112	0.301	-0.211	0.294	-0.0611	0.493	-0.139	0.386	1.669**	1.657**	1.951**
		(1.30)	(1.41)	(1.36)	(1.41)	(1.42)	(1.33)	(1.35)	(1.42)	(1.46)	(0.62)	(0.64)	(0.82)
W. EUROPE		-0.788	-0.672	-0.411	-0.663	-0.364	-0.489	-0.152	-0.724	-0.41	1.489***	1.512***	1.536***
		(1.22)	(1.34)	(1.22)	(1.38)	(1.27)	(1.25)	(1.14)	(1.35)	(1.27)	(0.33)	(0.37)	(0.37)
OBSERVATIONS		127	127	127	127	127	127	127	127	127	41	41	41
		0.30	0.31	0.34	0.31	0.34	0.32	0.35	0.31	0.34	0.68	0.68	0.70

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I find that there is a significant relationship between the cross-national distribution of FCPA cases and both U.S. foreign investment and variation in corruption levels (significant at the 1% confidence level). This relationship is robust to the inclusion of controls for such variables as per capita GDP and regional fixed effects (see Table 4).

Although the presence of a mutual legal assistance treaty with a given country was not a significant predictor of FCPA enforcement levels, the presence of regulatory and enforcement cooperation with the SEC was a significant determinant of FCPA enforcement (even when additional controls were added to the regression). On the other hand, most proxies for foreign policy considerations do not appear to be significantly associated with cross-national variation in FCPA enforcement levels once other relevant factors are controlled for. Although the results in Table 3 suggest that the presence of a U.S. military alliance is associated with fewer FCPA enforcement cases (controlling for the level of regulatory cooperation), this relationship largely disappears once regional controls are added (Table 4). One cannot entirely discount a causal relationship, however, given potential collinearity between the military alliance variable and certain regional dummies (particular Western Europe and South America).

Other variables—including regime type and General Assembly voting alignment—were not significantly associated with cross-national variation in FCPA cases. This finding suggests that FCPA enforcement may, in practice, operate in a way that is consistent with the rhetoric of the enforcement agencies.⁹¹ Similarly, the data lend support to the notion that U.S. enforcement practices under the FCPA operate in a manner that is consistent with Article 5 of the OECD Convention, which provides that the “[i]nvestigation and prosecution of the bribery of a foreign public official . . . shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”⁹²

Interestingly, cross-national variation in the number of FCPA cases is much more closely associated with variation in actual recorded experience with corruption (as measured by the ICVS survey) than with the measure of corruption *perceptions* employed (see regressions ten through twelve of Tables 3 and 4). However, the relatively small number (forty-one) of countries in the

91. See Sheri Qualters, *Risk of Bribe Probes Grows for Business*, NAT'L L.J., Jan. 9, 2008, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1199786732205> (reporting the assertion by Deputy Assistant Attorney General Barry Sabin that, in FCPA cases, “[w]e follow the evidence where it takes us”).

92. OECD Convention, *supra* note 27, art. 5.

dataset for which ICVS data is available requires that this finding be viewed with some caution.

IV. TOWARD AN ENFORCEMENT-BASED CROSS-NATIONAL MEASURE OF FCPA RISK?

A. The Importance of FCPA Risk Assessment and the Role of Corruption Perceptions Measures

Few regulatory and compliance issues today have a higher profile than the FCPA; as one work recently noted, “[T]he mere utterance of the acronym FCPA is enough to instill deep concern, and even fear, in corporate suites throughout the world.”⁹³ As firms seek to bolster and maintain anticorruption compliance programs in a world of increased FCPA enforcement, accurately assessing the relative FCPA country risk of the various foreign nations in which a multinational firm operates is a key challenge facing management teams, compliance officials, and legal practitioners alike. The FCPA risk profile of an organization may vary dramatically depending on the specific countries in which a firm does business; consequently, firms have long been counseled to tailor compliance programs by focusing finite compliance resources on “high-risk” countries.⁹⁴ Similarly, as a condition of entering into certain deferred prosecution agreements, the DOJ has required firms to maintain compliance programs that take into account the risks associated with the “geographical organization” of a firm’s business.⁹⁵

93. MARTIN T. BIEGELMAN & DANIEL R. BIEGELMAN, FOREIGN CORRUPT PRACTICES ACT COMPLIANCE GUIDEBOOK: PROTECTING YOUR ORGANIZATION FROM BRIBERY AND CORRUPTION 2 (2010).

