THE IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT ON EMERGING MARKETS: COMPANY DECISION-MAKING IN A REGULATED WORLD

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Abstract: *Over the course of the thirty-five-year lifespan of the Foreign Corrupt Practices Act (FCPA) there have been surprisingly few attempts to analyze the impact of the statute on company decision-making. Empirical studies have instead focused on macroeconomic indicators of foreign direct investment concluding that the statute deters investment in countries perceived to be corrupt. However, firm-level analysis of companies who have been subject to enforcement actions under the FCPA with either the United States Department of Justice (DoJ) or the Securities and Exchange Commission (SEC) paints a different picture. An examination of firm-level decision-making through a case study and broader statistical quantification suggests that these companies do not, on balance, divest from these countries. Theories which reconcile these potentially contrasting observations of the FCPA's impact in emerging markets suggest changes to the statute's enforcement policy which should be considered seriously by regulators. This Note serves as an initial attempt to offer a more nuanced view of the impact of FCPA enforcement on company decision-making and provide suggestions for further research and reform.*

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INTRODUCTION

Corruption is one of a special category of wrongs that is universally condemned—nearly every country in the world has laws prohibiting the bribery of public officials.[1] However, ef-

1. WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 13 (1997), *available at* http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf. There is some consensus on a definition of corruption as the "misuse of public authority for private gain." Kate Gillespie & Gwenn Okruhlik, *The Political Dimensions of Corruption Cleanups: A Framework for Analysis*, 24 COMP. POL. 77, 77 (1991); *see also* WORLD BANK, A DECADE OF MEASURING THE QUALITY OF GOVERNANCE: GOVERNANCE MATTERS 2006: WORLDWIDE GOVERNANCE INDICATORS 3 (2006). However, "debate exists over the criteria used to determine when authority has been misused." Gillespie & Okruhlik, *supra*, at 77. See *infra* notes 241–243 and accompanying text for a further discussion on the variety of ways to measure corruption.

forts to combat corruption of foreign officials are more contentious, and statutes such as the Foreign Corrupt Practices Act (FCPA)[2] in the United States have been met with some resistance. Critics from the U.S. business community have argued that the FCPA, in limiting companies' ability to pay bribes in foreign markets, effectively drives them out of the market because they are unable to compete.[3] Others have argued that U.S. regulators' enforcement of the FCPA with respect to conduct overseas represents an inappropriate exercise in extraterritorial jurisdiction.[4] From the other side, civil society activists have criticized the statute for being too weak on corruption by allowing exceptions for facilitation payments and requiring a knowing standard of *mens rea*.[5]

2. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 14 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff, 78m, 78o (2006)), amended by Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78-ff (2006)) and International Anti-Bribery and Fair Competition Act of 1988, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006)).

3. *See* ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 6 (2010) (discussing costs in lost trade due to the FCPA and the "chilling effect" of uncertain enforcement).

4. *E.g.*, 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, 359 (2001).

5. *See* T. O'Connor, *Cross-Cultural Corruption*, MEGALINKS IN CRIMINAL JUSTICE (last updated Feb. 12, 2012), http://www.drtomoconnor.com/4090/4090lect08a.htm (discussing weak enforcement of the statute and the tendency to overlook "facilitation payments"). Facilitation payments are payments to facilitate or expedite performance of a "routine governmental action," for which the statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country. U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 25 (2012) [hereinafter RESOURCE GUIDE]. For an argument that the *mens rea* standard is unclear, see David P. Burns & Erin K. Sullivan, *Navigating the FCPA's Vague Scienter Requirements*, GIBSON, DUNN & CRUTCHER LLP (2009), *available at* http://www.gibsondunn.com/publications/Documents/Burns-Sullivan-NavigatingThe FCPAComplexScienterReq.pdf.

While many of these claims are compelling, this Note will focus on a relatively new critique. Professor Andrew Spalding has argued that present enforcement of anti-bribery legislation functions as "de facto economic sanctions" and discourages foreign direct investment in emerging markets.[6] Although empirical analysis of the impact of FCPA and other international anti-bribery efforts is sparse,[7] macroeconomic studies have suggested that anti-bribery legislation deters investment abroad.[8] However, these macroeconomic studies do not paint a complete picture. Firm-level studies indicate that the statute's impact on investment decisions is at least mixed and that it potentially does not deter investment at all.[9]

This Note offers a unique empirical methodology to further illustrate the impact of the statute. The Note's main contribution is an analysis of firms' investment decisions following FCPA enforcement actions by the U.S. Department of Justice

6. Andrew B. Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 351 (2010).

7. *See* Kevin E. Davis, *Does the Globalization of Anti-Corruption Law Help Developing Countries?*, *in* INTERNATIONAL ECONOMIC LAW, GLOBALIZATION AND DEVELOPING COUNTRIES 283, 303 (Julio Faundez & Celine Tan eds., 2010) ("Most notably, no one appears to have undertaken a comprehensive empirical analysis of whether the transnational anti-corruption regime, or any component thereof, has caused corruption in developing countries to decrease.").

8. *See, e.g.*, Alvaro Cuervo-Cazurra, *The Effectiveness of Laws Against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634 (2008) (using data on bilateral FDI inflows to suggest that the FCPA decreased investment in countries with high levels of corruption only after the passage of the OECD Anti-Bribery Convention); James R. Hines, *Forbidden Payment: Foreign Bribery and American Business After 1977* (Nat'l Bureau of Econ. Research, Working Paper No. 5266, 1995), *available at* http://www.nber.org/papers/w5266.pdf (finding, based on four different indicators, that American legislation decreased U.S. business activity in countries with high rates of corruption).

9. *See, e.g.*, Beata K. Smarzynska & Shang-Jin Wei, *Corruption and Composition of Foreign Direct Investment: Firm-Level Evidence*, 3 (World Bank, Policy Research Working Paper No. WPS2360, 2000) ("U.S. companies are more likely than investors from other countries to retain full ownership in corrupt countries, even though they are not less likely to undertake FDI in corrupt economies than firms from other source countries."); Shang-Jin Wei, *How Taxing Is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1, 8 (2000) ("American investors are averse to host country corruption but not necessarily more so than other investors, in spite of its unique Foreign Corrupt Practices Act.").

(DoJ) or the Securities and Exchange Commission (SEC). The statistical analysis uses hand-collected data from 2000–2010 to examine whether companies choose to continue to operate in the countries where they have been sanctioned previously for corrupt activities. I find that 70% of the time a company continues to do business in the implicated country. A 30% divestment rate is perhaps not as high as the macroeconomic studies would predict, and it suggests that companies are not wholly abandoning high-risk countries. To explore this further, I next provide a case study of Alcatel-Lucent, a company that would be likely to divest according to a rational actor model based on cost-benefit analysis. Although the company did make some changes to its operating procedures, it continues to do business in most of the implicated countries despite paying nearly $140 million in sanctions for its business actions. This detailed treatment of a single case provides insight into not only the company decision-making process but also the reactions of investors and competitors. After describing these new findings, I offer several theories that reconcile my results with prior literature and provide policy recommendations that are sensitive to the impact of the FCPA on incentives to invest in or divest from high-risk countries.

The implications of this line of inquiry are important for two primary reasons. First, the DoJ and the SEC have recently begun to enforce the FCPA aggressively. For example, "[f]ive of the top ten FCPA settlements [ ] occurred in 2010 alone. The remaining five have all occurred since 2007."[10] From 1978 through 2006, the median number of actions per year was one; following this period enforcement activity increased sharply, peaking with 19 actions initiated in 2010.[11] This high level of enforcement increases the exigency of calibrating the impact of the statute on the firms that fall within its purview as its effects will be felt more widely and intensely today. Second, if it is true that the statute decreases investment in emerging markets this would have serious implications for those countries' development. Economists have established that "international direct investment is especially important for developing

10. WEISSMANN & SMITH, *supra* note 3, at 2.

11. Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, The Impact of Anti-Bribery Enforcement Actions on Targeted Firms 8 (Feb. 27, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222.

countries, for which it is not only a source of scarce capital but also an important conduit for the transfer of technological and managerial know-how."[12] Combining these two factors, emerging markets would face compounding issues of corruption and low technological capacity which could further retard economic growth and counteract anti-poverty measures implicit in initiatives such as the Millennium Development Goals.[13] Regulators concerned about appropriately incentivizing corporate actors must understand the impact of the statute on company decision-making with regard to these developing economies.

This Note proceeds in four parts. In Part I, I provide an overview of the FCPA with a particular emphasis on its implications for emerging markets. I describe recent enforcement trends and the interaction between the FCPA and other U.S. regulatory statutes such as the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Next in Part II, I turn to the empirical studies and summarize the macroeconomic and firm-level analyses that have been conducted to date. This Note commences a discussion of my new firm-level analysis with a discussion of methodology in Part III. I then present the results of the general statistical analysis before delving into the Alcatel-Lucent case study. Part IV explores theoretical explanations that bridge any potential empirical gap illustrated by the previous sections. It sets out the implications of each theory for enforcement policy and highlights opportunities for further research. While analysis of the empirical impact of the FCPA on business will continue to be debated, my hope is that this Note prompts a more nuanced discussion about the statute's implications for emerging markets. Ensuring that we fight corruption with good policies is almost as critical as the decision to combat global corruption in the first place.

12. Shang-Jin Wei, *Local Corruption and Global Capital Flows*, 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 303, 304 (2000).

13. *See We Can End Poverty 2015 Millennium Development Goals*, UNITED NATIONS, http://www.un.org/millenniumgoals/bkgd.shtml (last visited Apr. 6, 2013) (quoting United Nations Secretary-General Ban Ki-Moon) ("The Millennium Development Goals set timebound targets, by which progress in reducing income poverty, hunger, disease, lack of adequate shelter and exclusion—while promoting gender equality, health, education and environmental sustainability—can be measured.").

I. Overview of the FCPA

The FCPA was enacted in 1977 as an amendment to the Securities Exchange Act of 1934. It provides in relevant part:

> An Act to amend the Securities Exchange Act of 1934 to make it unlawful for an issuer of securities registered pursuant to section 12 of such Act or an issuer required to file reports pursuant to section 15(d) of such Act to make certain payments to foreign officials and other foreign persons, to require such issuers to maintain accurate records, and for other purposes.[14]

The statute was enacted under Congress' commerce clause power and prohibits a company from "mak[ing] use of the mails or any means or instrumentality of interstate commerce corruptly . . ."[15] Although the FCPA has been criticized for its vagueness in some parts,[16] it defines corrupt practices clearly. The FCPA's broad definition includes practices "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value. . . ."[17]

For present purposes there are three important provisions of the statute as originally adopted. First, the term "corruptly" has been interpreted to mean "inten[t] to induce the recipient to misuse his official position."[18] Corruption may be charged regardless of whether the payment is actually made or has its desired effect. Second, although an individual may be charged under the FCPA, the Act targets business bribery.[19] Third, the

14. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, pmbl., 91 Stat. 1494, 1494.

15. 15 U.S.C. § 78dd-1(a) (2011).

16. *See, e.g.*, Weissmann & Smith, *supra* note 3, at 7 (recommending greater guidance as to the definition of foreign official); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 Ga. L. Rev. 489, 502–03 (2011) (criticizing the lack of implementing regulations for the FCPA); *Client Alert: Courts Reject Bright-Line Approach to Defining "Foreign Official" in Favor of Fact-Based Approach, Creating Greater Uncertainty for Business*, 2 n. 5, White & Case LLP (2012), *available at* http://www.whitecase.com/alerts-03212012-1/#.UWCYAFdvCvl (discussing the lack of clear definitions of foreign officials and instrumentalities).

17. 15 U.S.C. § 78dd-1(a).

18. H.R. Rep. No. 95-640, at 8 (1977).

19. The purpose of the action must be "to assist such issuer in obtaining or retaining business for or with, or directing business to, any person." 15

Act prohibits payments to foreign officials defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[20] Textually the rank of the official is inconsequential; this provision has been interpreted to include all employees of state-owned enterprises as foreign officials.[21] Even though the statute granted significant regulatory powers as originally adopted, subsequent amendments have served to further expand regulators' authority, and recent enforcement trends demonstrate how the FCPA can be used as an aggressive tool.

The FCPA was enacted in response to the Watergate scandal in which the Special Prosecutor "uncovered evidence that major U.S. corporations had made illegal contributions to Richard Nixon's re-election campaign and to other political figures from secret 'slush funds.'"[22] Domestic impropriety was not the only concern motivating the statute—legislators were also concerned about bribery of foreign officials since this form of corruption "raised the issue of U.S. relations with foreign countries, and the solution would necessarily implicate

U.S.C. § 78dd-1(a). *See also* S. REP. NO. 95-114, at 11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108 (describing factors used to determine whether bribery was committed by the corporation or solely by an individual). Individuals may include "any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer." 15 U.S.C. § 78dd-1(a). I use the term individual bribery not to imply that individuals cannot be held liable under the FCPA or that the foreign official receiving the bribe is not individually benefitting. Rather, I use the term to distinguish corporate bribery, where one operates in his or her professional capacity for the purpose of obtaining or retaining business, from other forms of bribery undertaken in a purely personal realm.

20. 15 U.S.C. § 78dd-1(f)(1)(A).

21. *See, e.g.*, Information at 3, United States v. Control Components, Inc., No. SACR09-00162 (C.D. Cal. July 31, 2009) (determining that the officers and employees of a Chinese state-owned customer were 'foreign officials' within the meaning of the FCPA); Information at 5, United States v. Baker Hughes Services Int'l, Inc., No. 4:07-cr-00129 (S.D. Tex. May 4, 2007) (stating that Kazakhoil employees constitute foreign officials because the company is "controlled by officials of the Government of Kazakhstan").

22. Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497, 498 (2012).

foreign policy interests."[23] Whatever motivated the statute, early enforcement under the FCPA was weak and charges were often brought in combination with other statutes instead of initiating FCPA prosecution on the basis of foreign corruption allegations alone.[24] U.S. reticence to aggressively enforce the FCPA is understandable when one considers that the statute was the only one of its kind in the world at the time.[25] While taking a bold moral stance to combat bribery globally might be a good public relations move, Congress was sensitive to complaints from U.S. businesses that they were operating at a disadvantage internationally.[26] In an increasingly global marketplace the United States could not 'go it alone' with regard to anti-bribery efforts at these early stages. Instead, it needed international consensus that corruption should be stamped out everywhere.

Three amendments to the FCPA in the 1980s and 1990s reflect Congress's response to U.S. business complaints.[27] The first, the Tax Equity and Fiscal Responsibility Act of 1982, removed the tax penalty for "grease" payments to minor government officials[28] while the second, the Omnibus Trade and Competitiveness Act of 1988, added affirmative defenses to

23. Spalding, *supra* note 6, at 360. For a discussion of the potentially conflicting motivations behind the FCPA, see Davis, *supra* note 22.

24. *See, e.g.*, United States v. Young & Rubicam, Inc., 741 F. Supp. 334 (D. Conn. 1990) (consisting of charges against individuals brought under FCPA and RICO); United States v. Textron, Inc., Cr. No. 79-00330 (D.D.C. 1979), *available at* http://fcpa.shearman.com/?s=matter&mode=form&id=80 (prosecuted under a currency reporting statute instead of the FCPA).

25. *Spotlight: History of the FCPA: How a Tough U.S. Anti-Bribery Act Came to Pass*, PBS (Feb. 13, 2009), http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html ("It was more than 20 years before other countries followed suit and outlawed foreign bribery through the creation of the Organization for Economic Cooperation and Development's Anti-Bribery Convention.").

26. H.R. REP. NO. 100-576, at 916 (1988) (Conf. Rep.).

27. Interestingly, one of the first articulations by the court of the purpose of the FCPA similarly reflects the pro-business bent of the statute's interpretation. The Sixth Circuit held that "the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets, rather than to prevent the use of foreign resources to reduce production costs." Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990).

28. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (codified as amended in scattered sections of 26 U.S.C.); Hines, *supra* note 8, at 5.

FCPA liability, expanded the "grease" payments exception to "routine governmental actions," heightened the *mens rea* requirement to knowing, and directed the DoJ to issue guidance on its enforcement policy.[29] Furthermore, the 1988 amendment formally directed the President to engage in negotiations to encourage other countries to implement anti-corruption statutes,[30] an effort which eventually bore fruit in 1999 when the Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) entered into force. The OECD Convention requires countries to enact implementing legislation criminalizing the bribery of foreign officials in the same way that the country proscribes bribery of domestic officials.[31] In response, the United States amended the FCPA for a third time to extend the statute's jurisdiction to U.S. issuers or domestic concerns "regardless of their nationality."[32] This dramatically expanded

29. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(a)-(c), 102 Stat. 1107, 1415–21 (1988). *See supra* note 5 for an explanation of facilitation payments. *See* RESOURCE GUIDE, *supra* note 5, at 5 (discussing the element of willfulness as applied to companies and individuals). Affirmative defenses include (1) a claim that the payment or gift was lawful under the written laws of the foreign official's country and (2) a claim that the payment was a reasonable and bona fide business expenditure. 15 U.S.C. § 78dd-2(c). For an interpretation of the statute that holds that true extortion is another exception to the FCPA since in that situation the company would lack the requisite corrupt intent, see United States v. Kozeny, 582 F. Supp. 2d 535, 537–40 (S.D.N.Y. 2008).

30. "It is the Sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved." Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003(d)(1), 102 Stat. 1107, 1424 (1988) (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78-ff (2006)).

31. Lucinda Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 PLI/Corp 711, 731–32 (2008).

32. S. REP. NO. 105-277, at 4 (1998). *See* Spalding, *supra* note 6, at 361–62 (referencing the amendment of the FCPA to cover foreign corporations and their employees). Note that domestic concern is defined as "any individual who is a citizen, national, or resident of the United States" or "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of

the scope of the FCPA and brought a raft of international business action under its jurisdiction. In trying to level the playing field, Congress demonstrated its intent that FCPA enforcement not be used to discourage investment in high-risk markets, but rather to adjust competitive dynamics to exclude the distorting influence of bribes.

While expanded jurisdiction under the 1998 FCPA amendments was a critical step leading to the vigorous enforcement of the statute that we see today, it is the compounded interaction of the FCPA with other statutes such as Sarbanes-Oxley and Dodd-Frank along with tough Federal Sentencing Guidelines that has been most significant. Sarbanes-Oxley, passed in 2002, includes provisions on corporate responsibility and accounting oversight and mandates increased transparency through enhanced financial reporting requirements.[33] This increases the probability of detection of corruption and provides an additional basis for enforcement under the FCPA's books and records provisions.[34] The Dodd-Frank Act, passed in 2010, offers a ten to thirty percent bounty to whistleblowers exposing securities fraud.[35] As whistleblowers now have a monetary incentive to provide infor-

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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." 15 U.S.C. § 78dd-2(h)(1) (2011). For a discussion of the ways in which the amendments to the FCPA do not fully conform to the text of the OECD Convention, see Eric J. Smith, *Resolving Ambiguity in the FCPA Through Compliance with the OECD Convention on Bribery of Foreign Public Officials*, 27 MD. J. INT'L L. 377, 392–95 (2012).

33. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 101, 301–02, 401–09, 116 Stat. 745, 750–53, 775–78, 785–91.

34. *The Legal Obligation to Maintain Accurate Books and Records in U.S. and Non-U.S. Operations*, JONES DAY (Mar. 2006), *available at* www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=3210 ("[Sarbanes Oxley provisions] place responsibility for detecting fraudulent behavior and inadequate recordkeeping squarely in the laps of those occupying the highest levels of management. In response . . ., certifying officers are demanding greatly enhanced scrutiny of the adequacy of internal controls and procedures and other fraud-prevention measures, the natural consequence of which is an increase in the number of FCPA violations discovered internally and self-reported to regulators.").

35. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, § 922(a), 124 Stat. 1376, 1841–48 (2010). To be eligible for an award under the SEC whistleblower program, a whistleblower must: (1) voluntarily provide the SEC (2) with original information that (3) leads to the successful enforcement by the SEC of a federal court or administrative ac-

mation to the SEC, the probability of detection of corruption is likely to increase along with increased compliance costs as companies investigate frivolous claims chasing the bounty.[36] Finally, the 2004 amendments to the Federal Sentencing Guidelines provide substantial new details regarding the U.S. government's view of an "effective compliance program,"[37] which increases ongoing corporate costs and influences a company's decision to self-disclose. While amendments to the FCPA have been generally pro-business, changes in related statutes have created a regulatory regime that favors the prosecution.

Given this environment, it is unsurprising that enforcement of the FCPA over the last decade has been rigorous. Corruption has received attention from high-level U.S. officials including President Obama and Attorney General Eric Holder.[38] Both the DoJ and the SEC have offices dedicated to enforcement of the FCPA, and staff members in these offices collaborate closely with each other[39] and with international law en-

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tion, (4) in which the SEC obtains monetary sanctions totaling more than $1 million. *Id.*

36. Sara Moss, General Counsel, Estee Lauder, *Panel 3: The FCPA and the UK Bribery Act* (Jan. 27, 2012), *in* 8 N.Y.U. J.L. & BUS. 355, 358 (2012). *See also* Joel Androphy et al., *The Intersection of the Dodd-Frank Act and the Foreign Corrupt Practices Act: What All Practitioners, Whistleblowers, Defendants, and Corporations Need to Know* 59 ADVOC. (Texas) 19, 24 (2012) (describing the incentives provided to whistleblowers who utilize internal compliance mechanisms alongside SEC reporting).