94. See, e.g., DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 59-60 (1994) (presenting a list of “countries where prudence and past history indicate inquiry should be made” in the anticorruption context); Lee Stein, *Recognizing the FCPA Risks Associated with Transactions with Foreign Companies*, in THE THIRD ANNUAL NATIONAL INSTITUTE ON THE FOREIGN CORRUPT PRACTICES ACT D-1, D-1 to D-2 (2010) (“It is well known, even to those who come into contact with the FCPA only on a casual basis, that some parts of the world have a bigger problem with corruption than others.”); see also Stephen Clayton, *Top Ten Basics of Foreign Corrupt Practices Act Compliance for the Small Legal Department*, ASS’N OF CORP. COUNS. (June 1, 2011), <http://www.acc.com/legalresources/publications/topten/SLD-FCPA-Compliance.cfm?makepdf=1> (“For most companies 80% of the FCPA risk will come from less than 20% of your business.”).

95. See, e.g., United States v. Maxwell Techs., Inc., No. 3:11-cr-00329-JM, 2011 WL 400543, at *31 (S.D. Cal. Jan. 31, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/maxwell/01-31-11maxwell-tech-dpa.pdf> (requiring the company to “develop . . .

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Nevertheless, the measurement of corruption on a cross-national basis and the quantification of a country's level of FCPA risk present serious measurement challenges: those who engage in corrupt acts seek, unsurprisingly, to avoid publicizing their transactions. Because of this, most attempts to measure corruption at the country level have relied on subjective perceptions of corruption rather than on objective measures. As I discuss above, the two most widely used subjective indicators are the Corruption Perceptions Index (CPI), which is published annually by Transparency International,⁹⁶ and the World Bank's Control of Corruption Indicator (CCI).⁹⁷ Both of these indices aggregate a variety of different corruption indicators (from such sources as the Economist Intelligence Unit and the World Economic Forum) based on the opinions of either businesspeople or country experts. These metrics have been used both in the risk assessment context,⁹⁸ as well as in the vast literature in economics and political science on corruption that has developed over the past fifteen years.⁹⁹ Nevertheless,

compliance standards and procedures . . . on the basis of a risk assessment addressing the individual circumstances of the company . . . including . . . its geographical organization”).

96. See TRANSPARENCY INT'L, *supra* note 69.

97. See Kaufmann et al., *supra* note 69; see also Mitchell A. Seligson, *The Measurement and Impact of Corruption Victimization: Survey Evidence from Latin America*, 34 WORLD DEV. 381, 383-87 (2006) (discussing the widespread usage of both the CPI and the CCI).

98. For example, as one compliance handbook notes, “the Transparency International CPI and similar lists from other organizations may be useful to counsel in evaluating the potential risks of a proposed foreign transaction, handling an internal investigation, defending a government investigation, or prioritizing foreign operations for FCPA audits.” ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS* 89 (2010).

99. A significant part of this literature consists of large-*n*, cross-national studies. A wide variety of possible causes of corruption have been discussed, including such factors as political instability, the existence of a presidential system of government, the nature of the electoral system, the presence of certain religious traditions, the existence of a unitary state, various types of legal or colonial heritage, the proportion of women in the legislature, and a lack of openness to trade. See Treisman, *supra* note 69. Although there is still significant debate regarding the causes of corruption, one author sums up the consensus that has developed as a result of cross-national studies in the following terms:

First, richer countries tend to have less corruption than [the] poorest ones. Second, democratic institutions . . . exert a certain control on corruption [but] only when they have been continuously held for decades. Third, countries characterized by more political instability [tend] to be more corrupt. Fourth, prevalently Protestant countries seem to be less corrupt. Finally colonial heritage appears to be strongly correlated with the current level of corruption

despite the widespread use of corruption perceptions as proxies for the level of corruption-related country risk (and as proxies for underlying corruption levels by researchers), an increasing number of authors have questioned the use of these indices.¹⁰⁰ As one study notes:

First, and most obviously, the data do not measure corruption itself but only opinions about its prevalence. Such opinions may not be based on any direct knowledge and could be biased. Cross-national differences could reflect differences in the socially encouraged level of cynicism, the degree of public identification with the government, and the perceived injustice of social or economic relations Likewise, opinions about the extent of corruption might reflect the frequency of muck-raking media reports, of government anticorruption campaigns, or of politically motivated accusations by opposition politicians. Ratings by international business people and experts, disproportionately drawn from developed Western countries, might be influenced by Western preconceptions or by the raters' greater familiarity with certain cultures. Some of the organizations that prepare corruption ratings might also have ideological axes to grind.¹⁰¹

Another warns:

[T]he real degree of reliability of survey information about corruption is largely unknown. Respondents directly involved in corruption may have incentives to underreport such involvement, and those not involved typically lack accurate information

Danila Serra, *Empirical Determinants of Corruption: A Sensitivity Analysis*, 126 PUB. CHOICE 225, 250 (2006).

100. See Mocan, *supra* note 72; Steven Van de Walle, *Perceptions of Corruption as Distrust? Cause and Effect in Attitudes Toward Government*, in ETHICS AND INTEGRITY OF GOVERNANCE: PERSPECTIVES ACROSS FRONTIERS 215 (Leo W.J.C. Huberts et al. eds., 2008); M.A. Thomas, *What Do the Worldwide Governance Indicators Measure?*, 22 EUR. J. DEV. RES. 31 (2010); Dilyan Donchev & Gergely Ujhelyi, *What Do Corruption Indices Measure?* (Aug. 13, 2009) (unpublished manuscript), <http://ssrn.com/abstract=1124066>; see also Gulnaz Sharafutdinova, *What Explains Corruption Perceptions?: The Dark Side of Political Competition in Russia's Regions*, 42 COMP. POL. 147 (2010) (critiquing the use of corruption perceptions as a proxy for corruption in the context of the post-Soviet regimes). See generally CHRISTIANE ARNDT & CHARLES OMAN, *USES AND ABUSES OF GOVERNANCE INDICATORS* 90-91 (2006) (highlighting numerous criticisms of perceptions measures in the context of a broader discussion on the role of governance indicators).

101. Treisman, *supra* note 69, at 215.

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The reliability of the Corruption Perceptions Index may also deteriorate over time. As the index has become widely publicized, there is a danger that survey respondents, rather than reporting how much “real” corruption exists around them, are reporting what they believe based on the highly publicized results of the most recent TI index.¹⁰²

Others have raised various methodological questions regarding the ways in which the corruption perceptions indices are compiled.¹⁰³ In fact, given the limitations inherent in using subjective corruption perceptions as a proxy for underlying corruption levels, a number of scholars have sought to generate various alternative measures of corruption, ranging from comparisons of the relative costs of public works projects¹⁰⁴ to the relative number of New York City parking tickets accrued by countries’ missions to the United Nations.¹⁰⁵

Moreover, even if we assume that corruption-perceptions indices do accurately and fully capture cross-national variation in corruption, such measures would still not capture variances in enforcement that were the result of other factors—such as greater enforcement cooperation between the United States and the country in question. A measure based on enforcement data, on the other hand, would reflect such variation. Thus, although the use of