37. Sentencing Guidelines for United States Courts, 69 Fed. Reg. 28,994, 29,022 (May 19, 2004).

38. Lanny A. Breuer, Assistant Attorney General, Criminal Division, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) ("Attorney General Eric Holder described the effect by saying, 'Corruption erodes trust in government and private institutions alike; it undermines confidence in the fairness of free and open markets; and it breeds contempt for the rule of law. Corruption is, simply put, a scourge on civil society.' Indeed, President Obama has said, 'The struggle against corruption is one of the great struggles of our time.'"). *See also* National Security Strategy, White House (2010) at 38, *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (professing a goal to "strengthen[ ] international norms against corruption").

39. Reagan R. Demas, *Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-corruption Initiatives*, 26 AM. U. INT'L L. REV. 315, 333 (2011) ("[T]here is increasing cooperation among law enforcement agencies in the United States.").

forcement agencies.[40] Greater collaboration among anti-bribery officials increases the probability of detection from a company's perspective and encourages companies to voluntarily disclose any improprieties discovered through internal investigations, which is a factor considered when regulators negotiate Non-Prosecution Agreements (NPAs) and Deferred-Prosecution Agreements (DPAs) in the FCPA context.[41] Companies are further incentivized to cooperate with officials in an effort to have 'one bad press day.'

Other regulatory policy decisions have an impact on companies operating in emerging markets. First, the DoJ has announced its intention to focus on specific sectors in a coordinated sweep of those industries most susceptible to corrupt behavior given the depth of government involvement in various stages of the business process.[42] In emerging markets, where

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40. *See* Thomas O. Gorman, *The Siemens FCPA Case: A Record Settlement And A Warning To All*, SEC ACTIONS (Dec. 16, 2008, 5:22 AM), http://www.secactions.com/the-siemen-fcpa-case-a-record-settlement-and-a-warning-to-all (explaining DoJ and SEC coordination with German regulators in the Siemens case, which resulted in a global settlement totaling $1.6 billion in fines, penalties, and disgorgement); Press Release, Dep't of Justice, Florida Businessman Sentenced to 57 Months in Prison for Role in Foreign Bribery Scheme (July 30, 2010), *available at* http://www.justice.gov/opa/pr/2010/July/10-crm-883.html (describing U.S. officials working with Haitian authorities to target participants in the telecom industry); *see also* Amy L. Riella et al., Vinson & Elkins, LLP, *The War on Bribery Goes Global: Recent Developments and Enforcement Trends in the International Anti-Corruption Arena*, BLOOMBERG L. REP. (2011), *available at* http://www.velaw.com/uploadedFiles/VEsite/Resources/WaronBriberyGoesGloball.pdf (examining anti-corruption developments in China and the U.K.). For an argument that international cooperation in anti-corruption efforts was linked to the terrorist attacks of September 11, 2001, see John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 28 (2012).

41. *See* Leslie R. Caldwell et al., Morgan, Lewis & Bockius LLP, *The Foreign Corrupt Practices Act (FCPA) & the Dodd-Frank Act*, MORGAN LEWIS (Mar. 8, 2011), *available at* http://www.morganlewis.com/pubs/FCPAWebinar_Dodd-FrankAct_08march11.pdf (explaining the role of the new cooperation tools and the rise of SEC enforcement). Some analysts have noted a trend toward providing discounts from the Federal Sentencing Guidelines, particularly for those companies that cooperate. *See* SHEARMAN & STERLING LLP, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at x (Jan. 2013) (describing discounts received by companies for their cooperation).

42. *See* Breuer, *supra* note 38 (announcing DoJ's intention to focus on the pharmaceutical and medical devices industry because "nearly every as-

the state takes on greater economic responsibilities to compensate for low capacity in the private sector,[43] companies may be particularly impacted by this policy. Second, "U.S. authorities have repeatedly stated that individuals, as well as corporations, need to be held accountable, a position echoed (or sometimes led) by politicians and commentators."[44] This focus explains why 2011 saw the second-highest total number of individuals and the most non-U.S. individuals charged in FCPA history.[45] High levels of non-U.S. defendants have caused experts to speculate that enforcement decisions reflect U.S. regulators' frustration with other countries' failure to prosecute their own nationals.[46] Since many emerging market countries are not party to the OECD Convention or any other anti-bribery agreement, they will be particularly affected by this policy, as will individuals heading up emerging market divisions.

pect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product may involve a 'foreign official' within the meaning of the FCPA"). *But see* Luke Cadigan et al., K&L Gates LLP, *FCPA and Other Anti-Corruption Concerns Facing Sovereign Wealth Funds*, SOVEREIGN WEALTH FUND INITIATIVE 2 (Apr. 2012), *available at* http://fletcher.tufts.edu/SWFI/~/media/Fletcher/Microsites/swfi/pdfs/2012/FCPA%20KL%20Final.pdf (arguing that although sovereign wealth funds, another target sector for regulators, have high levels of government involvement, they are at less risk of violation since they are more likely to be the recipients of a bribe, which is not prohibited by the FCPA, than they are likely to be the bribe payer).

43. *See* COMM'N ON THE PRIVATE SECTOR & DEV., U.N. DEV. PROGRAMME, UNLEASHING ENTREPRENEURSHIP: MAKING BUSINESS WORK FOR THE POOR 29 (2004), *available at* http://web.undp.org/cpsd/documents/report/english/chapter4.pdf ("Most efforts to address the constraints to sustainable private sector development originate in governments and public development institutions. But the Commission believes that to reach the needed level of change, it is essential to go farther and think about how better to engage the private sector in addressing the development challenge."). Even in countries where private sector capacity is high, the state may take a greater role because of the structure of the economic system as a whole, as in China where state-run companies dominate key industries. *See* Daniel Chow, *China Under the Foreign Corrupt Practices Act*, 2012 WIS. L. REV. 573, 573 (discussing the high number of businesspeople in China who may qualify as foreign officials).

44. SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 2 (Jan. 2012).

45. *Id.*

46. *Id.* ("U.S. authorities want to see enforcement actions by their foreign counterparts and, until they do, they will likely continue bringing actions against non-U.S. individuals.").

Third, the vast majority of FCPA investigations conclude in a settlement that allows the company to neither admit nor deny the alleged corruption.[47] Judge Jed Rakoff criticized this process for undermining the public interest in accountability and assessment of responsibility,[48] which prompted the SEC to change its policy. The Division of Enforcement for the SEC announced that it modified the settlement language to delete the "neither admit nor deny" assertions in cases involving criminal conviction where the defendant has admitted violations.[49] While hopefully the new policy will ameliorate this problem, the previous policy's failure to establish the facts through either admission or by trial is particularly harmful to emerging markets. In those countries, where officials often lack the capacity and resources to conduct an extensive investigation of their own, it is helpful to be able to piggyback on foreign regulator's efforts.[50] Each of these regulatory policy decisions impacts corporate decision-making following an FCPA enforcement action and informs a company's decision to divest. The statute's impact on emerging markets must be

47. Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 689 ("Most enforcement actions brought against firms under the U.S. Foreign Corrupt Practices Act (FCPA) are resolved via a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA)." These agreements do not result in a full exposition of the facts the way a trial would.). The FCPA also provides for settlement by declination and by civil action for injunctive relief. 15 U.S.C. § 78dd-2(d)(1); RESOURCE GUIDE, *supra* note 5, at 75, 77. However, civil action seems to be the least favored option as the last of these was in 2001 against KPMG's Indonesian affiliate and the DoJ and SEC *Resource Guide* fails to mention it as a potential settlement option. SHEARMAN & STERLING LLP, *supra* note 41, at viii.

48. U.S. S.E.C. v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011) ("[T]he S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if it fails to do so, this Court must not, in the name of deference or convenience, grant judicial enforcement to the agency's contrivances.").

49. Robert Khuzami, *Public Statement by SEC Staff: Recent Policy Change,* U.S. SEC. & EXCH. COMM'N (Jan. 7, 2012), http://www.sec.gov/news/speech/2012/spch010712rsk.htm ("[T]he new policy . . . eliminates language that may be construed as inconsistent with admissions or findings that have already been made in the criminal cases.").

50. *See* Amir N. Licht, *David's Dilemma: A Case Study of Securities Regulation in a Small Open Market,* 2 THEORETICAL INQUIRIES IN LAW 673, 676–80 (2001) (providing an example of how foreign market regulators can benefit from the regulatory standards set by larger markets such as the United States).

understood within this greater context, and the theories reconciling the empirical findings described in Parts II–III below should be evaluated with this in mind.

II. Existing Empirical Research

The links between corruption, economic growth, and development have been of interest to political scientists and economists for some time.[51] Since the FCPA stood alone in its efforts to combat bribery of foreign officials for nearly twenty-five years, there was initial interest in measuring the impact of the legislation on global markets.[52] With the recent trend toward more rigorous enforcement, there is a renewed interest in assessing the statute's repercussions. I first review macroeconomic studies that have been used to support the assertion that the FCPA diminishes investment in high-risk countries abroad. Next, I turn to firm-level analyses that draw into question the broad conclusions offered by the macroeconomic results. Since the methodology in each study differs slightly, none of these can be said to conclusively refute the findings of prior studies. However, their conflicting implications for predicted company response motivate my new firm-level study presented in Part III.

Macroeconomic studies regarding the impact of the FCPA were motivated primarily by critiques from the business community. Correspondingly, the studies confirmed companies' impressions that they were competitively disadvantaged in foreign markets. One of the earliest and most influential empirical studies concluding that the FCPA had a negative impact on foreign direct investment (FDI) was conducted by James

51. *See, e.g.*, William D. Bollan, An epistle from Timoleon to all the honest free-holders, and other electors of members of Parliament: wherein the great mischief and danger of corruption are set forth and proved from its operations in Greece and Rome 5 (London, W. Owen 1768) (discussing the corruption present and how it cannot promote their society's advancement).

52. *See, e.g.*, Kate Gillespie, *Middle East Response to the U.S. Foreign Corrupt Practices Act*, 29 Cal. Mgmt. Rev. 9, 9 (1987) (discussing the concerns various parties had over the impact of the FCPA on U.S. interests abroad); John L. Graham, *The Foreign Corrupt Practices Act: A New Perspective*, 15 J. Int'l Bus. Stud. 107, 107 (1984) (arguing that the FCPA has had no negative effect on the American export industry).

Hines.[53] Focusing on a firm's cost structure, Hines argued that the FCPA raised the cost of doing business in corrupt foreign countries, which changes the relative attractiveness of investment in this area and causes a reduction in FDI.[54] His regression assumes that growth in U.S. FDI into a particular country is a function of the host country's GDP growth, inward FDI from other countries, and the host country's level of corruption.[55] Comparing the coefficients, Hines concludes that "American FDI grew more rapidly after 1977 in the less-corrupt countries than in the corrupt countries, after controlling for GDP growth and total FDI."[56] While others have found similar results by studying exports,[57] Alvaro Cuervo-Cazurra used data on bilateral inflows to 103 host countries to conclude that U.S. investment abroad was not deterred by host country corruption until after the OECD Anti-Bribery Convention.[58] While there were some empirical studies that challenged these results,[59] the assertion based on macroeconomic studies was

53. Hines, *supra* note 8, at 6.

54. *Id.*

55. *Id.* at 6–7.

56. *Id.* at 10.

57. Paul J. Beck, Michael W. Maher & Adrian E. Tschoegl, *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 MANAGERIAL & DECISION ECON. 295, 301 (1991) (finding that the FCPA has had a negative effect on U.S. exports to non-Latin American countries where they do not have a comparative advantage due to geographic proximity); Johann Graf Lambsdorff, *Corruption in Empirical Research—A Review*, 8 (Nov. 1999), *available at* http://www.icgg.org/downloads/contribution05_lambsdorff.pdf (finding by empirical study that U.S. companies have lower market share in corrupt countries because of those exporters' unwillingness to offer bribes due to concerns about the FCPA).

58. Cuervo-Cazurra, *supra* note 8, at 646 ("Before the OECD Anti-Bribery Convention U.S. investors were not more sensitive to host country corruption than other investors, as found in other studies. However, after the OECD Anti-Bribery Convention U.S. investors became more sensitive . . . [and] reduced their FDI in corrupt countries."); *see also* Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUD. 807, 818 (2006) (correlating anti-bribery laws with reduced FDI in countries with high levels of corruption).

59. *See* Wei, *supra* note 12, at 305 ("FDI flows from the United States were not statistically different from those from other source countries in terms of their degree of aversion to host-country corruption."); Gillespie, *supra* note 52, at 20 (arguing that the FCPA did not significantly reduce U.S. business activity in Middle Eastern countries, since much of the post-1977 decline in U.S. export shares in the region can be explained by other events); David

that the FCPA had a negative impact on investment in countries perceived to be corrupt.

A different picture emerges, however, from firm-level empirical studies that ask company managers about the impact of the FCPA on their business. Mary J. Sheffet conducted a survey of Chief Legal Counsels of Fortune 500 companies and concluded that "though some corporations did change their codes of ethics and/or conduct and their sales and marketing practices, the majority of responding firms did not consider the changes they made to be major."[60] More recently, a survey conducted by the European Bank for Reconstruction and Development found that "[U.S. companies] are not less likely to undertake FDI in corrupt economies than firms from other source countries"[61] but that corrupt countries attract less foreign investment overall.[62] Thus, the firm-level surveys do not

Wheeler & Ashoka Mody, *International Investment Location Decisions: The Case of U.S. Firms,* 33 J. INT'L ECON. 57, 72 (1992) (finding no significant correlation between the capital expenditures by majority-owned foreign affiliates of U.S. companies, and a country's risk factor (which included corruption)); Graham, *supra* note 52, at 108, 118 (finding that the FCPA did not negatively affect the United States' share of imports to those countries where improper payments are common practice); *see also* U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES: IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 16 (1981), *available at* http://www.gao.gov/assets/140/132199.pdf (finding that given the sensitive nature of the bribery subject and "numerous factors affecting overseas business," claims that U.S. companies have lost sales are difficult to substantiate).

60. Mary Jane Sheffet, *The Foreign Corrupt Practices Act and the Omnibus Trade and Competitiveness Act of 1988: Did They Change Corporate Behavior?*, 14 J. PUB. POL'Y & MARKETING 290, 299 (1995). "[T]he results of this study suggest that, contrary to what American businesses predicted, the costs of compliance with the FCPA . . . [has] not made it impossible for U.S. corporations to compete abroad." *Id.* at 297.

61. Smarzynska & Wei, *supra* note 9, at 3. Smarzynska and Wei's findings are in line with Hines's contention that U.S. firms behave differently from firms in other countries in that they are "more averse to joint ventures in more corrupt host countries." *Id.* at 13. A similar result emerges from a 2010 KPMG study finding that while 70% of the respondents agree "there are places in the world where business cannot be done without engaging in bribery and corruption," only 28% have chosen not to do business in a country as a result. KPMG, GLOBAL ANTI-BRIBERY AND CORRUPTION SURVEY 2011, at 18 (2011).

62. Smarzynska & Wei, *supra* note 9, at 11. For other studies concerning companies' choice of entry mode in foreign markets see Magnus Blomstrom & Mario Zejan, *Why Do Multinationals Seek Out Joint Ventures?*, 3 J. INT'L DEV.

reflect the drastic change in business practices that companies initially complained would follow enactment of the FCPA.[63] Nor do they seem to indicate the full-scale retreat from high-risk countries that macroeconomic studies would predict. Lacking a clear view of the statute's impact, further analysis is warranted.

Along this line, Andrew Spalding adopted a different empirical approach to firm-level study. He "compiled a list of countries in which alleged acts of bribery formed the basis of either a finding of liability in a civil action, a conviction in a criminal action, or a settlement of either"[64] under the FCPA. After coding each alleged violation into one of three categories according to the level of development of the countries in which the alleged violation took place, he found that "68% of the total [enforcement actions]—have occurred in emerging markets, as defined today by S&P [Standard & Poor's]."[65] He concluded that this frequency emulated a sanction on emerging markets because the likely deterrent effect of FCPA enforcement would lead to the withdrawal of FDI in those countries.[66] However, my firm-level study looks specifically at those companies that have been through an enforcement action and finds that most of them continue to do business in the implicated country, thus diminishing the sanctioning effect that

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53 (1991) (studying characteristics of Swedish firms that have sought joint ventures and those that have not); Bruce Kogut & Harbir Singh, *The Effect of National Culture on the Choice of Entry Mode*, 19 J. INT'L BUS. STUD. 411 (1988) (examining the effect of culture on the mode of entry for foreign investment); Elisabeth Asiedu & Hadi Salehi Esfahani, *Ownership Structure in Foreign Direct Investment Projects* (Univ. of Ill., Office of Research, CIBER Working Paper No. 98-108, 1998), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=152570 (studying "the role of firm, industry, and country characteristics in ownership structure").

63. *See, e.g.*, Jack G. Kaikati & Wayne A. Label, *American Bribery Legislation: An Obstacle to International Marketing*, 44 J. MARKETING 38, 42 (1980) (discussing how bribery legislation has harmed the international competitiveness of American firms); *Bribes and Business: U.S. Firms Say '77 Ban on Foreign Payoffs Hurts Overseas Sales*, WALL ST. J., Aug. 2, 1979, at 1 (detailing complaints by firms that their overseas sales have suffered as a result of being unable to pay foreign officials).

64. Spalding, *supra* note 6, at 374.

65. *Id.* at 375.

66. *Id.* at 377.

Spalding presumes.[67] This Note's new firm-level analysis described in Part III below seeks to contribute to the quest to understand the ways the FCPA is impacting company decision-making with regard to investment abroad.

III. New Firm-level Analysis

As Part II illustrates, the conclusions drawn from empirical studies differ according to whether the researchers use macroeconomic indicators or firm-level indicators. While both types of analysis may be valuable for different reasons, recent enforcement trends will complicate the former. Most notably, given the expanded jurisdiction of the FCPA to include foreign companies that are U.S. issuers[68] and non-U.S. persons when the conduct takes place "while in the territory of the United States,"[69] it is no longer relevant to look only at the impact of FCPA enforcement on FDI from the United States. Adjusting macroeconomic statistics to be commensurate with an ever-changing interpretation of FCPA territorial jurisdiction over non-U.S. companies would be cumbersome and subjective. Macroeconomic studies suffer from additional drawbacks in that they have difficulty controlling for other factors that impact FDI to a given country such as the host country's expected growth opportunities in a given industry or favorable tax breaks and development zones designed to attract foreign firms. Furthermore, FDI is an imperfect measure of the myriad ways corruption can impact a business: causing it to forego bidding on a host government contract or hiring numerous compliance officers who monitor overseas offices. Accordingly, a more nuanced firm-level analysis of the impact of the FCPA is appropriate.

67. Although Spalding's definition of sanction includes both withdrawal and threat of withdrawal, he draws on the studies by Hines and Cuervo-Cazurra which argue that FDI has decreased as a result of the FCPA. *Id.*

68. An issuer is a company that "(1) is listed on a national securities exchange in the United States (either stock or American Depository Receipts); or (2) the company's stock trades in the over-the-counter market in the United States and the company is required to file SEC reports." Resource Guide, *supra* note 5, at 11.

69. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 104A, 112 Stat. 3302, 3306 (1988). *See supra* notes 32–34 and accompanying text (describing the expanded jurisdiction of the FCPA).

However, existing firm-level studies face their own limitations, most notably in that they rely on self-reported figures obtained through surveys. Corruption is a notoriously difficult thing to measure and analyze.[70] Although the most common definition of corruption is the misuse of public authority for private gain, there is debate about how one ascertains that this has occurred.[71] Alternative definitions include violations of legal codes, violations of public interest as measured by public opinion, and misallocation of scarce resources.[72] An example of a definition highlighting market interaction states that corruption is "an arrangement that involves an exchange between two parties (the 'demander' and the 'supplier') which: (1) has an influence on the allocation of resources either immediately or in the future; and (2) involves the use or abuse of public or collective responsibility for private ends."[73] But even within the market-focused realm there is space for disagreement, as "what look like corrupt local preferences might turn out to be efficient price discrimination, what look like market distorting interventions might compensate for a variety of market failures."[74] Thus, it is difficult to draw generalizable conclusions about the impact of corruption on business decisions from the survey-based studies when the definition itself is fraught. The existing firm-level studies are further limited in terms of their scope in that they require a response from a sufficiently senior officer who is willing to disclose corporate policy on the company's international operations. Also, the studies thus far have only focused on companies with considerable overseas operations[75] and so fail to capture the impact of the statute on firms deterred from investing abroad by a fear of corruption. Thus a

70. *See supra* note 1 (discussing complications in measuring corruption).

71. *See* Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Measuring Corruption: Myths and Realities*, WORLD BANK 1 (2006), *available at* http://www1.worldbank.org/publicsector/anticorrupt/corecourse2007/Myths.pdf ("[There is] debate on how best to measure corruption and monitor progress in reducing it.").

72. Gillespie & Okruhlik, *supra* note 1, at 77.

73. Chuck C. Y. Kwok & Solomon Tadesse, *The MNC as an Agent of Change for Host-Country Institutions: FDI and Corruption*, 37 J. INT'L BUS. STUD. 767, 767 (2006).

74. David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455, 463–64 (1999).

75. *See* Sheffet, *supra* note 60, at 294 (excluding from the author's dataset those companies that lacked "major international operations"); Smarzynska

more attractive measure of the impact of the FCPA would be an observable response independent from the company's self-reported impressions, yet more granular than macroeconomic statistics that fail to capture the company's decision-making processes in sufficient detail.

This Note's new firm-level analysis responds to this need through an empirical study of companies that have been subject to FCPA enforcement. The focus on companies that have been through an enforcement action is justified because although the macroeconomic studies would lead one to expect companies of all types would be similarly deterred, it is these companies that have undisputedly been impacted by the statute, allowing one to draw a relatively direct line between the statute and the company response.[76] Furthermore, this study measures the observable company response of either continued investment or divestment from a given country known by the company to be corrupt.[77] My hypothesis is that, contrary to the anti-FCPA assertion that companies' disadvantage in foreign markets leads them to withdraw, the opportunities offered by high-risk emerging markets are sufficient to convince most companies to continue to operate there even after receiving a sanction from alleged violation of the FCPA in that country. Consistent with my hypothesis, my findings suggest that over 70% of the time a company continues to do business in the implicated country.