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102. Miriam A. Golden & Lucio Picci, *Proposal for a New Measure of Corruption, Illustrated with Italian Data*, 17 *ECON. & POL.* 37, 39-40 (2005).
103. See Fredrik Galtung, *Measuring the Immeasurable: Boundaries and Functions of (Macro) Corruption Indices*, in *MEASURING CORRUPTION* 101 (Charles Sampford et al. eds., 2006); Stephen Knack, *Measuring Corruption in Eastern Europe and Central Asia: A Critique of the Cross-Country Indicators* (World Bank Policy Research Working Paper No. 3968, 2006), available at <http://ssrn.com/abstract=923275>.
104. See Golden & Picci, *supra* note 102 (constructing a corruption measure based on the difference between cumulative infrastructure spending in different Italian regions and the value of each region’s public infrastructure stock). For other works that seek to make inferences regarding corruption levels on the basis of an analysis of variation in observed prices and/or quantities, see Rafael Di Tella & Ernesto Schargrodsky, *The Role of Wages and Auditing During a Crackdown on Corruption in the City of Buenos Aires*, 46 *J.L. & ECON.* 269 (2003); Raymond Fisman & Shang-Jin Wei, *Tax Rates and Tax Evasion: Evidence from “Missing Imports” in China*, 112 *J. POL. ECON.* 471 (2004); Chang-Tai Hsieh & Enrico Moretti, *Did Iraq Cheat the United Nations? Underpricing, Bribes, and the Oil for Food Program*, 121 *Q.J. ECON.* 1211 (2006); Benjamin A. Olken, *Corruption and the Costs of Redistribution: Micro Evidence from Indonesia*, 90 *J. PUB. ECON.* 853 (2006); and Ritva Reinikka & Jakob Svensson, *Local Capture: Evidence from a Central Government Transfer Program in Uganda*, 119 *Q.J. ECON.* 679 (2004).
105. See Raymond Fisman & Edward Miguel, *Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets*, 115 *J. POL. ECON.* 1020 (2007).

enforcement statistics in the cross-national context can often be problematic,¹⁰⁶ deriving a measure of FCPA country risk based on enforcement statistics may nevertheless represent a compelling alternative to relying solely on perceptions measures.

B. Examining the “FCPA Enforcement-Action Intensity” of U.S. FDI

But how might we construct an enforcement-based measure? A simple comparison of the total number of enforcement actions associated with a given country would, of course, be largely unhelpful as a unit of measure because the U.S. business presence varies so greatly from country to country. Consequently, for each country I generate a measure of the log of the ratio of FCPA enforcement actions to the total level of U.S. investment (as proxied by total U.S. FDI stock as of the year 2000) – or, in other words, a measure of the “FCPA enforcement-action intensity” of U.S. FDI in different foreign countries.¹⁰⁷ By tying incidents of a negative externality to a given level of investment, this effort is arguably analogous to recent attempts to analyze the relative “pollution intensity” of investment and trade.¹⁰⁸ I plot this measure

106. One study discusses the typical problems facing cross-national comparisons of crime statistics as follows:

Most official crime data are not comparable across countries because each country suffers from its own degree of underreporting and defines certain crimes in different ways. Underreporting is worse in countries where the police and justice systems are not reliable, where the level of education is low, and perhaps where inequality is high. Country-specific crime classifications, arising from different legal traditions and different cultural perceptions of crime, also hinder cross-country comparisons.

Pablo Fajnzylber, Daniel Lederman & Norman Loayza, *Inequality and Violent Crime*, 45 J.L. & ECON. 1, 8 (2002). Similarly, as Transparency International notes in defense of the use of perceptions-based measures of corruption, “Measuring scandals, investigations or prosecutions, while offering ‘non-perception’ data, reflect less on the prevalence of corruption in a country and more on other factors, such as freedom of the press or the efficiency of the judicial system.” *What Is the CPI?*, TRANSPARENCY INT’L, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/in_detail (last visited Jan. 24, 2012).

107. In order to permit a log transformation of this data – necessary given the dramatic cross-national variance in U.S. FDI levels – countries with zero FCPA enforcement actions are excluded from this dataset. This removes seventy countries from the dataset.