My test of this hypothesis is organized into four subparts. First in Subpart A, I explain the methodology of the study and justify the selection of the case study. I focus on cases where the company was sanctioned rather than cases against individ-

& Wei, *supra* note 9, at 8 (specifically questioning firms about their investment in Eastern Europe and the former Soviet Union).

76. In order to measure the impact of the statute on the business community writ large, one would need a control group of companies operating in these countries that have not been subject to an enforcement action, or even better, are not subject to the jurisdiction of the FCPA or any other anti-bribery statutes. Another potential control would be to posit the counterfactual situation if the company had not been caught in the corrupt action. Without these controls, the findings of my firm-level study may be limited in their predictive value.

77. As my study only concerns the observable stay/leave response, it fails to capture any increase or decrease in the level of investment in a given country. To provide even greater nuance, further studies should explore the relative magnitude of foreign investment following an enforcement action.

uals since the corporate cost is more easily comparable than valuing a person's subjective response to time in jail. Subpart B expounds on the theoretical analysis of a company's divestment decision and puts forward a rational actor model in which companies will continue to invest so long as the expected benefits outweigh the costs of continued operation. Next in Subpart C, I present a few high-level findings illustrating that in most instances companies do not withdraw from the countries where they were sanctioned. Nor do these companies generally refrain from investing in other emerging markets or display other signs that they have been deterred from high-risk countries generally. Though only a few of the variables I measured were statistically significant in predicting a company's decision in a given country, the study suggests opportunities for further research. One notable weakness to the design of my firm-level study is that it measures only the statute's impact on the firms who have been sanctioned and does not capture the deterrent effect of FCPA proceedings on firms that have not been prosecuted. To ameliorate this weakness slightly, I explore in depth one company from the dataset that is most likely to divest given cost-benefit analysis (implying that costs of continued investment are high while benefits are low). While this case study is meant to be illustrative only, it presents insights into a firm's decision-making processes and includes a discussion of the subject firm's competitors that have not been prosecuted under the FCPA yet are subject to its jurisdiction. Comparing these otherwise similar firms may illuminate how the FCPA can impact competitive dynamics abroad. Both the statistical analysis and the case study are then compared to existing empirical research to explore theoretical reconciliations of the findings and related policy recommendations in Part IV.

A. *Justification of Firm-level Data Set*

Conveniently for purposes of this study, information on enforcement actions under the FCPA is readily available on both the DoJ and the SEC websites.[78] Information provided

78. *See Foreign Corrupt Practices Act*, UNITED STATES DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Jan. 29, 2012); *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Jan. 29, 2012) (providing information on FCPA enforcement).

includes the press release announcing the resolution of a given matter as well as additional material such as the complaint and litigation release announcements. From these sources, I was able to compile a dataset of each company that went through enforcement proceedings related to the statute's anti-bribery, books and records, conspiracy, and internal controls provisions between 2000 and 2010.

1. *Chosen Time Frame*

The time frame chosen for this study is 2000 to 2010, resulting in sixty-five enforcement actions against companies taking into account the adjustments described below. Since many of the enforcement actions concern more than one country, the dataset is comprised of 174 observations (a pairing of a company and an implicated country), which provides a significant yet manageable sample from which to investigate trends and relationships. As Spalding's study indicates, most of these implicated countries are emerging markets, but my dataset includes company divestment decisions even from developed countries. Decisions from developed countries serve as a built-in control group to analyze the differences in company response according to a country's perceived corruption level. Although more recent information is available on matters resolved in 2011 and 2012, I excluded these cases because it may be premature to gauge the company's reaction to such a recent event. Studies have found that a variety of factors inform a company's decision to release information.[79] Therefore the lack of an immediate announcement that the company is divesting from a country may reflect other timing concerns rather than a decision not to divest. Although it is possible that timing factors continue to have an impact on company announcements from enforcement proceedings resolved in 2010, this is less likely as over two years have passed since the matters' resolution until the time of analysis in early 2013.

Other cases that have been excluded are those that are currently pending resolution. Most FCPA enforcement actions proceed over several years and involve lengthy investigations

79. *See* John Graham & Campbell Harvey, *How Do CFOs Make Capital Budgeting and Capital Structure Decisions?*, 15 J. APPLIED CORP. FIN. 8 (2002) (surveying company managers on strategic decision-making practices).

before they are resolved.[80] Therefore, while companies at pre-resolution stages may have a notion as to a problem's magnitude, the final sanction cannot truly be assessed until the matter is resolved. Pre-resolution cost-benefit analyses of divestments are thus uncertain, and so it is prudent to analyze only matters that have been fully resolved.

In addition, the handful of enforcement actions prior to 2000 has been excluded from the dataset for three reasons. First, many of these companies have undergone several management changes implying that current managers are far removed from the situation and that their decisions regarding country investment are unlikely to reflect an impact from the enforcement proceedings undertaken decades ago.[81] Second, early enforcement of the FCPA was relatively infrequent and less comparable to current enforcement actions following successive waves of amendments to the statute. Finally, there was a logistical hurdle for many of these companies in terms of collecting relevant information that argued in favor of their exclusion. This lack of available information further explains the exclusion of three companies (Omega Advisers Inc., Mercator Corp., and Latin Node, Inc.) from the dataset to avoid the need to estimate or impute missing information.

80. *See, e.g.*, Letter from Denis J. McInerney, Chief, Fraud Section, Dep't of Justice, to Roger M. Witten & Kimberly A. Parker, Wilmer Cutler Pickering Hale & Dorr LLP (July 13, 2011), *available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/armorholdings.pdf (describing meetings between the company and the DoJ held from March 2007 to December 2010 in the matter of *In re* Armor Holdings, Inc.,).

81. *See, e.g.*, United States v. Harris Corp., No. 90-CR-456 (N.D. Cal. filed Aug. 31, 1990); United States v. Int'l Harvester, No. H-82-244 (S.D. Tex. Nov. 18, 1982). Harris Corp has operated under the management of four different CEOs since the time it settled this FCPA enforcement action and the current CEO has been with the company for just over a year. *See William M. (Bill) Brown: President and Chief Executive Officer*, HARRIS (Dec. 6, 2012), http://harris.com/pdf/bios/William_Brown.pdf; Press. Release, Harris, Howard L. Lance Named President and CEO of Harris Corporation (Jan. 20, 2003), *available at* http://harris.com/view_pressrelease.asp?act=lookup&pr_id=1066; Press Release, Harris, Harris Corporation Names Phillip W. Farmer to Succeed John T. Hartley as Chairman and CEO, Effective July 1 (Apr. 28, 1995), *available at* http://harris.com/view_pressrelease.asp?act=lookup&pr_id=275. International Harvester is now part of Case IH and is managed as one of several brands in the larger agricultural equipment company. *History*, CASE IH, http://www.caseih.com/en_us/aboutus/pages/caseihhistory.aspx (last visited June 5, 2013).

2. *Limitation to Company Actions*

As mentioned in Part I, recent FCPA enforcement has witnessed a high number of prosecutions against individuals in part in response to company criticism that vicarious liability has been overextended in this context.[82] Alternatively, this focus may reflect Professor Koehler's notion that individual prosecution is a more effective deterrent:

> For corporate employees with job duties providing an opportunity to violate the FCPA, it is easy to dismiss corporate money being spent on fines and penalties. It is not easy to dismiss hearing of an employee with your same job background being sent to Federal prison for violating the FCPA.[83]

Therefore it may be attractive to analyze the impact of FCPA enforcement against individuals. However, this methodology is dependent upon one's ability to collect information from individual decision-makers not only within the company but also across comparable companies. In fact, to analyze this impact one would need insight into individual responses throughout the entire business community, as the population of potentially impacted decision-makers would extend to anyone with access to the news. Even if senior managers were willing to provide candid information that could put their firms at a competitive disadvantage, this information would be subject to potential cognitive errors of self-reporting and recollection as

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82. *See supra* notes 44–45 and accompanying text (describing the recent focus on individual prosecutions). *See also* Jennifer Arlen, Remarks at the New York University School of Law's Milbank Tweed Forum—Fraud, Bribery, Corruption: Are Corporate Cops Fighting a Losing Battle? (Apr. 4, 2012), *available at* http://www.youtube.com/watch?v=T5GINwRmhQI (characterizing fraud as an agency cost that shareholders bear as a result of individuals acting in their own best interest).

83. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the S. Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 14 (2010) (statement of Mike Koehler, Assistant Professor of Business Law, Butler University); *see also* Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, regarding Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm ("Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing.").

well as the rhetorical complications described above.[84] Furthermore, the cost of an FCPA sanction to a company is less easily quantified in the case of an individual prosecution where the firm is not directly involved.[85] While surely the experience of having one's colleague sent to jail on anti-corruption charges impacts a manager's assessment of the risks involved in doing business in high-risk markets, this impact on corporate culture will be varied by individual factors. Influencing factors might include whether the charged individual was well-respected, whether the firm had expertise in the industry, and the reputation of domestic regulators in the country concerned.[86] These corporate costs may inform remaining managers' decisions on whether to divest from a country but are less predictably or objectively measurable as compared to monetary penalties and independent monitoring costs that the company bears directly.

Given this limitation, my dataset proceeds on the theory that a company's senior managers are impacted by their experience in FCPA enforcement proceedings in their professional capacity. As such they direct the firm's divestment decisions according to a cost-benefit analysis of continued operation in known high-risk countries based on their perception of the expected cost of a future sanction.[87] I assume that parent compa-

84. *See, e.g.*, Jared B. Jobe, *Cognitive Psychology and Self-Reports: Models and Methods*, 12 QUALITY OF LIFE RES. 219 (2003) (describing the variables that impact self-reporting). *See also supra* notes 70–74 and accompanying text (describing rhetorical complications).

85. *See* Yockey, *supra* note 47, at 701–02 (discussing the differences in settlement incentives in individual enforcement actions as compared to company enforcement actions).

86. *See* Andrew S. Boutros & T. Markus Funk, *"Carbon Copy" Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World*, 2012 U. CHI. LEGAL F. 259, 259–60 (2012) (describing the *Halliburton* case wherein the company settled the FCPA charges brought by U.S. officials but the following year Nigerian authorities released a sixteen-count criminal complaint against the company for conduct that mirrored that of the FCPA charges). This potential for follow-on prosecution illustrates the divergent interests of corporations and their officers wherein "if an individual corporate officer is even tangentially involved or implicated in a US-negotiated resolution, that corporate officer—even if not named at all in the resolution—faces potential criminal charges overseas." *Id.*

87. *See* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1297 (2001) (citations omitted) ("'It is difficult

nies exert sufficient control over foreign subsidiaries that divestment decisions can be made at the most senior levels with a view to the company's global operations.[88] Consequently, I consolidate cases against parents and subsidiaries and look at the parent company's decision to divest from all countries associated with sanctions.[89] I also assume that acquiring companies consolidate target businesses to a sufficient degree that post-merger companies' global operations reflect a response

to believe,' says [Robert] Clark, 'that any court would give more than short shrift' to a shareholder's claim asking the corporation to violate the law, even if the shareholder offered clear and convincing evidence that an accurate cost-benefit analysis would show that disobedience would be profitable. Similarly, the restatements and the ALI Principles of Corporate Governance, while non-binding on courts, describe the obligation to obey the law as an important duty of the firm.").

88. *See* Donatelli v. Nat'l Hockey League, 893 F.2d 459, 465–66 (1st Cir. 1990) (describing plus factors of parental control over a subsidiary, including a perceived "agency relationship" or "control . . . greater than that normally associated with common ownership and directorship"). In fact, divestment decisions made at the parent level may be less muddled analytically because "the emotional involvement of the implicated managers of the to-be-divested unit counts for less than it does in domestic divestment cases because these overseas managers are not located where the decision is made and because they are 'foreign' and thus more impersonally perceived . . ." Jean J. Boddewyn, *Foreign and Domestic Divestment and Investment Decisions: Like or Unlike?*, 14 J. INT'L BUS. STUD. 23, 30 (1983).

89. More empirical research is needed to determine the FCPA enforcement trends targeting subsidiaries and parent companies. However, there are a sufficient number of enforcement actions against both subsidiary and parent companies to justify consolidating these actions for analytical purposes. *See, e.g.*, United States v. Alcatel-Lucent France, S.A., No. 1:10-20906 (S.D. Fla. June 2, 2011); United States v. Pride Forasol S.A.S., No. 4:10-cr-00771 (S.D. Tex. Dec. 7, 2010) and United States v. Pride Int'l, Inc., No. 4:10-cr-00766 (S.D. Tex. Nov. 5, 2012); SEC v. Siemens Aktiengesellschaft, No. 1:08-CV-02167 (D.D.C. Dec. 12, 2008) and U.S. v. Siemens S.A. (Arg.), No. 1:08-CR-00368 (D.D.C. Jan. 6, 2009); United States v. Baker Hughes Servs. Int'l, Inc., No. 4:07-cr-00129 (S.D. Tex. May 4, 2007) and SEC v. Baker Hughes, Inc., No. 4:07-cv-01408, 2007 WL 3322098 (S.D. Tex. filed Apr. 26, 2007); United States v. SSI Int'l Far East, Ltd., No. CR 06-398 (D. Or. Oct. 17, 2006) and *In re* Schnitzer Steel Indus. Exchange Act Release No. 54606, 2006 WL 2987067 (Oct. 16, 2006); United States v. DPC (Tianjin) Co., No. CR 05-482 (C.D. Cal. 2005) and *In re* Diagnostic Prods. Corp., Exchange Act Release No. 51724, 2005 WL 1211548 (May 20, 2005); SEC v. ABB Ltd., No. 1:04cv01141 (D.D.C. Nov. 30, 2004) and United States v. ABB Vetco Gray Inc., No. CR H-04-279 (S.D. Tex. 2004); SEC v. Syncor Int'l Corp., No. 1:02CV02421 (D.D.C. Feb. 24, 2003) and United States v. Syncor Taiwan, Inc., No. 2:02-cr-01244 (C.D. Cal. Dec. 10, 2002).

to FCPA enforcement actions against formerly standalone firms.[90] This allows me to test whether the implicated company is currently operating in the country by looking at the new parent company's public information about the location of its facilities. Although the dataset only consists of corporate enforcement actions, it should also be noted that often cases involve both charges against the company and individuals,[91] so much of the corporate impact of individual enforcement proceedings is still captured in this empirical study.

3. *Exclusion of Enforcement Actions Solely Pertaining to Iraq*

This analysis is aimed at exploring the impact of FCPA enforcement on investment in emerging markets. While Iraq would certainly qualify as an emerging market based on GDP and level of development,[92] its economy has been severely distorted by U.S. military operations from 2003 until 2011. Therefore, company investment decisions during this time period are more likely to be driven by expected expenditures by the U.S. Department of Defense than by a view of the attractiveness of the market and business opportunity in a peacetime environment. Furthermore, FCPA enforcement in Iraq was significantly impacted by the Oil for Food scandal in which Saddam Hussein exploited the U.N. program to amass $1.7 billion through kickbacks and surcharges and $10.9 billion through

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90. RESOURCE GUIDE, *supra* note 5, at 28–30. *But see* SHEARMAN & STERLING LLP, *supra* note 41, at viii–ix ("[T]he DOJ agreed to end Pride International's DPA one year early, to reward the company for 'good behavior' in its compliance efforts. This marks the first time the DOJ has terminated a DPA before its term, but the DOJ's motion to dismiss does not provide meaningful clues as to why Pride was singled out for special treatment. . . . [T]he answer may lie in the fact that Pride was acquired by Ensco plc in 2011, and the DOJ has found Ensco's assumption of control and responsibility relevant to determining whether further supervision was necessary.").

91. *See, e.g.*, *Baker Hughes*, 2007 WL 3322098 (in which both individuals and the company were charged); United States v. Nguyen, No. 2:08-cr-00522 (E.D. Pa. Sep. 16, 2010) (in which both individuals and the company were charged).

92. Abdul Abiad et al., *The Rising Resilience of Emerging Market and Developing Economies* 7–8, 38 (Int'l Monetary Fund, Working Paper No. WP/12/300, 2012), *available at* http://www.imf.org/external/pubs/ft/wp/2012/wp12300.pdf (classifying Iraq as an emerging market economy because it is not a member of the OECD nor does it qualify for concessionary IMF loans based on a low-income status).

illegal oil smuggling.[93] The U.N. committee charged with investigating this matter accused nearly half of the 4,500 participating companies of fraud,[94] and the DoJ and the SEC initiated several follow-on enforcement proceedings against these companies. Since this situation represents a significant one-off event, including this situation would skew analysis concerned with companies operating in normalized business environments. Where investigations into businesses operating in Iraq revealed corrupt practices in other countries,[95] however, these instances have been retained as decisions related to these other markets would be subject to generalizable business trends relevant to my analysis.

B. *Divestment Decision Theoretical Analysis*

The prior subsection describes the process of arriving at the relevant set of companies to investigate. However, before commencing the analysis, it is critical to justify the theoretical rationale supporting the hypothesis as to the expected behavior of firms to a given enforcement proceeding. Employing a rational actor model, one would expect that the company would conduct a cost-benefit analysis in making its decision whether to continue operating in or divest from the high-risk country. Therefore, the company would measure the expected benefit of operating in that country and compare it to the expected cost, which would be the product of the probability of detection and the expected size of the sanction.[96] Subsections

93. Sharon Otterman, *Iraq: Oil for Food Scandal*, COUNCIL ON FOREIGN RELATIONS (Oct. 28, 2005), http://www.cfr.org/un/iraq-oil-food-scandal/p7631 (citing a CIA investigation finding).

94. Press Release, Indep. Inquiry Comm. into the United Nations Oil-For-Food Programme, Illicit Oil-For-Food Programme Payments of Nearly $2 Billion to Saddam Hussein; IIC Urges UN Reform (Oct. 27, 2005), *available at* http://www.iic-offp.org/documents/PressRelease27Oct05.pdf ("More than 2000 companies were involved in illicit payments.").

95. *E.g.*, United States v. ABB Ltd., No. 4:10-cr-00665 (S.D. Tex. Sept. 29, 2010); United States v. Daimler AG, 1:10-cr-00063 (D.D.C. Mar. 24, 2010); United States v. Innospec Inc., 10-cr-00061 (D.D.C. Mar. 17, 2010); SEC v. Siemens Aktiengesellschaft, No. 08-CV-02167 (D.D.C. Dec. 12, 2008); United States v. York Int'l Corp., 1:07-cr-00253 (D.D.C. Oct. 15, 2007); SEC v. Textron Inc., No. 1:07-CV-01505 (D.D.C. Aug. 31, 2007) (all enforcement proceedings concerning actions in other countries in addition to Iraq).

96. This basic tenet of law and economics literature is most often associated with Judge Learned Hand's opinion in *United States v. Carroll Towing Co.*,

1 and 2 below describe the specific variables that were measured within each of these three components.

Of course, it is possible that a rational actor model is not appropriate for modeling divestment decisions. Boddewyn, for example, claims that ". . . divestments are seldom strategic: they are rarely related to a pre-planned change in corporate directions; they are usually responses to environmental stimuli that were not anticipated although they could have been . . ."[97] Similarly, Porter considers outside factors termed 'barriers to exit,' including "economic factors (such as, hard-to-sell assets), structural factors (such as, interrelatedness between the unprofitable unit and other parts of the firm), and managerial factors (such as, lack of information, blow to the manager's pride, threat to careers)" that may deter otherwise rational divestment.[98] Specifically relevant in this context, some theorists have highlighted 'other moral factors' that inform company divestment decisions: namely whether the company prefers to simply wash its hands of the corrupt business context (and divest) or to participate in anti-corruption reforms (and continue to operate in the host country).[99] Companies might also act contrary to a rational actor model prescription to save face and maintain their overall corporate reputation. While these

159 F.2d 169, 173 (2d Cir. 1947) ("Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL.").

97. Boddewyn, *supra* note 88, at 27.

98. *Id.* at 26 (referencing Michael E. Porter, *Please Note Location of Nearest Exit: Exit Barriers and Planning*, 19 CAL MGMT. REV. 21 (1976)). However, Boddewyn goes on to say, "Foreign barriers to exit are lower because: (a) most foreign investments are relatively small when compared to their domestic counterparts, at least as far as U.S. multinationals are concerned; (b) the possibility of further geographical diversification (which is always incomplete) and of alternative ways of sourcing (importing, licensing, management contract, and so on) reduces the interrelatedness problems connected with any single foreign investment in the case of multinational firms; and (c) the emotional involvement of the implicated managers of the to-be-divested unit counts for less than it does in domestic divestment cases because these overseas managers are not located where the decision is made and because they are 'foreign' and thus more impersonally perceived (home-country expatriate managers can always be brought back to the parent company or reassigned to some other subsidiary)." *Id.* at 30 (internal citations omitted).

99. A.E. Singer & N.T. van der Walt, *Corporate Conscience and Foreign Divestment Decisions*, 6 J. BUS. ETHICS 543, 549 (1987).

influences may be impossible to rule out, it seems likely that they are diminished in the FCPA enforcement actions considered here since "[d]ivestment decisions can be fairly rational when there is no major time pressure and when specialized units. . . are instructed to scrutinize existing investments on a continuous basis."[100] Since observed divestment decisions occur after corrupt activity has been identified, there is no time pressure to withdraw from the country. Furthermore, the level of scrutiny involved in the company's internal investigation as part of the FCPA enforcement proceeding suggests that significant high-level consideration was given to the decision. Therefore, proceeding under the assumption of a rational actor model is justified.

1. *Expected Benefit of Continued Operation in Risky Markets*

The value a company realizes by operating in a given country varies according to the type of business that is being conducted there.[101] For example, consumer products and manufacturing services operating in China are likely to be motivated by the country's large market and high growth rates. Conversely, companies operating in Nigeria in the oil and gas industry are less interested in the size of the local market since their expectation is to trade oil in international markets.[102] Accordingly, my dataset considers two different variables as relevant factors in estimating the value of the business in the implicated country in order to capture these two dynamics. The first, GDP, seeks to emulate the size of the host market.[103] The

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100. Boddewyn, *supra* note 88, at 29 (citing Bernard Marois, *L'Art de désinvestir*, REVUE FRANÇAISE DE GESTION, May–June 1979, at 13).

101. *See* Wheeler & Mody, *supra* note 59, at 59 ("[T]he weights on location factors [such as host country market size and 'degree of openness'] differ significantly across industries.").

102. Since oil is such a limited resource critical to our modern economy, companies operating in this industry have less flexibility as to where they locate their business. They may thus be willing to accept comparatively more risk of corruption to ensure that they maintain access to the resource. ROBERT J. CARBAUGH, INTERNATIONAL ECONOMICS 309 (8th ed. 2002) ("The pursuit of essential raw materials may underlie a company's intent to go multinational. This is particularly true of . . . certain agricultural commodities.").

103. Smarzynska & Wei, *supra* note 9, at 11 ("[Foreign investors] are attracted to countries with large markets and higher GDP per capita. Distance between investor's country and the host has a negative impact on the probability of FDI."). GDP values are taken from the International Monetary

second, labeled Industry, is a classification variable that takes a value of 0 if the company operates in the natural resource industry or a value of 1 if the company does not.[104] While companies clearly realize value from operation in a given country for a myriad of reasons not captured by access to markets or access to resources,[105] these factors are nevertheless expected to be insightful in predicting a company response according to a cost-benefit analysis.

2. *Expected Cost of Continued Operation in Risky Markets*

The rational actor model would dictate that companies considering divestment would weigh the expected cost of continued operation in risky markets against the value proposition of that market described above. The expected cost in this context is the product of (1) the probability of detection of corrupt activities by FCPA regulators and (2) the expected sanction related to the activities. While neither of these can be definitively measured *ex ante*, there are several factors that logically might contribute to the firm's expected cost estimation and so predict the company's response in a given situation.

With regard to the probability of detection, I measured three variables that would be theoretically related to the risk that regulators would detect corrupt business practices. The first variable was whether a company had been required to adopt a monitor as part of the settlement of its enforcement proceedings.[106] These independent consultants are tasked with assessing the company's compliance procedures to pre-

Fund's *World Economic Outlook Database* statistics for 2012, GDP in current USD. *World Economic Outlook Database*, INT'L MONETARY FUND (Apr. 2012), http://www.imf.org/external/pubs/ft/weo/2012/01/weodata/index.aspx.

104. See Exhibit 1, *infra*, for a tabulation of the minimum, maximum, mean, and standard deviation for these variables across my dataset.

105. *See, e.g.*, CARBAUGH, *supra* note 102, at 308 ("Some [Multinational Enterprises] set up overseas subsidiaries to tap foreign markets that cannot be maintained adequately by export products."); Wheeler & Mody, *supra* note 59, at 72 ("For developing countries, our results suggest the overriding importance of infrastructure development, stable international relations, rapid industrial growth, and an expanding domestic market.").

106. Accordingly, this variable, termed Monitor, is a categorical determination with 1 representing those companies who had a monitor and 0 representing those that did not. See Exhibit 1 for a tabulation of frequency and percentages of observations in each of these categories.

vent future fraud and so should increase the likelihood of detection. Second, I factored in whether the company was from a country that ranked high on Transparency International's Bribe Payers Index.[107] This was based on the theory that the perception that companies from a given country are more likely to pay bribes would increase the DoJ's and the SEC's scrutiny and therefore the probability of detection of any corrupt practices.[108] Third, I considered whether the company is a U.S. issuer, since the reporting requirements resulting from Sarbanes-Oxley and Dodd-Frank increase transparency and provide a basis for DoJ and SEC jurisdiction. As a result, U.S. issuers would face a higher probability of detection.[109]

The second component of expected cost in the rational actor model is the value of the future sanction itself. The anti-bribery provisions carry both criminal and civil penalties, the FCPA provides for penalties of up to $2 million for non-natural persons and for civil penalties of up to $100,000 in an action brought by the Attorney General,[110] and the Alternative Fines Act provides for a fine of $500,000 for this felony (or up to twice the amount of gross gain).[111] Furthermore, violations

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107. The TI Bribe Payers Index evaluates the supply side of corruption—the likelihood of firms from the world's industrialized countries to bribe abroad. *Bribe Payers Index: Overview*, TRANSPARENCY INT'L, http://www.transparency.org/policy_research/surveys_indices/bpi (last visited Apr. 13, 2013). Countries are scored 1–10, where a maximum score of 10 corresponds with the view that companies from that country never bribe abroad and a 0 corresponds with the view that they always do. Figures used are from 2011 and the variable is named BPIndex. See Exhibit 1 for a tabulation of the minimum, maximum, mean, and standard deviation for this variable across my dataset.

108. The rationale for this theory is provided by the regulators' own guidance, in which they encourage companies to conduct risk assessment of a given counterparty and to focus their anti-corruption efforts on those perceived to be the highest risk. *See* RESOURCE GUIDE, *supra* note 5, at 58–59 ("[P]erforming identical due diligence on all third-party agents, irrespective of risk factors, is often counterproductive, diverting attention and resources away from those third parties that pose the most significant risks.").

109. *See supra* Part I (describing the implications of Sarbanes-Oxley and Dodd-Frank on enforcement and the books and records provisions of the FCPA). This variable, termed Issuer, is a categorical determination with 1 representing those companies who qualify as U.S. issuers under the statute and 0 representing those that do not. See Exhibit 1 for a tabulation of frequency and percentages of observations in each of these categories.

110. 15 U.S.C. § 78dd-2(g).

111. 18 U.S.C. § 3571 (2011).

of the accounting provisions carry penalties of up to $25 million in fines for criminal liability and $500,000 per offense for civil penalties[112] along with the potential for "SEC injunctive actions, civil penalty actions, [and] equitable remedies, such as 'disgorgement' of profits and administrative proceedings."[113] Throughout this Note I refer to this raft of potential fines and penalties paid by the company collectively as a sanction. In practice, the amount of an FCPA sanction is driven by a multiplicity of factors including the value of business gained through improper means, the amount of the payments made, and other discretionary factors such as cooperation with regulators.[114] As each of these is highly fact-dependent, *ex ante* estimations of future sanctions can only be made through proxy variables based on past performance—namely, the company's previous sanction. Accordingly, I selected one variable that tracks the pervasiveness of corruption in a given country where the company received the sanctioned action as stipulated by Transparency International's Corruption Perceptions Index.[115] While the level to which a country is perceived to be corrupt does not directly impact the size of the sanction, it does suggest the pervasiveness of corruption and thus a company's ability to avoid paying a bribe. Second, I considered whether the company had already been through multiple enforcement actions within my dataset's time period. This demonstrated susceptibility to alleged violations of the FCPA exhibits a failure of remediation following the first sanction

112. 15 U.S.C. §§ 78u(d)(3)(B)(iii), 78ff(a) (2011).

113. Carl Pacini, *The Foreign Corrupt Practices Act: Taking A Bite Out of Bribery in International Business Transactions*, 17 FORDHAM J. CORP. & FIN. L. 545, 582 (2012).

114. Sentencing Guidelines for United States Courts, 69 Fed. Reg. 28,994, 29,018–19 (May 19, 2004). *See also* RESOURCE GUIDE, *supra* note 5, at 68–72 (discussing how regulators determine FCPA sanctions).

115. Transparency International's Corruption Perceptions Index is the best known of its tools. First launched in 1995, it has been widely credited with putting the issue of corruption on the international policy agenda. The CPI ranks almost 200 countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys. *Corruption Perceptions Index*, TRANSPARENCY INT'L, http://www.transparency.org/research/cpi/overview (last visited Apr. 13, 2013). This variable, termed CPI in my dataset, reflects the 2012 score for a given country within a range from 0–100. See Exhibit 1 for a tabulation of the minimum, maximum, mean, and standard deviation for this variable across my dataset.

and continued inadequacies of internal controls.[116] Since a "corporation's history of similar misconduct"[117] is a factor in negotiating a plea with the regulators, firms which are repeat players are likely to suffer a higher penalty.

Before presenting the results of this analysis, it is important to note the other costs related to FCPA enforcement that are not captured by the amount of the sanction itself. As with any regulation, the cost to companies increases even absent any wrongdoing since companies will employ compliance officers to monitor business operations and investigate any allegations of foreign bribery.[118] Similarly, the cost of merger and acquisition activities increases as companies conduct more thorough due diligence to mitigate risks of successor liability from the targets' malfeasance.[119] If a violation or potential weakness is uncovered, the company must pay costs to remediate the issue even aside from any imposed monitor required by a settlement. Furthermore, although the FCPA does not provide for a private right of action, disclosure of a violation could lead to private shareholder litigation for fraud or breach of fiduciary duty or to follow-on enforcement by domestic regulators in host countries,[120] not to mention causing the company to suffer reputational costs that may hinder its ability to win business in the implicated country in the future or may impact

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116. Accordingly, this variable, termed Repeat, is a categorical determination with 1 representing those companies who have been subject to more than one enforcement action and 0 representing those that have not. As with other observations in the dataset, conduct of subsidiaries is attributed to the parent and conduct of formerly standalone companies is imputed to the successor company. See Exhibit 1 for a tabulation of frequency and percentages of observations in each of these categories.

117. RESOURCE GUIDE, *supra* note 5, at 53.

118. *See The Bloodhounds of Capitalism*, ECONOMIST, Jan. 5, 2013, at 47 (describing how corporate compliance departments often bring corporate detectives in to assist their own investigations to ensure compliance with the FCPA).

119. RESOURCE GUIDE, *supra* note 5, at 62.

120. *See* Weston C. Loegering, Joshua S. Roseman & Samantha Cox, *The Hidden Costs of Bribery,* 59 ADVOC. (Texas) 8, 9 (2012) ("Enterprising plaintiffs have filed derivative lawsuits, securities fraud actions, tort and contract law claims, employment lawsuits, and private actions under the Racketeer Influenced and Corrupt Organizations (RICO) Act all stemming from FCPA-related disclosures.").

its stock price at home.[121] As many of these costs are difficult to estimate and would likely be incurred regardless of the time or place of violation, they are excluded from the analysis as a sort of fixed cost of doing business in risky markets. It is important to note, however, that the presence of these additional costs motivates many of the business complaints about the FCPA.

C. *Statistical Results Imply Continued Investment in Implicated Countries*

Executing the methodology described above, I hand collected data to measure the company response[122] in each of the individual countries where it faced a sanction for its conduct. In order to qualify as continuing to operate, the company must maintain a facility or office location in the country.[123] This adds a conservative gloss to my analysis in that companies might still be interacting with customers in an implicated country through a subsidiary based in a different country, which could open them up to risk of a corruption violation, yet they would not be captured by my study. I chose to limit my analysis to facility locations of the parent or subsidiaries because this would be included in FDI (unlike purely sales figures) and so is more comparable to many of the existing macroeconomic studies.[124] Despite this conservative bent, the

121. *See* Karpoff et al., *supra* note 11, at 24–30 (analyzing the indirect costs of bribery enforcement actions).

122. The variable measuring response, termed Response, is a categorical variable wherein a value of 1 is given if the company continues to operate in the country and a value of 0 is given if it has divested.

123. Where the location of facilities was not clear from the company website, I referenced Exhibit 21 of the company's 10-K filings for a list of subsidiaries or equivalent lists for foreign issuers where available.

124. FDI is defined as "a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor." ORG. FOR ECON. CO-OPERATION & DEV., OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT 17 (4th ed. 2008), *available at* http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf. "Direct investment enterprises are corporations, which may either be subsidiaries, in which over 50% of the voting power is held, or associates, in which between 10% and 50% of the voting power is held, or they may be quasi-corporations such as branches which are effectively 100% owned by their respective parents." *Id.* "[T]he direct investment position can be viewed as financing the portion of the

results of the study indicate that 70% of the time companies continue to operate in the implicated country.[125] In addition, in all but two instances these companies continue to operate in other emerging markets,[126] suggesting that the enforcement action is not deterring them from high-risk countries more generally.[127] This supports my hypothesis that companies who have been through FCPA enforcement actions are not necessarily pulling out of high-risk countries. Instead, they are generally continuing to invest in the country, though likely with greater oversight and internal controls.

Although the overall results support my hypothesis, few of the predictive factors measured as part of the cost-benefit analysis prove to be statistically significant. In order to assess whether these variables influence the observed response, I ran a probit regression in Stata which models the inverse standard normal distribution of the probability as a linear combination of the predictors.[128] The function is as follows:

$$\Pr(\text{Response} = 1) = f(ß_{1GDP}, ß_{2Industry}, ß_{3Monitor}, ß_{4BPIndex}, ß_{5Issuer}, ß_{6CPI}, ß_{7Repeat})$$

The likelihood ratio chi-square of 61.56 with a p-value of 0.0001 indicates that the model as a whole is statistically significant (i.e. is better than a model with no predictors), but using a p-value of 0.05 for the individual variables shows that only GDP, Monitor, and BPIndex are statistically significant.[129] To understand the significance of these variables I ran marginal analysis to isolate the effects of each one independently (hold-

'other' assets of the enterprise [ ] that is not financed by other investors and lenders. Included among these 'other' assets would be tangible assets, such as plant, equipment, and inventories; intangible assets, such as patents and copyrights; and financial claims—both equity and debt—on entities other than the direct investor." *Id.* at 127.

125. *See infra* Exhibit 2.

126. I use the term "emerging market" as defined by Standard & Poor's. *See S&P Dow Jones Indices' Country Classification Consultation: Feedback Requested by October 1, 2012*, S&P DOW JONES INDICES (Aug. 2012), http://us.spindices.com/documents/index-policies/SP_Dow_Jones_Country_Classifications_Consultation.pdf.

127. *See* Exhibit 3.

128. Stata Data Analysis Examples: Probit Regression, INST. FOR DIGITAL RESEARCH & EDUC., UCLA, http://www.ats.ucla.edu/stat/stata/dae/probit.htm (last visited Feb. 23, 2013).

129. *See* Exhibit 4.

ing all other variable to their means). I find that as a country's GDP increases from \$0 to \$250 billion, the likelihood of a company continuing to operate there increases by 12.4%. An increase from \$250 billion to \$500 billion of GDP increases the likelihood of continued operation by 11.5%, and growth in GDP from \$500 billion to \$750 billion increases the probability by 9.7%. The marginal impact is diminishing such that once a country has achieved a GDP of \$1,750 billion the marginal increase to \$2,000 billion only increases the likelihood of a company that has been subject to an enforcement action continuing to operate there by 1.0%.[130] This positive correlation is intuitively rational in that companies are less likely to forgo the value potential of operating in a large foreign market, even if it is corrupt. However once a country's GDP reaches a sufficiently large size, a company doesn't treat the incremental value as significant in its decision-making. For example, if India were to expand from its current GDP of \$1,779 billion to a GDP of Russia's size, \$2,022 billion, that increase would not play a significant role in a company's divestment decision.

The Monitor variable is statistically significant but does not exhibit the relationship that one would predict. The average company that was required to employ an independent monitor following the first enforcement action was 11.1% more likely to continue operating in the implicated country, all else equal, than one that had no monitor. While the rational actor model would predict that the existence of a monitor would increase the probability of detection of corrupt action and therefore deter a company from continued operation in high-risk countries, this is not the observed response. Instead, one could intuit that companies with a monitor in place seem more comfortable with the risk of these markets, because they have come to understand them well through the internal investigation process. This finding also lends support to the negotiation theory discussed below in which a company sanctioned for conduct in a given country now has superior bargaining power to refuse to offer a bribe to foreign officials in that country; thus continued operation is relatively more valuable.[131]

130. *See* Exhibit 5.
131. *See infra* Part IV-B-3.

The third statistically significant variable, BPIndex, which measures the perceived level of corruption exhibited by companies from a given country (on a scale from 0–10 with higher values representing a lower propensity to pay bribes), is consistent with the rational actor model described above. That model assumed that the fact that a company was from a country perceived to be prone to impropriety would be a red flag for regulators, increase the probability of detection, and thus encourage divestment. Accordingly we see the companies headquartered in those countries with the cleanest corporate cultures as the ones continuing to operate in implicated countries. So as a company moves from a country with a low index score of 7, such as Mexico, to a more moderate level of 7.5, such as Taiwan, the probability that a company will continue to operate in an implicated country increases by 15%. The marginal effects of home country culture exhibit diminishing incremental value such that the difference between a company from France (with an index score of 8) and a company from Canada (with an index score of 8.5) results in only a 4.5% increased probability of continued operation in the implicated country.[132] This result is relevant with regard to the discussion of the enforcement strategy of targeting specific industry sectors[133] in that it suggests that we have less need to fear the emergence of black knights to fill a void when more honest businesses have been driven out of the market.

When we consider the signs of the coefficients of the other four variables in the regression model, only two of them exhibit the directional correlation that we would expect. First, we see that companies that are resource-dependent are more likely to continue to invest (as measured by the Industry variable), representing a greater value proposition from operations in the implicated country. Second, the Corruption Perception Index is positively correlated with continued investment as one would predict: Companies will remain invested in countries that are relatively less corrupt since an expected future sanction would be lower as bribery would be less pervasive. How-

132. *See* Exhibit 6.

133. *See infra* Part IV-B-1. A black knight is a company not subject to anti-corruption regulations that operates in a high-risk market, taking advantage of the reduced competition as regulated companies are deterred by the corruption risks. *See infra* note 250 and accompanying text.

ever, the remaining two variables reflect surprising relationships. We see that issuers are more likely to continue to operate even though their reporting requirements would open the company up to violation of the books and records provisions of the FCPA. Similarly, companies that have settled multiple enforcement actions over the period of my dataset are nevertheless more likely to remain invested in the implicated countries than those who have only been through a single enforcement action. This suggests that, despite the fact that any subsequent sanction would likely be larger as punishment for the company's pattern of misconduct, repeat offenders are likely to continue to gamble on risky market environments. As noted, however, these four additional variables are not statistically significant and so should not be over-interpreted from the model.

In conclusion, the quantitative component of my new firm-level analysis supports the proposition that companies involved in FCPA enforcement actions are not generally divesting from the countries in which they received the alleged violations. This is not what the anti-FCPA assertion based on macroeconomic studies would predict. It may be tempting to use these results to counter the anti-competitive rhetoric claiming that U.S. companies are irreparably disadvantaged abroad. However, it is important to recognize that this study in no way refutes the validity of the existing empirical studies as each seeks to measure a unique aspect of this situation employing a different method. Instead one should take these results as informative and explore the extent to which they may be consistent with prior macroeconomic and firm-level studies. In the event that they are contradictory, there may be enlightening reasons why firms that have been through an enforcement action may behave differently in their divestment decisions from the rest of the business community. Exploring these theories constitutes the discussion in Part IV, but first the following Subpart D seeks to obtain some insight into the company decision-making process of an individual firm that was subject to an enforcement action through a company case study.

D. *Case Study Illustrates Company Reaction to an FCPA Enforcement and Continued Investment Decisions*

The aggregate statistics provide some relevant insights into the impact of FCPA enforcement on a company's investment in emerging markets, but additional perspectives can be gained from more in-depth analysis of an individual case. While the case study method is not uncontroversial,[134] it is generally deemed appropriate in at least two specific instances relevant here.[135] First, the case study may be used in a 'disciplined-configurative' or 'interpretive' vein wherein theory is used to select the case and informs the examination.[136] The focus is on the case, but the analyst uses some theoretical foundation to interpret the case. Second, a case study may be used to develop theory; while the focus is still primarily on the case, the goal is to provide testable hypotheses.[137] My case study will combine these two purposes in that theory will guide the selection of the case and the analysis will build on the theoretical framework.

Since my hypothesis is that most firms continue to operate in the implicated country, the most enlightening test is a company that the measured variables would predict would divest. This company, according to the rational actor model, would face high expected costs and low value in the given market. One company that fits this profile, Alcatel-Lucent, received

134. *See, e.g.*, John Gerring, *What Is a Case Study and What Is It Good for?*, 98 AM. POL. SCI. REV. 341, 344–46 (2004) (describing the problem of ambiguities that are inherent in case study work).

135. Other purposes of using case studies include to describe, to explore or refine theory, and to test theory. The latter two generally require more statistical consideration of sample sizes and variable definition, etc. than is involved in the type of case study used in this note. *See* Juliet Kaarbo & Ryan K. Beasley, *A Practical Guide to the Comparative Case Study Method in Political Psychology*, 20 POL. PSYCHOL. 369, 373–76 (1999) (discussing the different purposes of case studies).

136. *See, e.g.*, H. Eckstein, *Case Study and Theory in Political Science*, *in* 7 HANDBOOK OF POLITICAL SCIENCE 79, 99 (Fred I. Greenstein & N.W. Polsby eds., 1975) (defining "disciplined-configurative" case studies); Arend Lijphart, *Comparative Politics and the Comparative Method*, 65 AM. POL. SCI. REV. 682, 692 (1971) (discussing interpretative case studies).