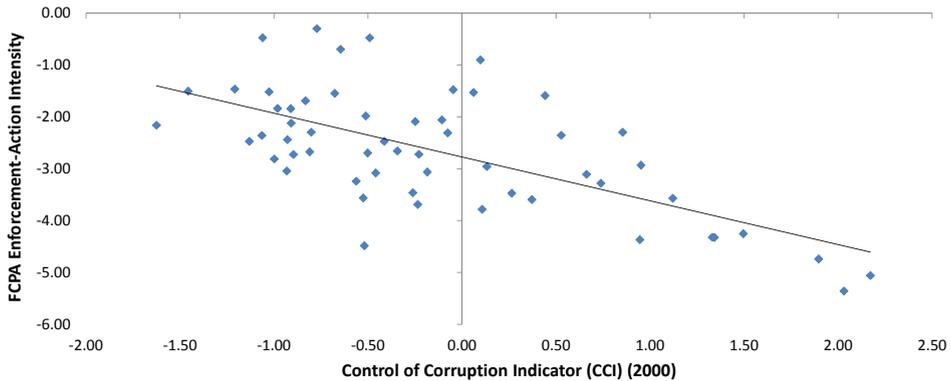
108. See, e.g., Qun Bao, Yuanyuan Chen & Ligang Song, *Foreign Direct Investment and Environmental Pollution in China: A Simultaneous Equations Estimation*, 16 ENV’T & DEV. ECON. 71 (2010); Beata Smarzynska Javorcik & Shang-Jin Wei, *Pollution Havens and Foreign Direct Investment: Dirty Secret or Popular Myth?*, 3 CONTRIBUTIONS TO ECON. ANALYSIS & POL’Y, no. 3, art. 8, at 1 (2004), <http://www.bepress.com/bejeap/contributions/vol3/iss2/art8>; Kahn & Yoshino, *supra* note 12, at 23-24.

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against corruption perceptions (as measured by the World Bank CCI) in Figure 1 below.

Figure 1.

FCPA ENFORCEMENT-ACTION INTENSITY OF U.S. FDI VERSUS PERCEIVED CORRUPTION



The two measures are relatively highly correlated, with an R^2 of 0.66. But having established that levels of FCPA prosecutions track cross-national variation in perceived corruption, a key question is this: Are corruption *perceptions*, or varying levels of corruption itself, driving enforcement? My analysis in Part III provides some initial support for the latter hypothesis, given that FCPA enforcement patterns tend to more closely track survey-based experiential measures of corruption than traditional perceptions-based measures.¹⁰⁹ Nevertheless, these results must be viewed with caution in light of the small sample size, and this remains an open question in many respects.

If our goal is simply to use cross-national enforcement data to generate a measure of “FCPA risk,” this endogeneity concern is less salient; regardless of whether certain countries are being disproportionately targeted because they are *perceived* as being corrupt (for example, by government officials when deciding where to focus investigations), or whether a greater number of FCPA cases in a given country is truly illustrative of cross-national variation in underlying corruption levels, the implications at the firm level (in terms of how compliance resources ought to be allocated) are similar.

109. Similarly, the correlation between the log of the ratio of enforcement actions to U.S. FDI and the ICVS data is 0.73, versus (as discussed above) an R^2 of 0.66 in the case of the CCI data. However, only twenty-one countries have data available for both the log-transformed enforcement ratio and for the ICVS survey.

If, however, we broaden our focus and attempt to employ FCPA enforcement data in a cross-national measure of corruption simpliciter, then the picture becomes significantly murkier as endogeneity issues come to the fore. The notion of using enforcement data as a measure of corruption is, at least superficially, an attractive one. After all, if patterns in the cross-national distribution of America's FCPA cases are largely the result of investigators and prosecutors simply "follow[ing] the evidence,"¹¹⁰ then surely we might glean useful information on relative corruption levels from the cross-national distribution of FCPA cases. Such a measure would provide those engaged in research on the determinants and consequences of corruption with a new dataset that is both cross-national in scope and tied to the micro-foundations of corruption—bribes (allegedly) paid by firms to government officials—rather than simply based on perceptions of corruption.

However, for the "FCPA enforcement-action intensity" of U.S. FDI to serve as a viable cross-national measure of corruption, two key conditions would have to hold. First, the level of U.S. FDI in a given country would have to be independent of corruption perceptions.¹¹¹ Second, corruption perceptions

110. Qualters, *supra* note 91; cf. Robert S. Mueller, III, Dir., Fed. Bureau of Investigation, Address to the American Bar Association Litigation Section Annual Conference (Apr. 17, 2008), available at <http://www.fbi.gov/news/speeches/corporate-fraud-and-public-corruption-are-we-becoming-more-crooked> ("The FBI is uniquely situated to address public corruption. We have the skills to conduct sophisticated investigations. But more than that, we are insulated from political pressure. We are able to go where the evidence leads us, without fear of reprisal or recrimination.").

111. Although such a relationship might seem intuitive, the evidence is mixed. At a theoretical level, two competing hypotheses as to the role of corruption exist. The "grasping hand" hypothesis regards corruption as a tax on foreign firms (and thus, *ceteris paribus*, a deterrent to foreign investment), while the "helping hand" regards corruption as a method of evading inefficient regulations and "greasing" the wheels of commerce. Empirically, although some studies have found a negative relationship between FDI flows and corruption (as proxied by perceptions), others have not. Compare Wei, *supra* note 35 (finding a negative relationship between corruption and FDI), with Peter Egger & Hannes Winner, *Evidence on Corruption as an Incentive for Foreign Direct Investment*, 21 EUR. J. POL. ECON. 932, 949 (2005) (finding a positive relationship between corruption and FDI, and concluding that "corruption is a stimulus for FDI"), and David Wheeler & Ashoka Mody, *International Investment Location Decisions: The Case of U.S. Firms*, 33 J. INT'L ECON. 57 (1992) (failing to find a statistically significant relationship between FDI and a composite measure of country risk that includes the relative level of perceived corruption). One author has recently summarized the state of the literature on this question:

The empirical literature on the effects of the host country's corruption level on FDI inflows, however, has not found the commonly expected effects. Some empirical studies provide evidence of a negative link between corruption and FDI inflows, while others fail to find any significant relationship.

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would have to be assumed not to drive enforcement (and, as a corollary at the firm level, we would have to assume that companies allocate compliance resources in a manner that is not disproportionate to the actual level of corruption associated with a given country).

CONCLUSION

This Note has sought to explore the cross-national patterns associated with America's enforcement of the FCPA. In order to explain cross-national variation in FCPA enforcement actions, I propose a simple model in which the number of FCPA enforcement actions associated with a given country is a joint function of the level of U.S. FDI stock and the level of corruption in the host country. Using a new dataset of FCPA enforcement actions over the past decade, I find that the cross-national distribution of FCPA cases tracks both cross-national variation in U.S. foreign investment and variation in corruption levels (significant at the one-percent confidence level). This relationship is robust to the inclusion of various controls, including GDP per capita and region-fixed effects. Similarly, I find that the presence of bilateral frameworks for securities regulatory and enforcement cooperation appear to be associated with increased levels of FCPA enforcement.

Testing for other possible influences on FCPA enforcement patterns, I find that proxies for U.S. foreign policy considerations are generally not associated with cross-national variation in FCPA enforcement, once other relevant factors (such as GDP per capita, regional fixed effects, FDI, and corruption levels) are controlled for. Moreover, I find that the best predictor of the number of FCPA enforcement actions in a given country is the level of that country's experience with actual recorded corruption, rather than simply the relative level of corruption *perceptions* as measured by expert and business opinion. This could provide a measure of additional support to those who question whether the determinants of corruption and the determinants of corruption perceptions are, in fact, coterminous. Finally, I consider potential uses of FCPA enforcement statistics as an avenue for quantifying FCPA country risk, and examine whether enforcement-based metrics may have a future role to play in the academic study of corruption.

Ali Al-Sadig, *The Effects of Corruption on FDI Inflows*, 29 CATO J. 267, 267 (2009). Al-Sadig finds that "after controlling for other characteristics of the host country such as the quality of institutions, the negative effects of corruption disappear and sometimes it becomes positive but statistically insignificant." *Id.* at 268.

Corruption-perception indices are extremely valuable tools for cross-national analysis; nevertheless, consumers of such data—including those in the private sector—must remain cognizant of the possibility that corruption and corruption perceptions may not have identical causes. My aim here is emphatically not to argue that enforcement-based measures can or should supplant existing measures of corruption; nevertheless, an additional measure of corruption based on FCPA-related investigation and enforcement data might well complement existing subjective measures of corruption perceptions. As Kaufmann et al. note:

Progress in fighting corruption on all fronts requires measurement of corruption itself, in order to diagnose problems and monitor results.

. . . .

. . . Given the imperfections of any individual approach, it is appropriate to rely on a wide variety of different indicators both subjective and objective, individual as well as aggregate, cross-country as well as country-specific. This is important to monitor results on the ground, assess the concrete reality of corruption, and develop anticorruption programs.¹¹²

112. Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Measuring Corruption: Myths and Realities*, DEV. OUTREACH, Sept. 2006, at 37, 37-40.