137. *See, e.g.*, Lijphart, *supra* note 136, at 692 ("Hypothesis-generating case studies start out with a more or less vague notion of possible hypotheses, and attempt to formulate definitive hypotheses to be tested subsequently among a larger number of cases.").

sanctions for corruption in two different enforcement actions. The first enforcement action in 2007 against legacy Lucent involved conduct in China where the post-merger company continues to operate and a second enforcement action in 2010 concerns thirteen different countries: Angola, Bangladesh, Costa Rica, Ecuador, Honduras, Ivory Coast, Kenya, Malaysia, Mali, Nicaragua, Nigeria, Taiwan, and Uganda. Alcatel-Lucent continues to operate in all but six of these countries. Comparing the company actions in these various markets illustrates the multitude of factors influencing company decision-making and broadly supports my hypothesis from the general statistical study that even in the most extreme cases individual firms are not wholly divesting from emerging markets.

Doubtless, many of the FCPA enforcement actions by the DoJ and the SEC provide rich analytical material from which to extrapolate interesting policy theories. But the Alcatel-Lucent case study in particular is notable for many reasons. First, according to the variables outlined in Part III-B, it represents a situation in which the rational actor model and relevant indicators would predict that the company would divest from all of the implicated countries. As an issuer based in a country perceived to harbor greater numbers of bribe-prone companies than the United States, one would suspect that its probability of detection is high, particularly since the firm has a monitor in place from its previous enforcement action. Similarly, the expected cost of a future sanction is likely to be high since it is a repeat offender operating in countries perceived to be corrupt.[138] On the other hand, the value of business in many of these countries is driven by access to the local market,[139] which aside from China, is often relatively small in terms of GDP.[140] Thus the balance of cost and benefit would suggest a high likelihood of divestiture. Second, this case study is notable because the variations in the company's responses to

138. Transparency International's Corruption Perceptions Index scored countries on a scale from 1–100 with clean countries receiving a higher score. The average level of corruption in the countries where it received sanctions in the first case was 39 and in the second 34. *See* Exhibit 7. If one considers the average country rank (out of the 178 countries in the index), Alcatel-Lucent's first enforcement action had an average rank of 78 and the countries implicated in the second enforcement had an average rank of 118.

139. As opposed to access to scarce natural resources, for example.

140. *See* Exhibit 7.

operations in the thirteen countries implicated in its most recent enforcement action provide insightful comparisons. Third, the diverse types of corruption and mechanisms for influence illuminate different business models that can be considered high-risk. Finally, the implicated actions stretch back to 1995 and were brought to light by an interesting convergence of factors that helps to situate FCPA enforcement in the broader regulatory scheme. This case study illustrates how the goals of state procurement policies and large-scale infrastructure projects coincide, and at times conflict, with anti-bribery efforts abroad. With this impressive confluence of elucidating elements, the Alcatel-Lucent case study provides a valuable contribution to the empirical quest to understand the impact of the FCPA on company decision-making.

1. *Lucent's First FCPA Enforcement Action*

Alcatel-Lucent is a provider of "mobile, fixed, IP and optics technologies, . . . applications and services," as well as a center for research in communication technology through its Bell Labs division.[141] Lucent was spun-off from AT&T in 1996 and operated independently as a registered Delaware corporation listed on the New York Stock Exchange until it merged with Alcatel SA on November 30, 2006.[142] The DoJ and the SEC informed Lucent that they were commencing investigations into possible violations of the FCPA in August 2003 following an action filed against the company by National Group for Communications and Computers Ltd. (NGC).[143] NGC's suit concerned a $4.6 billion telecom expansion project Lucent commenced with the Saudi Telecom Company and subcontracted with NGC for $75 million of design and construction services of Telemobile equipment over four years.[144] This project was subsequently cancelled as the Saudi Telecom Com-

141. *Company Overview*, ALCATEL-LUCENT, http://www.alcatel-lucent.com/aboutus/companyoverview.html (last visited Feb. 5, 2012).

142. Complaint at 3, SEC v. Lucent Techs. Inc., No. 1:07-cv-02301 (D.D.C Jan. 8, 2008) [hereinafter SEC v. Lucent Techs Complaint].

143. LUCENT TECHNOLOGIES, 2003 ANNUAL REPORT, NOTICE OF 2004 ANNUAL MEETING AND PROXY STATEMENT F-68–69 (2003).

144. Declaration of Frank E. Vogel at 7, Nat'l Grp. for Commc'ns & Computers Ltd. v. Lucent Techs. Int'l Inc., 331 F. Supp. 2d 290 (D.N.J. 2004) (No. CV-00-86).

pany opted to use Lucent's GSM technology[145] instead of NGC's equipment. NGC alleged that Lucent encouraged the Saudi Telecom Company to abandon the NGC technology by plying company representatives with gifts valued in excess of $60 million.[146] Although the NGC lawsuit was ultimately resolved in favor of Lucent[147] and neither the SEC nor the DoJ recommended enforcement actions related to events in Saudi Arabia,[148] the event triggered a company-wide internal investigation. This study brought to light internal control deficiencies in China that Lucent reported to the regulator.[149] It was found that the company spent millions of dollars on "approximately 315 trips for Chinese government officials that in-

145. GSM stands for "Global System for Mobile Communications," one of the leading digital cellular systems.

146. "These gifts included: (i) Improper personal or private uses of a Gulf Stream 4 jet aircraft leased by defendant for 8 years at a cost in excess of $18 million; (ii) Five Mercedes automobiles; (iii) The expenses of a senior MoPTT/STC official's extended hospital and medical care treatment in a U.S. hospital; and (iv) Expenses (including air fares, hotels, meals) in connection with MoPTT/STC officials' attendance at the following conferences or events from January 1995 through December 31, 1999: a) 1995 and 1999 Telecommunications Conferences in Geneva, Switzerland; b) 1998 World Cup, Switzerland; c) Africa Telcom Conference; d) Seabit Trade Show, Hanover, Germany; e) GSM-MOU Conference; f) Olympics - Atlanta, Georgia. [ ] As a result of defendant's breaches of contract, plaintiff has suffered damages in excess of $60 million." Declaration of Frank E. Vogel, *supra* note 144, at 8–9).

147. *See* Nat'l Grp. for Commc'ns & Computers Ltd. v. Lucent Techs. Int'l Inc., 420 F. Supp. 2d 253 (S.D.N.Y. 2006) (holding that RICO claims based on alleged kickback payments and subcontract were time-barred and that NGC failed adequately to allege RICO enterprise or conspiracy); Nat'l Grp. for Commc'ns & Computers Ltd. v. Lucent Techs. Int'l Inc., 331 F. Supp. 2d 290 (D.N.J. 2004) (holding that NGC would not be entitled to recover for value of liquidated projects department beyond loss in actual value of department's existing assets).

148. The SEC did issue "Wells" notices to Lucent's former Chairman and Chief Executive Officer, the former head of their Saudi Arabia operations, and a third former employee on November 8, 2004, but these individuals were informed that SEC Enforcement Staff would not be recommending enforcement action against them in May 2005. Alcatel, Note d'Opération 295 (Aug. 7, 2006) (English translation) [hereinafter Alcatel Note d'Opération], *available at* http://www3.alcatel-lucent.com/Search/s.s?S_FULLTEXT=mote+%27operation+2006&siteId=internet&templateId=search&locale=en.

149. *Id.*

cluded primarily sightseeing, entertainment and leisure"[150] and took other efforts to gain favor with approximately 1,000 officials responsible for awarding contracts on behalf of Chinese state-owned or state-controlled telecommunications enterprises.[151]

Although the details of the various vacations taken by Chinese officials under the guise of "training visits" and "factory inspections" were doubtless embarrassing, the associated sums of potential business were equally breathtaking[152] and could easily lead one to conclude that the entire endeavor was worth it. At the very least there are indications of the pervasiveness of this practice as the SEC complaint makes several references to the competitive pressure the company faced in winning this business. The following was uncovered in a Lucent employee email:

> I know it is not easy to arrange [Customer No. 3] to meet operators in U.S. But we need to do this . . . We are fighting for [$]20M expansion project with [a competing telecommunications company]. One thing customer complained about [to] us that [sic] [this same competing telecommunication company] agreed to arrange [meetings with operators in the United States]. We have to agree to this request under such competition.[153]

Throughout 2001–2003 (the time period in which regulators uncovered corrupt practices) Lucent's annual reports tout other profitable developments in China,[154] illustrating the expected benefit from the country.

After initial allegations of corrupt practices in China came to light, Lucent's tone regarding its operations in the country remained optimistic. In 2003, the company reported consis-

150. Press Release, Dep't of Justice, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), *available at* http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html.

151. SEC v. Lucent Techs Complaint, *supra* note 142, at 1.

152. *See id.* at 7 ("Lucent estimated $500 million in revenues in potential business with Customer No. 2."); *id.* at 11 ("Lucent, as noted in its internal documents, foresaw $2–3 billion in potential business opportunities with Customer No. 4 . . .").

153. *Id.* at 10.

154. *See, e.g.*, LUCENT TECHNOLOGIES, *supra* note 143 (describing various successful investments in China).

tent revenue in the Asia Pacific & China region (APaC) despite declines in every other geographic segment, which the company attributed in part to "ongoing wireline and wireless build-outs in China."[155] In fact, the country represented such a large fraction of Lucent's revenue the company had to report sales to Chinese customers in a separate section on 'concentrations' as a risk factor for its business.[156] These factors indicate Lucent's high level of investment in China and would justify the company's initial decision to continue operations there according to a rational actor model. Particularly since the company would not have much visibility as to the size of the potential sanction at this early stage of the internal investigation and because corporate sanctions under the FCPA at this time were relatively low,[157] it is possible that expected costs were discounted.

While Lucent's initial response is consistent with my hypothesis, the case study becomes more illuminating in subsequent years as Lucent's profitability in that region waned. From 2004 to 2006 the APaC division represented a decreasing share of Lucent's consolidated revenue. The 2006 annual report explains as follows:

> The decrease in APaC was primarily due to lower CDMA[158] sales in China driven by further delays in the issuance of 3G licenses, the continuing reduction in [Personal Handyphone Systems (PHS)] sales in China and to a lesser extent, our limited participation in highly competitive market opportunities in India. Revenues from customers in China represented 4% and 9% of consolidated revenues during fiscal 2006 and 2005 respectively, and are expected to continue to decline due to further delays in the issuance

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155. LUCENT TECHNOLOGIES, Notice of 2005 Annual Meeting and Proxy Statement, at F-12, *in* 2004 ANNUAL REPORT (2004).

156. *Id.* at F-72. Since companies reliant on a few large customers are considered riskier than those which have a more diversified customer base, the fact that customers in China accounted for 11% and 10% of consolidated revenue in 2003 and 2004 respectively was deemed material information for investors. *Id.*

157. Total criminal and civil fines imposed on corporations were $2.7 million in 2002 and $0 in 2003. SHEARMAN & STERLING LLP, *supra* note 44, at 4.

158. CDMA stands for Code Division Multiple Access and is a network technology similar to GSM.

> of 3G licenses and the continuing reduction in PHS sales and other unfavorable conditions.[159]

Although one might be tempted to attribute declining revenue in China to Lucent's competitive disadvantage from an inability to host these lavish trips for foreign officials with the company in the midst of an FCPA investigation, an analysis of competitor dynamics indicates that other companies in the industry complained of increased competition unrelated to the FCPA.[160] For example, Cisco's annual report states that Cisco has experienced price-focused competition from competitors in Asia, especially China, and that Cisco anticipates this will continue.[161] Similarly, Nortel explained its experience in the region as follows: "[P]ricing pressures continue to increase as a result of global competition, particularly from suppliers situated in emerging markets with low cost structures like China."[162] In contrast, those competitors that referenced strong market dynamics in China during this time period were local companies who attribute their success to early entry[163] and relationships with service providers.[164] While these industry dynamics suggest that the FCPA may have an impact on U.S. companies as compared to firms outside its jurisdiction, it does not suggest that proceeding through an enforcement action alters the statute's effect. Also instructive is the fact that quarterly earnings calls throughout this period (2002–2007)

159. Lucent Technologies Inc., United States Securities and Exchange Commision Form 10-K for 2006, at F-11. Similarly, the decline in 2005 was attributed in part to unfavorable business dynamics in China. "The decline in APaC was primarily due to lower voice networking sales in China, primarily in PHS sales . . ." *Id.*

160. Lucent's Form 10-K identifies the following list of competitors: Ciena Corporation, Cisco Systems, LM Ericsson Telephone Company, Fujitsu Limited, Huawei Technologies, Motorola, NEC Corporation, Nokia Corporation, Nortel Networks Corporation, Samsung Networks, Siemens, UTStarcom, and ZTE Corporation. *Id.* at 6.

161. CISCO SYSTEMS, INC., 2006 ANNUAL REPORT 19 (2006).

162. Nortel Networks Ltd., United States Securities and Exchange Commission Form 10-K for 2005 (2006).

163. *See, e.g.*, UTstarcom Holdings Corp., United States Securities and Exchange Commission Form 10-K for 2006, at 17 ("We believe our competitive strengths are derived from . . . our early entry . . .").

164. *See, e.g.*, ZTE CORP., ANNUAL REPORT 2006, at 5 (2007) ("The Group has achieved a leading market position for its telecommunications products in China with longstanding cooperative relationships with China's leading telecommunications service providers . . . .").

do not mention the litigation, implying not only that the company considered the risks and eventual sanction immaterial, but further that the investment analysts were not concerned enough to inquire.

Whatever difficulties Lucent faced in China immediately following resolution of the first FCPA enforcement action, the company's more recent performance in China, both individually and following its merger with Alcatel, has proven positive. Equity research reports speak of "accelerating momentum" in Alcatel-Lucent's Chinese operations including a Gigabit Passive Optical Networking (GPON) contract with China Telecom that the company won in 2009.[165] Although investors are skeptical about the continued competitiveness of Alcatel-Lucent's CDMA technology in the face of more sophisticated GSM technology, several reports cite the benefits the company continues to derive from this unit.[166] Similarly, there seems to be real value from Alcatel-Lucent's consistency in the country as financial analysts predict its relationships with certain carriers will allow the company to capture meaningful market share even in new technologies.[167] It seems that the company's commitment to China may finally be paying off despite the risks the business environment presents and despite the continued stiff competition from low-cost competitors there.

In the midst of Lucent's internal investigation and negotiation with regulators, the company merged with Alcatel in 2006.[168] The merger, which was pitched to investors as "the

165. KAI KORSCHELT & JOHANNES SCHALLER, ALCATEL-LUCENT: TURNING THE CORNER—INITIATING WITH BUY 18 (Deutsche Bank ed., 2010).

166. *See, e.g.*, RICHARD DINEEN & NICOLAS COTE-COLISSON, ALCATEL LUCENT (ALUA.PA) 10 (HSBC Global Research ed., 2010) ("China, for example, saw major 3G rollouts in 2009 with China Telecom inheriting the former China Unicom CDMA network as part of the Chinese government's restructuring of the telecoms industry. With a heavy bias towards Chinese CDMA investment, around three-quarters of total 2009 CDMA market share went to Chinese vendors last year.").

167. ROBERT V. TANGO, JR., ALCATEL-LUCENT: EXPECT OPERATIONAL EFFICIENCIES TO DRIVE EBIT MARGIN EXPANSION—REVENUE VISIBILITY HEALTHY—INITIATING COVERAGE ON SHARES OF ALCATEL-LUCENT WITH A BUY RATING AND PRICE TARGET OF $10, at 1 (Craig-Hallum Capital Group LLC ed., 2011).

168. Vikas Bajaj, *Alcatel and Lucent Agree to Merge in $13.4 Billion Deal*, N.Y. TIMES, Apr. 2, 2006, *available at* http://www.nytimes.com/2006/04/02/business/02cnd-lucent.html?pagewanted=print&_r=0.

right time, the right solution, the right companies,"[169] sought to capitalize on the firms' widespread global operations.[170] While consolidation of the two firms was seen as a prudent move,[171] executives recognized the need for aggressive cost-cutting to meet competition from low-cost countries such as China and the demands of customers' increased purchasing power.[172] Nevertheless, the merged company did not abandon the country but rather settled the FCPA allegations with the regulators through a Non-Prosecution Agreement with the DoJ and an accounting and auditing enforcement release with the SEC. The former required a $1 million fine to the U.S. Treasury,[173] while the latter resulted in a $1.5 million civil penalty related to the same company actions.[174] With all of the excitement of the merger it is perhaps understandable that neither senior executives nor investors seem overly focused on the FCPA implications of a firm touting its worldwide operations.

2. *Alcatel-Lucent's Second FCPA Enforcement Action*

Since the response by investors to the first FCPA enforcement action was muted and the size of the sanction paltry in comparison to the value of business obtained through the alleged violations, it is perhaps understandable that Alcatel-Lucent did not meaningfully alter its business practices. Reflective of the requirement that the company improve its controls

169. *Alcatel, Lucent Announce $13.4B Merger*, FOX NEWS, Apr. 3, 2006, *available at* http://www.foxnews.com/story/0,2933,190222,00.html.

170. *Observer: Case Studies Waiting To Be Written*, FINANCIAL TIMES, Oct. 10, 2006, *available at* http://www.ft.com/cms/s/0/d2c53674-57fb-11db-be9f-0000779e2340.html#axzz2PnOIaClL (noting that the merged company was "a giant transatlantic experiment in multinational diversity").

171. This was evidenced by the fact that both companies' stock rose on announcement of the deal.

172. Bajaj, *supra* note 168 (recounting the top executives' intention to lay off "9,000 people, or 10 percent of their combined staff").

173. Press Release, Dep't of Justice, *supra* note 150.

174. Press Release, U.S. Sec. & Exch. Comm'n, SEC Files Settled Action Against Lucent Technologies Inc. in Connection With Payments of Chinese Officials' Travel and Entertainment Expenses; Company Agrees to Pay $1.5 Million Civil Penalty (Dec. 21, 2007), *available at* www.sec.gov/litigation/litreleases/2007/lr20414.htm.

resulting from the first enforcement action,[175] Alcatel-Lucent included an extensive section in its 2007 annual report dedicated to the company's "global system of internal control."[176] The disclosure highlights the principles underpinning the project, explains the organizational chart of senior management involved, and heralds that it is "backed up by an internal control system using a frame of reference established by a recognized body, the Committee of Sponsoring Organizations."[177] However, it was later found that while "Alcatel[-Lucent] had a company-wide FCPA training program, [Alcatel-Lucent's] employees routinely disregarded or circumvented it."[178] In fact,

> [A] former high-level employee and the president of Alcatel Standard, [a Swiss subsidiary of Alcatel-Lucent], trained country senior officers, including those who conducted business in Latin America and Taiwan, on how to "paper" consulting agreements so that Alcatel Standard [the subsidiary of Alcatel-Lucent which entered into most agreements with business consultants worldwide on behalf of Alcatel-Lucent] would authorize them.[179]

It seems that without greater effort to adjust corporate culture, formal control processes proved ineffective.

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175. "Lucent agrees to adopt new or modify existing internal controls, policies and procedures in order to ensure that it maintains: (a) a system of internal accounting controls designed to ensure that Lucent makes and keeps fair and accurate books, records and accounts; and (b) a rigorous anti-corruption compliance code, standards and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws." Letter from Steven A. Tyrrell, Chief, Fraud Section, Criminal Div., Dep't of Justice, to Martin J. Weinstein, Counsel for Lucent Technologies Inc., Wilkie Farr & Gallagher LLP (Nov. 14, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/lucent-tech.html.

176. ALCATEL-LUCENT, ADDITIONAL INFORMATION CONTAINED IN THE 2007 REFERENCE DOCUMENT 37 (2008) [hereinafter ALCATEL-LUCENT 2007]. For an argument in favor of a liability regime that imposes high penalties subject to mitigation for firms that engage in compliance activities, see Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

177. ALCATEL-LUCENT 2007, *supra* note 176, at 41.

178. Complaint at 6–7, SEC v. Alcatel-Lucent, S.A., No. 1:10-cv-24620, 2010 WL 5301046 (S.D. Fla. Dec. 30, 2010) [hereinafter SEC v. Alcatel-Lucent Complaint].

179. *Id.*

The identified failing within Alcatel-Lucent's business model was its practice of using third-party agents and consultants. "This business model was shown to be prone to corruption, as consultants were repeatedly used as conduits for bribe payments to foreign officials (and business executives of private customers) to obtain or retain business in many countries."[180] The concerns of this system were exacerbated by Alcatel-Lucent's decentralized business structure and "approval process permit[ing] corruption to occur, as the local employees were more interested in obtaining business than ensuring that business was won ethically and legally."[181] This organizational structure was primarily associated with Alcatel before the merger,[182] which likely explains why the corrupt conduct in several of the countries implicated in the second enforcement action stemmed from actions at legacy Alcatel offices. As a result of actions exploiting this system, Alcatel-Lucent received a $137 million penalty for improper payments in Costa Rica, Honduras, Malaysia, Taiwan, Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda, and Mali.[183] This subsection will first examine those countries where Alcatel-Lucent continues to operate, followed by a discussion of those from which it chose to divest. It will conclude with some analysis comparing these opposite responses in order to provide insights into firm decision-making in response to the FCPA.

Countries where Alcatel-Lucent still operates

In Costa Rica the impetus for investigations leading to the second enforcement action was criminal charges brought by

180. Deferred Prosecution Agreement at A-11, United States v. Alcatel-Lucent, S.A., No. 1:10-cr-20907 (S.D. Fla. Feb. 22, 2011).

181. *Id.*

182. Even before the corruption allegations came to light financial analysts were noting that legacy Alcatel operated "like a loose federation, with country managers reporting little more than annual results to Paris." Carol Matlack & Jennifer L. Schenker, *Alcatel-Lucent's Troubled Marriage*, BLOOMBERG BUSINESSWEEK, June 17, 2008, *available at* http://www.businessweek.com/stories/2008-06-17/alcatel-lucents-troubled-marriage.

183. Press Release, 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), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html (representing combined sanctions from both the DoJ and the SEC).

the Costa Rican Attorney General in October 2004.[184] Alcatel responded aggressively,[185] and the former employee implicated in the corrupt conduct entered into a plea agreement in the U.S. District Court for the Southern District of Florida for violations of the FCPA.[186] Although the DoJ and the SEC had initiated investigations, it was not until 2009 that the company reported that regulators had informed Alcatel-Lucent what action they would take against it or its subsidiaries.[187]

With regard to its Costa Rican business, Alcatel-Lucent's business decisions do not seem to be motivated primarily by the value of the business. The company regularly stated that the loss of the Costa Rican market would not have a significant effect on the overall company.[188] It is notable, though, that over the course of the investigation the expected revenue from this business declined dramatically—from €10 million in 2006 to €1.5 million in 2011.[189] Instead, the company's decision

184. Alcatel Note d'Opération, *supra* note 148, at 143.

185. *Id.* The company responded by (1) dismissing the chairman of Alcatel Costa Rica and the manager for the Latin American region; (2) launching criminal proceedings against the former chairman of Alcatel Costa Rica, various local consultants, and an employee of a French subsidiary whom it reproached for "an improper payment scheme and misappropriation of funds"; and (3) cancelling contracts of local consultants limited to these projects and suspending payments.

186. ALCATEL-LUCENT 2007, *supra* note 176, at 27.

187. ALCATEL-LUCENT, 2009 ADDITIONAL INFORMATION 28 (2010) [hereinafter ALCATEL-LUCENT 2009] (describing the terms of the "agreements in principle" with the DoJ and SEC and announcing a reserve amount of €93m to reflect the "U.S. $45.4 million as agreed upon in the agreement in principle with the SEC and U.S. $92 million as agreed upon in the agreement in principle with the DOJ, discounted back to net present value and converted into Euros"). Therefore, although the corrupt conduct in the two enforcement actions overlaps, Alcatel-Lucent managers were not focused on the matter until the settlement for the first enforcement action was complete.

188. Alcatel Note d'Opération, *supra* note 148, at 144; ALCATEL-LUCENT 2007, *supra* note 176, at 27.

189. The expected value fell from €10 million in 2006, to €8 million in 2008 and €3 million in 2009, only to rise again in 2010 to €6 million. However, this final optimistic figure in 2010 proved unfounded as the Costa Rican business achieved revenue of only €3 million in 2010 causing the company to forecast revenue of only €1.5 million for 2011. *See id.* at 144; ALCATEL-LUCENT 2007, *supra* note 176, at 27; ALCATEL-LUCENT, 2008 ADDITIONAL INFORMATION 31 (2009) [hereinafter ALCATEL-LUCENT 2008]; ALCATEL-LUCENT 2009, *supra* note 187, at 28; ALCATEL-LUCENT, 2010 ADDITIONAL INFORMATION 24 (2011) [hereinafter ALCATEL-LUCENT 2010] (providing the expected values for each of these years, respectively).

seemed to be driven by concerns for its reputation in the country and region.[190] These reputational effects similarly motivated Alcatel-Lucent to settle related claims brought by the Costa Rican Attorney General's Office, which sought compensation for "loss of prestige suffered by the Nation of Costa Rica."[191] Having vigorously fought allegations of wrongdoing in Costa Rica, Alcatel-Lucent may continue to operate in the country to resist claims of defeat and to project a resilient image in the region.

French authorities have also commenced investigations into Alcatel-Lucent's subsidiary in Costa Rica regarding the same conduct. The French investigation is still pending. Overlapping French and U.S. anti-corruption investigations have also been undertaken with regard to the company's actions in Nigeria. In Nigeria, Alcatel-Lucent made payments totaling $10 million to foreign officials either directly or through sham consultants, a technique used widely in its corrupt practices.[192] Although the operations in Nigeria do not earn much discussion in the company's annual reports, Alcatel-Lucent hosted a Mobile World Congress to bring together high-level information, telecommunications, and technology ministers, which included officials from Nigeria suggesting that the company still strives to develop the market.[193] Nigeria is the only African

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190. *See, e.g.*, ALCATEL-LUCENT 2008, *supra* note 189, at 31 ("However, these events may have a negative impact on the reputation of Alcatel-Lucent in Latin America.").

191. This was referred to as "social damages." ALCATEL-LUCENT 2009, *supra* note 187, at 27. The latter claims were settled for $10 million in 2010. *See* ALCATEL-LUCENT 2010, *supra* note 189, at 24 (2011) ("Alcatel-Lucent settled the Attorney General's social damages claims in return for a payment by CIT of approximately U.S. $10 million. [Instituto Costarricense de Electricidad S.A.]'s claims [which sought moral damages in compensation for reputational harms] are not included in the agreement with the Attorney General and are pending and currently in trial, as noted above.").

192. Deferred Prosecution Agreement, *supra* note 180, at A-35–36.

193. Press Release, Alcatel-Lucent, Governments of Emerging Digital Economies Meet at Mobile World Congress for High-Level Ministerial Summit on the Roadmap for Mobile Broadband (Feb. 28, 2012), *available at* http://www.alcatel-lucent.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4w3MfQFSYGYRq6m-pEoYgbxjgiRIH1vfV-P_NxU_QD9gtzQiHJHR0UAAD_zXg!!/delta/base64xml/L0lJayEvUUd3QndJQSEvNElVRkNBISEvNl9BX0U4QS9lbl93dw!!?LMSG_CABINET=Docs_and_Resource_Ctr&LMSG_CONTENT_FILE=News_Releases_2012/News_Article_002596.xml. Participants included Bitange Ndemo—Permanent Secretary,

country where the company maintains offices after the FCPA investigation.

In a similar chain of events to those in Costa Rica, the FCPA enforcement investigation in Taiwan was prompted by the allegations of the Taipei Investigator's Office of the Ministry of Justice in 2004.[194] Alcatel again responded aggressively to these allegations by firing the country senior officer, and another director who was involved in the Taiwan Railways contract resigned. Both were indicted for violating Taiwan's Government Procurement Act.[195] Although the charges were eventually dropped,[196] Alcatel-Lucent stated that it "[does] not believe a loss of business in Taiwan would have a material adverse effect on our Group as a whole."[197] This is telling given that the expected sanction included a ban from participating in government procurement contracts for a specified period of time[198] and that Alcatel-Lucent's Taiwanese division expected to generate €126 million in annual revenue during 2006, some of which would have come from government contracts.[199] Investors participating in earnings conference calls did take more interest in Alcatel's operations in the country than it had in Costa Rica, but these comments mostly refer to Alcatel's customer Chunghwa Telecom and did not reference the litigation in any way.[200] Given investor indifference it is un-

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Ministry of Information & Communications, Kenya, and Omobola Johnson—Minister of Information & Communication Technology, Nigeria ironically speaking on a panel entitled *Reinventing the Rules for Mobile Internet*. *Id.*

194. ALCATEL, ANNUAL REPORT 2004, at 102 (2005).

195. *Id.*; ALCATEL, DOCUMENT DE REFERENCE 2005: ENGLISH VERSION 114 (2006).

196. ALCATEL-LUCENT, 2009 ANNUAL REPORT ON FORM 20-F, at 73 (2010) (A Taipei criminal district court dismissed the charges in 2005, the Taiwan High Court affirmed in 2008, and the Supreme Court denied the appeal by the Taiwan Prosecutor's Office.).

197. ALCATEL-LUCENT, 2008 ANNUAL REPORT ON FORM 20-F, at 77 (2009).

198. ALCATEL, *supra* note 195, at 114.

199. *Id.*

200. *See, e.g.*, Transcript of ALA–Q4 2004 Earnings Conference Call, at 2 (Feb. 3, 2005), *available at* Thomson Research (mentioning Alcatel's relationship with Chunghwa Telecom as evidence of their "big momentum in this business"); Transcript of ALA–Alcatel Conference Call for Financial Community: IPTV–Market and Opportunities, at 12 (Sep. 27, 2005), *available at* Thomson Research (posing a question about Chunghwa Telecom's operations); Transcript of ALA–Q2 2005 Alcatel Earnings Conference Call, at 3

surprising that Alcatel-Lucent continues to operate in Taiwan.[201]

In Malaysia, Alcatel-Lucent was accused of paying employees of Telekom Malaysia, its largest client in the country, for inside information regarding public tenders.[202] In addition, it employed the sham consultant technique used elsewhere to pay two consultants $500,000 each to produce market reports and studies that were never received.[203] Although Alcatel-Lucent touted impressive growth in Malaysia related to mobile communications, IP, and network integration in 2006,[204] the contracts specifically concerned with the corrupt practices did not generate any profits for the company.[205] As in Costa Rica, Alcatel-Lucent faced auxiliary litigation related to the FCPA enforcement disclosure. Local officials conducted an investigation into payments made to a state-controlled customer[206] and although the Malaysian authorities decided not to press charges, two customers have suspended Alcatel from "obtaining new business for a period of 12 months commencing in January 2011 and February 2011 respectively."[207] Nevertheless, Alcatel continues to maintain an office in Malaysia[208] and

(July 28, 2005), *available at* Thomson Research (referencing Chunghwa Telecom in Taiwan as a large customer).

201. *Taiwan*, ALCATEL-LUCENT, http://www.alcatel-lucent.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4w3MfQFSYGYRq6m-pEoYgbxjgiRIH1vfV-P_NxU_QD9gtzQiHJHR0UAAD_zXg!!/delta/base64xml/L0lJayEvUUd3QndJQSEvNElVRkNBISEvNl9BXzJFSS9lbl93dw!!?LMSG_CABINET=Corporate&LMSG_CONTENT_FILE=Global_Map_and_Contacts/Taiwan_Contact.xml (last visited Mar. 31, 2012) (listing current contact information for Alcatel-Lucent's operations in Taiwan).

202. Deferred Prosecution Agreement, *supra* note 180, at A-24–25.

203. *Id.* at A-25. One of these consultants began working for Alcatel-Lucent as part of a "gentlemen's agreement" and was only formalized as a consultant retroactively. *Id.* at A-26.

204. Alcatel Note d'Opération, *supra* note 148, at 106, 149, 307.

205. Deferred Prosecution Agreement, *supra* note 180, ¶ 69 ("Although Alcatel won the $85 million Celcom contract, Alcatel did not generate any profits from it.").

206. ALCATEL-LUCENT, 2011 ADDITIONAL INFORMATION 26 (2012).

207. *Id.*

208. *Malaysia*, ALCATEL-LUCENT, http://www.alcatel-lucent.com/wps/portal/CountryContact?LMSG_CABINET=Corporate&LMSG_CONTENT_FILE=Global_Map_and_Contacts/Malaysia_Contact.xml (last visited Jan. 16, 2013) (listing current contact information for Alcatel-Lucent's operations in Malaysia).

appointed a new senior country officer in 2009.[209] It is less clear what the value proposition is in Malaysia, but it would be reasonable to presume that it is part of a regional strategy linked to China and Taiwan, both countries where Alcatel chooses to continue operating despite charges of corruption.

In the interest of space and to avoid repetition, I will not provide extensive details on the other countries where Alcatel-Lucent received sanctions for corrupt practices under the FCPA. In Honduras, allegations of Alcatel's bribery mirror those in other contexts: namely, paying for lavish vacations for foreign officials and paying bribes through sham consultants for "vaguely described marketing and advisory services such as 'maintaining liaisons with appropriate government officials.'"[210] Since this conduct generated only $870,000 in profits it does not warrant discussion in the company's annual reports[211] or on investor calls,[212] which, in keeping with trends in other countries, implies that Alcatel-Lucent could continue to operate there without negative public attention. Similarly, in Ecuador, the company employed a consultant model, paying a wealthy Ecuadorian businessman to provide access not only to the three major state-owned telecommunications customers in Ecuador but also to the state-owned telecommunications customer in Nicaragua.[213] Alcatel-Lucent continues to

209. Press Release, Alcatel-Lucent, Alcatel-Lucent Appoints New Country Senior Officer for Malaysia (Feb. 24, 2009), *available at* http://www.alcatel-lucent.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4w3MfQFSYGYRq6m-*pEoYgbxjgiRIH1vfV-P_NxU_QD9gtzQiHJHR0UAAD_zXg!!/delta/base64xml/L0lJayEvUUd3QndJQSEvNElVRkNBISEvNl9BX0U4QS9lbl93dw!!?LMSG_CABINET=Docs_and_Resource_Ctr&LMSG_CONTENT_FILE=News_Releases_2009/News_Article_001457.xml.*

210. Deferred Prosecution Agreement, *supra* note 180, at A-21. Alcatel's lack of due diligence in contracting with this company is almost comical in that even the Dun & Bradstreet report lists the consultant's main business as the distribution of fine fragrances and cosmetics in the Honduran market. *Id.* at A-21–22.

211. The first mention of Honduras in any of Alcatel's annual reports is in 2010 in reference to the deferred prosecution agreement. ALCATEL-LUCENT 2010, *supra* note 189, at 25.

212. The only reference to Latin America generally from this time period is that business there was "not that great." Fair Disclosure Financial Network, Transcript of Alcatel Optronics (ALA)—Alcatel's Strategy for 2003—Press Conference and Analysts Call, at 16 (Jan. 14, 2003).

213. Deferred Prosecution Agreement, *supra* note 180, at A-38 to -41.

maintain offices in both countries and to do business there.[214] In all, Alcatel-Lucent continues to operate in most of the countries for which it received FCPA sanctions in its second enforcement action, supporting my hypothesis that these firms generally continue to do business even in high-risk countries.

Countries where Alcatel-Lucent has chosen to divest

It is not initially apparent what sets apart the six countries (Angola, Bangladesh, Ivory Coast, Kenya, Mali, and Uganda) where Alcatel-Lucent has chosen to discontinue operations from the majority of implicated countries where the company continues to operate. There does seem to be a commitment to Asia that is stronger than the company's interest in Africa, yet Alcatel-Lucent continues to maintain its office in Nigeria while no office exists in Bangladesh. Remember, however, that Alcatel-Lucent might nevertheless continue to service customers in these areas through other offices since my analysis measures facility locations to judge investment. Again, in the interest of conciseness my discussion of Alcatel-Lucent's business in these countries will be brief. In Kenya, Alcatel-Lucent used the same consultant structure as in other countries to pay $20 million to Kenyan officials.[215] In Bangladesh, Alcatel-Lucent again operated through the consultant model to provide bribes to foreign officials, gaining access to lucrative contracts.[216] Although the company does not maintain an office in the country, it seems that it continues to service customers there through its

214. *See* Press Release, Alcatel-Lucent, Alcatel-Lucent and CNT to Enrich Communication in Ecuador by Deploying an Advanced 3G Mobile Broadband Network (Mar. 12, 2012), *available at* http://www.alcatel-lucent.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4w3MfQFSYGYRq6m-pEoYgbxjgiRIH1vfV-P_NxU_QD9gtzQiHJHR0UAAD_zXg!!/delta/base64xml/L0lJayEvUUd3QndJQSEvNElVRkNBISEvNl9BX0U4QS9lbl93dw!!?LMSG_CABINET=Docs_and_Resource_Ctr&LMSG_CONTENT_FILE=News_Releases_2012/News_Article_002605.xml (describing a new network added in 2012); Alcatel-Lucent, Transforming Voice—IMS for PSTN Modernization in ETSI Markets 6, Strategic White Paper (June 3, 2010) (This is the most recent reference to Alcatel-Lucent's work in Nicaragua located by the author.). Alcatel-Lucent's work in Nicaragua might additionally be justified by a regional strategy with Costa Rica and Honduras.

215. Deferred Prosecution Agreement, *supra* note 180, at A-33.

216. *Id.* at A-37 to -38.

broadband division.[217] These two countries represent the most sizeable operations that the company withdrew following its FCPA enforcement action.

To round out my discussion of Alcatel-Lucent's divestment decisions in implicated countries, the company withdrew from operating in Angola, Ivory Coast, Mali, and Uganda following its sanction for entering into consultancy agreements without proper due diligence. Business in these countries seems to have been de minimis and thus did not warrant disclosure in financial documents, which could also explain why the company has no offices there. Nonetheless, Alcatel-Lucent recently announced collaboration with Angola Cables to connect Southern Africa with high speed Internet in Angola[218] and with Smile to provide 4G services in Uganda.[219] In Ivory Coast, Alcatel has not mentioned its business operations since

217. Press Release, Alcatel-Lucent, Telenor to Deliver Faster, Higher-Quality Mobile Broadband Voice and Data Services to Customers Worldwide with the Help of Alcatel-Lucent (Feb. 23, 2012), *available at* http://www.alcatel-lucent.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4w3MfQFSYGYRq6m-pEoYgbxjgiRIH1vfV-P_NxU_QD9gtzQiHJHR0UAAD_zXg!!/delta/base64xml/L0lJayEvUUd3QndJQSEvNElVRkNBISEvNl9BX0U4QS9lbl93dw!!?LMSG_CABINET=Docs_and_Resource_Ctr&LMSG_CONTENT_FILE=News_Releases_2012/News_Article_002593.xml ("Under a new global frame agreement, Alcatel-Lucent will have the opportunity to provide Telenor with small cell base stations to support its customers . . . in the 11 countries in which Telenor operates [including Bangladesh] . . . ").

218. Press Release, Alcatel-Lucent, Alcatel-Lucent and Angola Cables Connect Southern Africa and the Global Community Through a Superfast Data Link (Nov. 13, 2012), *available at* http://www.alcatel-lucent.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4w3MfQFSYGYRq6m-pEoYgbxjgiRIH1vfV-P_NxU_QD9gtzQiHJHR0UAAD_zXg!!/delta/base64xml/L0lJayEvUUd3QndJQSEvNElVRkNBISEvNl9BX0U4QS9lbl93dw!!?LMSG_CABINET=Docs_and_Resource_Ctr&LMSG_CONTENT_FILE=News_Releases_2012/News_Article_002742.xml.

219. Press Release, Alcatel-Lucent, Smile and Alcatel-Lucent to Expand Availability of 4G Services in Africa (Nov. 15, 2012), *available at* http://www.alcatel-lucent.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4w3MfQFSYGYRq6m-pEoYgbxjgiRIH1vfV-P_NxU_QD9gtzQiHJHR0UAAD_zXg!!/delta/base64xml/L0lJayEvUUd3QndJQSEvNElVRkNBISEvNl9BX0U4QS9lbl93dw!!?LMSG_CABINET=Docs_and_Resource_Ctr&LMSG_CONTENT_FILE=News_Releases_2012/News_Article_002743.xml. A presentation at a technology symposium from May 2012 also lists Uganda as the site of a "managed services local delivery center & centers of excellence." Adolfo Hernandez, Alcatel-Lucent At Your Service 8 (May 23, 2012), *available at* http://www.alcatel-lucent.com/wps/DocumentStreamerServlet?LMSG_CABINET=Docs_and_Resource_Ctr&LMSG_CONTENT_FILE=

a 2009 reference to business with an individual customer, implying that the ties to the country might be thin.[220] In Mali, the latest news refers to the company's donation of a communications system designed to improve emergency services in a hospital in Bamaco.[221] While this might imply a long-term commitment to the country, it can also be explained as a corporate social responsibility commitment Alcatel-Lucent made in partnership with a customer, Orange, that it values in other contexts. In keeping with my empirical methodology I have counted these countries as divestments since Alcatel-Lucent does not maintain offices there, but it seems more likely that the company maintains customers in those countries and thus would still be subject to corruption risk in these markets.

Without private information about Alcatel-Lucent's decision-making processes, one can only hypothesize as to the rationale that accounts for the varied treatment of the six divestment countries from the other seven in which Alcatel-Lucent continues to do business. Two theories are consistent with the data in this case study. One theory is that Alcatel-Lucent would continue to operate in those countries in which the corruption was relatively less than in the other countries. The average Corruption Perception score is higher (implying a more honest business environment) for those countries where Alcatel-Lucent continues to do business as compared to those from which it divested.[222] A second theory is that Alcatel-Lucent would divest from those countries where it has been paying bribes for the longest period of time because it is in these places the company is least optimistic that regularized business conditions could exist. This theory is borne out in the numbers since the average period of corrupt conduct in the countries divested from is four months longer than the average for

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Presentations/May23_1135_Hernandez_Services_FINAL2.pdf&lu_lang_code=EN_WW.

220. *See* Rich Garafola & Frederic Wauquiez, *Alternative Energy Comes of Age in Mobile Markets*, ALCATEL-LUCENT (Nov. 17, 2009), http://www2.alcatel-lucent.com/techzine/alternative-energy-comes-of-age-in-mobile-markets/ (describing a solar-powered base station Alcatel-Lucent contributed to in Ivory Coast).

221. ALCATEL-LUCENT, CORPORATE SOCIAL RESPONSIBILITY REPORT 2008, at 24–25 (2009).

222. The average score for those countries where Alcatel-Lucent still operates is 40.0, while the one for those from which it divested is 27.8. *See* Exhibit 7.

the countries where Alcatel-Lucent continues to operate.[223] However, this difference is not dramatic.

Two other potential explanations of the differing responses between the sets of implicated countries do not fit the data in this case study. First, the existence of criminal action against the subsidiary does not govern the decision to divest since the company maintained operations in Costa Rica, Honduras, Malaysia, and Taiwan even though all of these subsidiaries entered plea agreements related to criminal charges. On the other hand, it divested from countries where the domestic subsidiary made no such plea.[224] Another potential factor that does not seem to have an impact is whether Alcatel-Lucent settled violations of the FCPA with both the DoJ and the SEC or only faced charges from the DoJ.[225] Alcatel-Lucent chose to continue operating in all of the countries where dual charges were brought (Costa Rica, Honduras, Malaysia, and Taiwan) while divesting from some (but not all) of those countries where the company faced only charges from the DoJ.[226] It is of course possible that this case study is an outlier as to these trends and that more systematic analysis should be undertaken to further illuminate these aspects of company decision-making.

Overall, the Alcatel-Lucent case study is useful in comparing the varied responses to FCPA enforcement actions across

223. The average period of time of corrupt activity in those countries where Alcatel-Lucent still has operations is 3.86 years, while the average for those countries from which it divested is 4.17 years. *See* Exhibit 7.

224. Plea Agreement, United States v. Alcatel Centroamerica, S.A., No. 10-CR-20906 (S.D. Fla. Feb. 22, 2011); Plea Agreement, United States v. Alcatel-Lucent France, S.A., No. 10-CR-20906 (S.D. Fla. Feb. 22, 2011); Plea Agreement, United States v. Alcatel-Lucent Trade Int'l, A.G., No. 10-CR-20906 (S.D. Fla. Feb. 22, 2011). Alcatel-Lucent also divested from Angola, Bangladesh, and Mali even though those subsidiaries did not face criminal charges.

225. *Cf.* SEC v. Alcatel-Lucent Complaint, *supra* note 178 (bringing charges for conduct in Costa Rica, Honduras, Malaysia, and Taiwan); Deferred Prosecution Agreement, *supra* note 180 (bringing charges for conduct in Costa Rica, Honduras, Malaysia, Taiwan, Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda, and Mali).

226. The Alcatel-Lucent situation is unusual since normally the SEC's complaints are broader than the DoJ's. Mike Koehler, *Analyzing Alcatel-Lucent*, FCPA PROFESSOR: A FORUM DEVOTED TO THE FOREIGN CORRUPT PRACTICES ACT (Jan. 6, 2011, 5:21 AM), http://fcpaprofessor.blogspot.com/2011/01/analyzing-alcatel-lucent_06.html.

several countries. One factor unique to the Alcatel-Lucent case that may explain some of the results is the relative timing of the alleged violations as compared to the timing of their disclosure and the timing of the Lucent/Alcatel merger. Since most of the alleged violations occurred prior to the merger but were announced after, the newly merged company could portray itself as a "radically different company today."[227] With management changes and new additions to FCPA training processes, it could present a new face untarnished by prior misdeeds and may have been more willing to admit to past wrongdoing than a comparable company that had not recently been through a merger. Furthermore, "Alcatel-Lucent announced in 2008 that it would terminate the use of sales agents and consultants—the primary means by which certain former employees made the improper payments involved in the violations described in the DOJ and the SEC settlement papers."[228] While this is phrased as a game-changing event, it attracted no attention on the company's quarterly investor conference calls or in equity analyst reports issued thereafter. Another less positive factor that is unique to Alcatel-Lucent and that might explain some of this case study's results is that the "company has struggled since Alcatel and Lucent merged in 2006 under a complex structure, and an ultimately unprofitable vision to be everything to all clients."[229] Despite several rounds of layoffs and efforts to cut costs, the company finally announced a comprehensive restructuring plan in September 2012 in an effort to "focus on profitable markets and customers around the world."[230] There have not yet been any divesti-

227. Press Release, Alcatel-Lucent, Alcatel-Lucent Welcomes the Settlements with U.S. Authorities Regarding Previously Reported Violations of Foreign Corrupt Practices Act (Dec. 27, 2010), *available at* http://www3.alcatel-lucent.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4x3tXDUL8h2VAQAURh_Yw!!?LMSG_CABINET=Docs_and_Resource_Ctr&LMSG_CONTENT_FILE=News_Releases_2010/News_Article_002305.xml.

228. *Id.*

229. Daniel Thomas, *Alcatel at Fault for Problems, Says Chief,* FINANCIAL TIMES, July 31, 2012, *available at* http://www.ft.com/cms/s/0/46a5637a-db18-11e1-8074-00144feab49a.html#axzz2IIUTXV1Z.

230. Press Release, Alcatel-Lucent, Alcatel-Lucent Executes Performance Program with Focus on Core Products (Sept. 10, 2012), *available at* http://www.alcatel-lucent.com/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd4x3tXDUL8h2VAQAURh_Yw!!?LMSG_CABINET=Docs_

tures mentioned as part of this initiative, which went into effect on January 1, 2013,[231] yet one could argue that the earlier decisions not to divest were the result of mismanagement rather than rational cost-benefit analysis.[232] However, the fact that the company is creating a "Global Sales and Marketing" organization to manage all customer-facing commercial relationships suggests that even the newly restructured Alcatel-Lucent will maintain its extensive operations abroad. In sum, the Alcatel-Lucent case study reflects a company's continued commitment to global operations despite perceived risks of corruption and significant sanction as a result of two FCPA enforcement actions.

IV. Theories Reconciling Empirical Research Provide Policy Recommendations

After reviewing the above empirical studies to form a complete picture of the impact of FCPA enforcement on macroeconomic indicators as well as firm-level decision-making, one can make more informed policy recommendations that take these various perspectives into account. This section will compare my new firm-level study with the existing empirical studies and offer explanations for why its findings are consistent with those that have come before and why they may be contradictory. First, my study's results may be consistent with the macroeconomic studies since they focus on different units of observation and use different predictive indicators. Similarly, my study's results may be consistent with the firm-level studies if timing and rhetorical factors implicit in the methodology employed critically impact the findings. Second, subpart B explores reasons why the results of my study conflict with prior studies due to its focus specifically on companies that have been through an enforcement action. Drawing on game theory and law and economics, I explore why companies in my study might rationally act differently than the business community at large captured by prior studies. Third, in the event the reader is unconvinced by any of the prior reconciliations and instead concludes that the impact of the statute is too

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231. *Id.*

232. *Id.*

complex to be captured by any single empirical study, I review independent reasons policy-makers should continue to combat corruption.

A. *Methodological Differences Explain Results*

Methodological explanations attempting to reconcile my study's results with the macroeconomic and firm-level studies take a variety of forms but at their core posit that the studies are consistent in the impact measured. In contrast to macroeconomic studies, my study uses a different unit of observation, the post-enforcement action firm, instead of country-level investment flows, measured by FDI or export levels, as well as different predictive indicators. Thus, it is possible that aggregation and consistency in measuring corruption demonstrate that firms subject to the FCPA reduce their business in high-risk countries in both the macroeconomic studies and in my study. As compared with other firm-level studies, the results of my study could be explained by the politics of rhetoric surrounding corruption or the timing of the study itself that skews firm-level analysis based on self-reporting. Proponents of each of these theories would be led to suggest different policy responses to their resolution.

1. *Consistency with Macroeconomic Studies*

As described in Part III, my firm-level study measures whether a company that has been through an enforcement action under the FCPA continues to operate a facility in the implicated country today. While 70% of the time a company continues to operate in the country, there is a significant minority of situations in which the company has divested. Aggregating this minority across the economy as a whole could result in the decrease in FDI in corrupt countries observed by Hines and Cuervo-Cazurra.[233] Furthermore, my study utilizes the company's facility locations as a binary response reflecting continued operation. This blunt measurement, however, does not reflect the level of investment a company deploys in a given country. Therefore a company might appear in my study as continuing to do business yet at a reduced level, which is captured by the macroeconomic studies demonstrating lower FDI

233. *See supra* notes 53–58 and accompanying text.

or export levels. The measure of investment utilized by my study also does not capture the company's equity investments or joint ventures that would be included in macro indicators.[234] Further research should explore whether the numerous components of FDI exhibit similar trends in response to the FCPA.[235]

All of the widely-used indexes measuring corruption are based on perception and are therefore subjective. Some, such as Business International and Political Risk Services Group, consist of "ratings given by in-house experts at international consulting firms."[236] Others, such as the Global Competitiveness Report[237] and the World Bank Governance Indicators,[238] are based on surveys of business executives in the countries concerned. The former have the benefit of some level of objectivity and are likely devoid of reporting biases but suffer from less first-hand knowledge in a given country, while the latter has the opposite limitations. The survey-based studies may further be problematic as a result of bias in terms of selection and response.[239] Alternatively, Transparency Interna-

234. *See* Org. for Econ. Co-operation & Dev., *supra* note 124, at 17 ("The 'lasting interest' [of a direct investor] is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise [resident in another country].").

235. Beata K. Smarzynska's and Shang-Jin Wei's study on U.S. companies' aversion to joint ventures in more corrupt host countries is an important contribution in this realm and should be expanded upon. Smarzynska & Wei, *supra* note 9.

236. Wei, *supra* note 12, at 308.

237. Xavier Sala-i-Martín et al., *The Global Competitiveness Index 2012–2013: Strengthening Recovery by Raising Productivity*, *in* The Global Competitiveness Report 2012–2013, at 3, 9–10 (Klaus Schwab, World Economic Forum ed., 2012), *available at* http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf ("[T]he GCI uses data from the World Economic Forum's annual Executive Opinion Survey (Survey) to capture concepts that require a more qualitative assessment or for which internationally comparable statistical data are not available for the entire set of economies.").

238. *Worldwide Governance Indicators*, World Bank, http://info.worldbank.org/governance/wgi/resources.htm (last visited Apr. 17, 2013) ("The Worldwide Governance Indicators (WGI) are a research dataset summarizing the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries.").

239. *See, e.g.*, Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Worldwide Governance Indicators Project: Answering the Critics* 12–14 (World Bank, Pol-

tional's ranking, which is an average of existing indices, has been criticized for introducing noise into the measure by mixing dissimilar elements.[240] Accordingly, since the macroeconomic studies discussed in Part II are inconsistent in terms of which of these indexes they use, the variation in my results can perhaps be attributed to the indicators themselves. The attractiveness of this reconciling theory is that it is relatively easy to correct—all that would be required is greater investment in tracking and recording levels of corruption such that a reliable measure could be developed as the gold standard.

2. *Consistency with Firm-Level Studies*

As was discussed in Part III above, the rhetoric of corruption is complicated and laden with judgment as to what business practices are appropriate in a given setting. Further complications arise when discussing corruption in an international context. Here one man's bribe is another's culturally appropriate gift.[241] Accordingly, cultural anthropologists tend to be sympathetic to gifts and favors because they emphasize loyalties to friends, family, tribe, region, religion, or ethnic group. Furthermore, if the gifts are based on affective ties, they are "socially acceptable, economically beneficial, and compensate for the imperfections of government and of electoral institutions."[242] But since corruption takes on a universally negative connotation, "once something has been at least plausibly swept into the corruption category the discursive balance of forces changes. Efforts to eliminate the practice are harder to oppose."[243] It is this complication that suggests the firm-level studies indicating that the FCPA has had a minimum impact

icy Research Working Paper No. 4149, 2007), *available at* http://ssrn.com/abstract=965077 (describing the critiques of bias and the World Bank's response).

240. Wei, *supra* note 12, at 309.

241. *See* Michael B. Runnels & Adam M. Burton, *The Foreign Corrupt Practices Act and New Governance: Incentivizing Ethical Foreign Direct Investment in China and Other Emerging Economies*, 34 CARDOZO L. REV. 295, 298 (2012) ("Bribery, as understood under the FCPA, is a perfect example; it is not just common, but runs rampant throughout China's business practices and is accepted as a valid means of doing business.").

242. Susan Rose-Ackerman, *Corruption: Greed, Culture, and the State*, 120 YALE L.J. ONLINE 125, 128 (2010).

243. Kennedy, *supra* note 74, at 456.

on company operations may underestimate the 30% observed divestment response captured by my study.

An additional methodological distinction in the time frame captured in my study and the firm-level studies provides another explanation in support of their consistency. The firm-level analysis asks companies about the impact of the statute in the ordinary course of their business rather than specifying a given regulatory event.[244] Thus respondents are less focused on a stay or leave decision and are instead concerned about managing and mitigating risks in a state of status quo. They are thus less likely to respond with dramatic shifts in strategy and instead seek to improve business practices on the margin. Furthermore, the very fact that the manager was invited to respond to the survey implies that the company is continuing to operate in high-risk countries after enactment of the FCPA and suggests that the initial cost-benefit analysis left the company comfortable that the attendant risks justified this choice. Therefore, my study's focus on company decision-making post-enforcement action may reflect a unique period in a company's history and exhibit a higher divestment rate than a company operating in more normalized business conditions would predict through firm-level studies.

The policy implications of these reconciling theories take a very different tack from most of the other anti-corruption efforts currently discussed. To tackle rhetorical complications, one would promote community dialogue with civil society and grassroots organizations. In recognition of this goal, the World Bank has for fifteen years been promoting involvement by civil society and the business community in anti-corruption policies in order to have sustainable reform.[245] To combat distortions

244. *See* Smarzynska & Wei, *supra* note 9, at 8 (describing the survey question under study, which asked about the company's "existing or planned FDI" but did not inquire into the "timing or size of the investment").

245. World Bank, *New Frontiers in Diagnosing and Combating Corruption* 5 (World Bank, Poverty Reduction and Economic Management (PREM) Note No. 7, 1998), *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/11530/multi_page.pdf?sequence=1 ("Reforms can be sustained by encouraging all branches of the state, civil society, and business community to participate in the [anti-corruption] policy process."). A recent example of progress made in this regard is the grassroots initiative "Empowering Citizens to Fight Corruption", which has promoted non-violent actions including frank discussion to curb corruption in communities. *Empowering Citizens to Fight Corruption*, NEW TACTICS IN HUMAN RIGHTS, http://www.

arising from the timing of the study itself, a long-term impact analysis would benefit policy-makers concerned about the FCPA influence on company decision-making throughout an industry lifecycle. Since regulatory policy will continue to evolve over time, an unbiased view of the FCPA's impact is an important goal.

B. *Companies Captured by Firm-Level Studies Are Different Than the General Business Community*

Unlike the previous Subpart IV-A, which presumed that my study was consistent with the existing empirical research, the explanations in this Subpart take my findings as conclusive and offer alternate explanations for why post-enforcement action firms may behave differently than the rest of the business community. One distinction is that the sectors targeted for FCPA enforcement are precisely those industries that stand to gain most from investment in emerging markets, so they are unlikely to divest even though other companies in less location-specific industries may be divesting. Second, one could postulate that companies that have been through an enforcement proceeding have better information to make cost-benefit analyses in a divestment decision context, which eliminates a tendency toward risk-averse behavior in the general business community. Third, one could imagine the negotiation context in which a foreign official requests a bribe and a post-enforcement action firm is better able to resist, citing the penalty previously paid to the regulators. As a result, the firms captured by my study have a lower risk of future corrupt business practices, encouraging continued investment even in high-risk countries. All three of these explanations accept the assertion based on the macroeconomic studies that overall levels of FDI have decreased as a result of the FCPA, but counter that the individual firms captured in my study more often continue doing business in these countries. As in Subpart IV-A, each of the reconciliations implies specific policy recommendations worth considering.

newtactics.org/conversation/empowering-citizens-fight-corruption (last visited Sept. 23, 2012).

1. *Sector Targeting Selection Bias*

Regulators have a policy of targeting specific sectors as described in Part I. Therefore, companies who have been through an enforcement action are not generally representative of the wider business community but rather are concentrated in the target sectors. Past target sectors have included the oil industry and freight forwarders, which are both highly resource- and location-dependent. Since this scarcity of resources ties a company to a given location, it creates a condition of relatively inelastic company response toward local business conditions and explains the results of my analysis wherein a majority of the companies continue to do business in the country where they received a sanction for alleged violations of the FCPA. Other targeted sectors such as pharmaceuticals and medical devices are characterized by high fixed costs of development but relatively low marginal cost where volume is important, so access to new markets may be critical to recoup initial investments. Alcatel-Lucent is an example of a company with this cost structure. Although some of their products are customized, several of them represent network solutions that require considerable upfront investment in research and development of patents. Since previous FCPA enforcement targets are, comparatively, more closely tied to the countries in which they operate, it would explain those companies' continued investment as compared to the general business community.

There might also be an element of collusive détente in an industry following a round of targeted FCPA enforcement. In an effort to conserve resources and build up expertise in a targeted industry, regulators often "use facts learned from one case to examine the activities of a target company's competitors, suppliers, or distributors."[246] To facilitate this process, regulators make direct inquiries from other companies in the industry to encourage firms to "tell on" their competitors.[247] Since cooperation with regulators is rewarded and failure to respond to these "sweep letters" might result in the company instead responding to subpoenas for documents or testi-

246. Yockey, *supra* note 47, at 693–94.
247. *Id.* at 694.

mony,[248] companies are faced with a traditional prisoner's dilemma where the incentives are to defect and confess to the regulators. However, game theorists have shown that small groups of players in repeated games can build sufficient levels of trust for a stable equilibrium of cooperation to emerge.[249] Thus it is possible that the regulator's policy of industry targeting encourages companies to collude to thwart prosecutions. If successful, this industry agreement would reduce the probability that individual companies' corrupt practices would be detected, which would encourage continued investment in high-risk countries according to my rational actor model. Non-target sectors in the general business community would find it more difficult to cooperate with an amorphous, heterogeneous group of other firms and thus would face a higher risk of detection, which encourages divestment.

The policy implication from this reconciliation has two parts. First, regulators should continue a sector-focused approach with regard to those sectors where demand for investment in emerging markets is most inelastic. Such sectors are those in which the value from the emerging market is sufficiently unique that the company is not likely to divest but instead will absorb sanctions while cleaning up business practices. A critical component of this policy, however, is international cooperation such that all companies operating in this targeted sector face similar costs as measured by probability of detection and size of the expected sanction. If the cost-benefit analysis of one company within this sector is vastly inferior to its peers, for example if the American business is disadvantaged relative to foreign companies, it will be unable to compete, which opens up the market for exploitation by less scrupulous firms. For example, following the prosecution of Griffen for corrupt practices in the oil industry in Kazakhstan the company divested, which provided an opportunity for Russian and Chinese operators to serve as 'black knights' and

248. OECD WORKING GROUP ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES 18 (2010).

249. *See* Kyle Bagwell & Asher Wolinsky, *Game Theory and Industrial Organization* 21–25 (Columbia Univ. Dep't of Econ., Discussion Paper No. 9900-03, 2000), *available at* http://ssrn.com/abstract=239431 (discussing the emergence of collusion in repeated games among oligopolists).

meet the demand for oil field services.[250] This dynamic reflects the concerns of the Chamber of Commerce and others who stress the need to maintain a level playing field in the global economy.

Encouragingly, much has already been done to promote this policy. The DoJ has expressed its commitment to continue to work with foreign counterparts through the OECD and less formal means.[251] It trumpeted the enactment of two treaties on mutual legal assistance and extradition that came into force in 2010 which allow regulators to coordinate prosecution efforts against companies regardless of where they are located.[252] Additionally, it can be argued that those enforcement proceedings resulting in the largest fines in the statute's history (e.g., Siemens and Alcatel-Lucent) would not have been possible without international cooperation. Even countries whose domestic enforcement of corruption leaves much to be desired have cooperated with U.S. officials to good effect in the FCPA context.[253] Therefore, diplomacy and enforcement efficiency arguments can be made in favor of greater international cooperation.

Less attention has been paid to the second implication from this reconciliation theory. In recognition of the possibil-

250. *See* Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire*, 59 UCLA L. REV. 354, 408 (2011) ("This black knight phenomenon is likewise visible, with alarming intensity, in the anticorruption context."); U.S. Energy Info. Admin., *Kazakhstan*, 1 (Sep. 18, 2012), *available at* http://www.eia.gov/countries/analysisbriefs/Kazakhstan/kazakhstan.pdf ("Neighbors China and Russia are key economic partners, providing sources of export demand and government project financing.").

251. Breuer, *supra* note 38 ("In addition, we will continue to work with the Departments of State and Commerce and the SEC. With them, we will press for ever-increasing vigilance by our foreign counterparts to prosecute companies and executives in their own countries for foreign bribery—both through the OECD and less formal means.").

252. Press Release, Dep't of Justice, U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force (Feb. 1, 2010), *available at* http://www.justice.gov/opa/pr/2010/February/10-opa-108.html.

253. *See* Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2023 (1996) (citing JAMES STEWART, THE PROSECUTORS 18–86 (1987)) (discussing the "investigation of alleged bribery of Pakistani officials by McDonnell Douglas Corporation and its employees in order to secure aircraft sales to the Pakistani national airline").

ity of firms colluding in the face of a prisoner's dilemma, regulators should take steps to discourage any attempts among targeted firms to band together and hinder prosecution under the FCPA. Game theory again provides some insight in this realm. First, regulators could broadly define targeted industries to increase the number of companies potentially impacted and complicate their efforts to collude. Conversely, a micro-targeting strategy defining sectors narrowly might be effective at deterring collusion. Since many of the large multinational companies who are most at risk of FCPA enforcement operate across a variety of small sub-sectors in each of which they compete with a different set of companies, micro-targeted sectors would mean that each company must cooperate with a different set of peers for each subsector. The changing constellation of players would diminish opportunities for establishing trust that could arise from repeat players. Finally, since cooperation is more difficult in finite games, regulators could simulate a discrete single-round game perhaps through a leniency policy that offered reduced sanctions to the first firm to whistle-blow in a particular industry. Under such a policy, the incentives to defect would be too high for companies to resist.

This sort of nuanced targeting strategy would be achieved best through a combination of international prosecution efforts discussed above and greater domestic anti-corruption efforts in foreign countries. It is possible that host country governments could be incentivized to coordinate domestic prosecutions with U.S. regulators. For one thing, relying on foreign institutions to investigate and prosecute corruption allows local actors to save money.[254] Professor Kevin Davis points to three factors that suggest foreign actors are more efficient at enforcing anti-corruption initiatives: (1) They have access to superior information and/or superior expertise; (2) they are more willing to deploy coercive force since they do not have democratic accountability concerns; and (3) they may have greater integrity as independent parties uninvolved in domestic politics and unaffiliated with any of the foreign officials implicated in the action.[255] To the extent that cross-border FCPA enforcement leads to technical and financial assistance for host country law enforcement offices, it is likely to be wel-

254. Davis, *supra* note 7, at 289.
255. *Id.* at 284–85, 290.

comed. The Alcatel-Lucent case study illustrates the potential of this policy recommendation since host country regulators in several of the implicated countries (e.g., Taiwan and Malaysia) initially brought anti-corruption charges against the company or its officers only to abandon them.[256] Contrastingly, those situations in which French regulators cooperated with U.S. officials have met with more prosecutorial success.[257] Similarly, multilateral "anti-corruption conventions provide a framework for strengthening preventive and punitive measures" and setting standards or common mechanisms that can be relied upon in cross-border enforcement.[258] Therefore, proponents of this theoretical bridge between the two methods of empirical analysis would seek even greater efforts at international collaboration to bolster a sector-focused targeting of inelastic industries and guard against company collusion to thwart enforcement.

2. *Statutory Ambiguity as a Deterrent*

Practitioner panels on the FCPA almost universally have one element in common—complaints about the ambiguities in the FCPA.[259] Phrases such as "foreign official" and "while in the territory of the United States" have been interpreted broadly by the DoJ over company objections.[260] Although these criticisms find voice in policy documents such as the Chamber of Commerce proposed amendments to the FCPA,[261] the settlement dynamics of FCPA enforcement are

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256. *See supra* notes 195–196, 206–207 and accompanying text.

257. French officials have initiated investigations into corrupt practices in Costa Rica, Nigeria, and Kenya. ALCATEL-LUCENT, 2011 ANNUAL REPORT ON FORM 20-F, at 76 (2012).

258. TRANSPARENCY INT'L, ANTI-CORRUPTION CONVENTIONS IN THE AMERICAS: WHAT CIVIL SOCIETY CAN DO TO MAKE THEM WORK 7 (2006).

259. *See, e.g.*, FCPA and UK Bribery Act, Panel, NYU Journal of Law and Business Symposium (Jan. 27, 2012); Fraud, Bribery, Corruption: Are Corporate Cops Fighting a Losing Battle?, Milbank Tweed Forum at NYU School of Law (Apr. 4, 2012); Policing, Regulating, and Prosecuting Corruption, Center on the Administration of Criminal Law and the NYU Annual Survey of American Law Symposium (Mar. 25, 2012) (all discussing unclear aspects of the FCPA).

260. *See* RESOURCE GUIDE, *supra* note 5, at 11–13 and 19–21 (providing examples of situations that would constitute alternative jurisdiction and presenting factors to consider when determining who is a 'foreign official').

261. WEISSMANN & SMITH, *supra* note 3, at 7.

such that these arguments rarely find their way into a courtroom. Facing uncertainty in legal liability, companies are likely to be overly cautious, thus increasing the perceived costs when conducting a cost-benefit analysis in a divestment decision.[262] This would result in a greater number of divestments or forgone investments than pure economics would predict, and it could explain the decrease in FDI found in macroeconomic studies. A 2009 study by Dow Jones supports this notion that companies delayed or abandoned key business plans in new or developing markets because of legal questions arising from unclear anti-corruption regulations.[263]

However, firms that have already proceeded through an enforcement action have greater information about the application of the statute to their business. They have had the benefit of a thorough review of internal controls and can more accurately assess both the probability of detection and the expected future sanction. This is especially true of those companies that were required to employ a monitor as part of the negotiated settlement with regulators. Therefore, the cost-benefit analysis of these companies' post-enforcement actions captured by my study lack the uncertainty discount faced by the general business community and should favor continued business as illustrated by my new analysis.

Another somewhat pessimistic view is that proceeding through an enforcement action with the DoJ or the SEC gives companies more information about ways in which it can bypass

262. *See* Runnels & Burton, *supra* note 241, at 301 (suggesting that clarification of the FCPA's definition of 'anything of value,' 'facilitation payments,' and 'foreign official' would combat bribery while promoting foreign direct investment); Sheffet, *supra* note 60, at 299 ("It is difficult to determine whether the FCPA has made American corporations more ethical or merely more cautious."). This excess caution is a departure from pure rational choice theory caused by ambiguity and can necessitate suboptimal decision making. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1083 (2000).

263. Press Release, Dow Jones & Company, Dow Jones Survey: Confusion about Anti-Corruption Laws Leads Companies to Abandon Expansion Initiatives (Dec. 9, 2009), *available at* http://www.dowjones.com/pressroom/releases/2009/1209-US-FIS-0010.asp. The survey included 182 company executives worldwide. 51% claimed their companies delayed key business plans while 14% abandoned them completely because of legal questions regarding corruption risk.

the regulations yet still achieve the desired influence over foreign officials through legal means. One way this may be possible is if the firm hires greater numbers of the foreign official's constituents.[264] This dynamic was measured using capital-labor ratios in an empirical study conducted by Hines who found that following enactment of the FCPA, this ratio declined, lending support to the notion that companies are finding alternative ways to achieve the same results in currying favor with powerful political actors.[265] Similarly, a company may work around the law by contributing to a charity associated with a politician, using local, well-connected suppliers, or by providing local public goods.[266] Although one would expect that the court's requirement of an independent monitor would offset this effect and create an environment of genuine compliance, recent settlements have been less likely to include provisions for a monitor,[267] and it is possible that an outside monitor is unable to truly modify corporate culture.[268]

The implications of this theoretical reconciliation depend on the U.S. legislature's priorities with regard to these alternative forms of gaining influence. If public opinion considers them equally reprehensible, then regulators should (a) maintain the ambiguity in the statute to encourage risk-averse firm behavior and (b) lobby Congress to expand the language to include prohibitions on these other techniques. Alternately, if

264. Andrei Shleifer & Robert W. Vishny, *Politicians and Firms*, 109 Q.J. ECON. 995, 999 (1994).

265. Hines, *supra* note 8, at 11–12.

266. A survey of 350 international companies found that almost "two-thirds of respondents believed that companies in their own country either 'regularly' or 'occasionally' seek to gain a business advantage through making donations to charities favoured by decision-makers." CONTROL RISKS GROUP LTD. & SIMMONS & SIMMONS, INTERNATIONAL BUSINESS ATTITUDES TO CORRUPTION—SURVEY 2006, at 4, 13 (2006), *available at* http://www.csr-asia.com/summit07/presentations/corruption_survey_JB.pdf.

267. SHEARMAN & STERLING LLP, *supra* note 41, at ix ("Only three of the twelve corporations charged in 2012 had independent monitors imposed on them, and in only one case, Marubeni, did the DOJ impose a monitor for the full term of the agreement.").

268. Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 714 (2009) ("[E]xpertise [with the FCPA] may be insufficient to ensure that the corporation's employees actually comply with those policies. This is where issues related to a corporation's culture (e.g., incentives, social norms) are important for understanding future compliance.").

public opinion analogizes this to the beltway politicking that goes on between lawmakers and corporate interests every day, then no effort should be made to penalize these new forms of influencing public officials. Consistent with this view, regulators should also then take steps to clarify the meaning of specific terms in the statute to encourage more rational divestment decisions and greater self-regulation of corruption. A step taken in this respect is represented by the comprehensive guidance published by the DoJ and the SEC in 2012[269] and the 1998 amendment to the FCPA, which allowed for DoJ advisory opinions, though these opinions have been relatively infrequent.[270]

Another related element that contributes to ambiguity is that a typical company faces uncertainty as to investor response to an enforcement action, while a post-enforcement action firm in my study has observed the degree to which financial analysts are focused on the statute. This dynamic was discussed in the context of the Alcatel-Lucent case study in Part III-D. In that case the lack of discussion of the FCPA on quarterly investor calls during the first enforcement action would serve as a weak deterrent of future corrupt action. One effort to measure investor response to the FCPA through changes in share price concludes that "financial deterrents to bribery come primarily from the direct costs imposed by regulators, and not from an impact to the firm's reputation with counterparties."[271] Since firms are not being punished by the equity markets, proponents of this theory would advocate for stricter penalties from the regulators to achieve the desired level of compliance once the ambiguity of shareholder response is removed.

269. RESOURCE GUIDE, *supra* note 5.

270. The DoJ has issued no more than four advisory opinions in any year and on average less than two. *See Opinion Procedure Releases*, U.S. DEP'T OF JUSTICE, http://www.usdoj.gov/criminal/fraud/fcpa/opinion/ (last visited Sept. 23, 2012) (providing DoJ FCPA opinion letters since 1993); *Review Procedure Releases*, U.S. DEP'T. OF JUSTICE, http://www.usdoj.gov/criminal/fraud/fcpa/review/ (last visited Sept. 23, 2012) (providing DoJ FCPA opinion letters from 1980 through 1992).

271. Karpoff et al., *supra* note 11, abstract.

3. *Superior Bargaining Power with Officials*

Bribery is a relatively inefficient way to conduct business.[272] Empirical studies have shown that firms that pay bribes spend more time negotiating with bureaucracy in host countries, increasing the cost and delay of business operations.[273] Corrupt firms have been found to exhibit lower rates of growth[274] and lower productivity.[275] A culture of illegality that results from corruption may encourage employees to engage in other illegal activities at the expense of the firm or may generally create an atmosphere of self-serving behavior that is detrimental to productive work environments.[276]

Thus, all things being equal, companies may find it easier to operate in a country as a non-bribe-payer than as a corrupt one. Having been through an FCPA enforcement action could provide those firms a stronger bargaining position to refuse to pay a bribe requested by a foreign official. While negotiating dynamics may require that the non-bribe-paying firm give up some other benefit important to the opposing party, it is likely that this concession is less value-destructive than the bribe would have been. This theory is supported by evidence that companies that continue to operate in a corrupt country could reduce the level of corruption through a demonstration ef-

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272. *See* Davis, *supra* note 22, at 497 ("Bribery is a relatively expensive way to obtain favors from foreign officials."); Philip M. Nichols, *The Business Case for Complying with Bribery Laws,* 49 AM. BUS. L.J. 325, 344 (2012) (discussing the costs associated with an environment where employees consider self-serving behavior acceptable).

273. *See* Daniel Kaufmann & Shang-Jin Wei, *Does "Grease Money" Speed Up the Wheels of Commerce?* 2 (World Bank, Policy Research Working Paper No. 2254, 1999), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629191 (providing an overview of literature regarding the effects of corruption); Donato De Rosa et al., *Corruption and Productivity: Firm-Level Evidence from the BEEPS Survey* 3–4 (World Bank, Policy Research Working Paper No. 5348, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630232 (discussing the relationship between firm-level bribery and productivity).

274. Raymond Fisman & Jakob Svensson, *Are Corruption and Taxation Really Harmful to Growth?: Firm Level Evidence*, 83 J. DEV. ECON. 63, 64 (2007).

275. Johann Graf Lambsdorff, *How Corruption Affects Productivity*, 56 KYKLOS: INT'L REV. FOR SOC. SCI. 457, 457–69 (2003).

276. *See* Marshall Schminke et al., *The Power of Ethical Work Climates*, 36 ORGANIZATIONAL DYNAMICS 171, 175 (2007) (discussing empirical research on the powerful effects of workplace ethics climates).

fect.[277] Corporations that maintain ethical business practices are good role models for other businesses in that country, which can eventually change corporate practices and ultimately make the market more valuable for all players. This reconciliation theory explains why post-enforcement action firms captured by my study continue to operate in corrupt countries in order to gain benefits from their strengthened bargaining position as a non-bribe-payer.

The policy implications of this theory involve preserving the business relationships between the post-enforcement action firm and the host-country to allow the firm to benefit from its improved negotiating position. This would imply a reduced focus on individual FCPA enforcement actions in order to encourage continuity of the business relationships of firm employees with host country officials. It would also suggest publicity efforts by the DoJ or the SEC might be useful to inform potential negotiating partners that these firms will be less likely to pay bribes in the future. It is possible that a firm's inability or unwillingness to pay bribes following an enforcement action would cause the foreign official to cease doing business with the firm completely, but if sufficient levels of trust and mutually beneficial business can be arranged, it seems likely that the relationship could continue under the right, less corrupt, conditions.

In conclusion, this collection of explanations takes the results of the studies as accurate and seeks alternate explanations based on the composition of the company actions that are being captured under each methodology. First, given the target sector approach to enforcement, those companies that have proceeded through enforcement decisions may be tied more closely to that market than the average company—making them less likely to divest. Second, ambiguities in the statute create uncertainty in most companies' cost-benefit analysis, which could lead them to be more risk-averse as compared to companies who have proceeded through an enforcement action and have more clarity on the statute's interpretation. Third, the very prospect of having been through an enforcement action strengthens a company's negotiating position in refusing to pay bribes, which may make even high-risk countries very attractive investment opportunities. Each of these se-

277. *See* Kwok & Tadesse, *supra* note 73, at 770.

lection biases should be tested with additional research to evaluate more thoroughly the impact of FCPA enforcement on companies' decision to invest in emerging markets.

C. *Regardless of Investment Impact, Anti-Corruption Efforts Are Worthwhile*

A final category of potential responses to the empirical studies are really not reconciliations at all but rather independent arguments about the value of anti-corruption efforts regardless of their impact on investment in emerging markets. The literature in this regard is both vast and beyond the scope of this Note, but in brief, anti-corruption arguments have touched on nearly every aspect of economic and political governance in emerging markets. From an economic standpoint corruption distorts market prices and leads to inefficient allocation of scarce resources.[278] It also diverts funds away from more beneficial development projects and warps programs intended to ameliorate poverty.[279] Officials accustomed to corrupt systems will be likely to enact more regulations in an effort to increase their opportunities to collect bribes while further hindering the development of ethical businesses.[280] In the realm of governance, corrupt systems that concentrate power in the executive are prone to opacity and state capture by elites.[281] Corruption impedes access to justice as illicit rents

278. Susan Rose-Ackerman, *Corruption and Development*, *in* ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1997, at 27, 29 (Boris Pleskovic & Joseph Stiglitz eds., 1998).

279. Transparency Int'l, *Poverty, Aid and Corruption* 2 (Transparency Int'l, Policy Paper No. 01/2007, 2008), *available at* http://www.u4.no/recommended-reading/poverty-aid-and-corruption/.

280. Cyavash Nasir Ahmadi, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT'L BUS. & L. 351, 363 (2012) (describing this form of bribery as an "eco-cycle"); *see also* Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861, 869 (2010) (arguing that bribes destroy rational markets).

281. James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 129 (2009); *see also* Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable,* 33 CORNELL INT'L L.J. 689, 694 (2000) (arguing that such governance systems are unstable because they lack "normal systems of checks and balances"). In recognition of the ill motives of the bribe takers, some have argued for decriminalization of bribe paying to be replaced by a mandatory reporting scheme and a focus on prosecuting the foreign officials who take the bribes. *E.g.*, Bruce W. Klaw, *A New*

demanded by judicial clerks not only violate due process rights but also hinder enforcement of other substantive human rights.[282] More generally, the average citizen in the United States or an emerging market benefits from vigorous enforcement of the FCPA for its ability to create efficiency and fairness gains in the international marketplace with only marginal cost.[283] Therefore, anti-corruption efforts must be carefully crafted to take into account incentives of various stakeholders and to try to minimize the damage that corruption does to a community's social fabric. Overall, these justifications argue, corruption has widespread deleterious effects on emerging markets; therefore, whether or not enforcement of anti-bribery schemes such as the FCPA have a negative effect on investment, it is preferable to the alternative.

Conclusion

Although the FCPA is no longer the only statute targeting bribery of foreign officials, the United States is still the most active advocate of anti-corruption enforcement. As such, it is important to assess the impact of the statute on global economic markets, including companies' decisions to invest or divest from emerging markets. However, measuring this phenomenon has proved challenging due to the difficulty of defining and measuring corruption in different contexts. Macroeconomic studies have concentrated on time series of FDI and export levels to conclude that the statute has decreased company investment in emerging markets. Firm-level studies, on the other hand, complicate these results by illustrating that most companies surveyed have in fact made very few changes in their business practices as a result of the statute. My new analysis of companies that have proceeded through FCPA enforcement actions shows that on balance,

Strategy for Preventing Bribery and Extortion in International Business Transactions, 49 Harv. J. on Legis. 303 (2012).

282. Gathii, *supra* note 281, at 126. This is particularly true in systems involving many complex procedural steps. Edgardo Buscaglia, *Comment* on Susan Rose-Ackerman, *Corruption and Development*, *in* Annual World Bank Conference on Development Economics 1997, *supra* note 278, at 51–52 (1998).

283. Susan Rose-Ackerman & Sinead Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. Ann. Surv. Am. L. 433, 445–46 (2012).

these companies still maintain facilities in the implicated countries. An in-depth case study of one such company that continues to invest in most implicated countries despite the risks shows a lack of response from investors as well as competitors and only a marginal change in business practices. Thus, the empirical results present potentially conflicting impressions of the impact of the FCPA on company investment decisions. Accordingly, I offer several theoretical explanations reconciling the studies, assuming first that they reflect consistent practices measured in inconsistent ways. Only afterward do I consider the possibility that my study illustrates that post-enforcement action firms behave differently from the rest of the business community, so I offer theories that explain these conflicting results. Each of these theories implicates a different policy response that should be considered by regulators. From promoting community dialogue to reducing enforcement against individuals, from investing in indicators of corruption to improving the clarity of the statute's definition, these suggestions warrant regulators' attention. Good enforcement policies are critical to the success of fighting corruption globally, and understanding the myriad impacts of the current regulatory framework is an important prerequisite for success.

EXHIBIT 1: SUMMARY OF VARIABLES

Summary Statistics

Continuous Variables

Variable	# of Observations	Mean	Std. Dev.	Min.	Max.	Potential Range	Explanation
GDP	174	1414.626	2548.708	4.278	15609.7	Infinite	In billions of current U.S. Dollars
BPIndex	174	8.218391	0.304695	6.5	8.8	0–10	Business executives are asked for each of the countries with which they have a business relationship–'how often do firms headquartered in that country engage in bribery in this country?' A maximum score of 10 corresponds with the view that the companies from that country never bribe abroad and a score of 0 corresponds with the view that they always do.
CPI	174	36.29885	13.44061	17	80	0–100	A country or territory's score indicates the perceived level of public sector corruption on a scale of 0–100, where 0 means that a country is perceived as highly corrupt and 100 means it is perceived as very clean.

Categorical Variables

Variable	# of Observations	Potential Values	Frequency of 0	Frequency of 1	% of 0	% of 1	Explanation
Industry	174	0 and 1	28	146	16.1%	83.9%	A value of 1 corresponds to companies that are not resource dependent whereas a value of 0 corresponds to companies that are in the oil and gas industry.
Monitor	174	0 and 1	71	103	40.8%	59.2%	A value of 1 corresponds to companies that were required to hire an independent monitor following the enforcement action related to that implicated country. A value of 0 corresponds to those companies that were not required to have a monitor.
Issuer	174	0 and 1	22	152	12.6%	87.4%	A value of 1 corresponds to companies that are U.S. issuers under the statute. A value of 0 corresponds to those companies that are not U.S. issuers.
Repeat	174	0 and 1	114	60	65.5%	34.5%	A value of 1 corresponds to companies (their parent companies or successor companies) that have been subject to more than one enforcement action during the period studied. A value of 0 corresponds to those companies who have only been through one enforcement action during this period.

EXHIBIT 2: COMPANY RESPONSE: IN EACH IMPLICATED COUNTRY

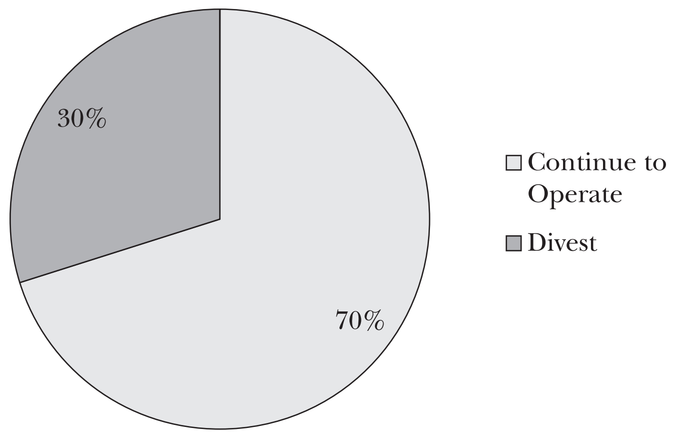

EXHIBIT 3: COMPANY OPERATIONS IN OTHER EMERGING MARKETS

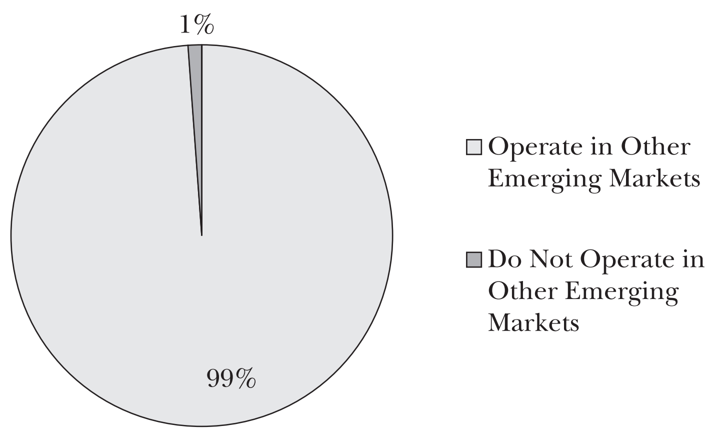

EXHIBIT 4: PROBIT REGRESSION OUTPUT

Probit Regression	Number of obs	=	174
	LR chi2(7)	=	61.56
	Prob > chi2	=	0.0000
	Psudo R2	=	0.2901

Log likelihood = -75.338944

Response	Coef.	Std. Err.	z	P>l z l	[95% Conf. Interval]	
GDP	0.0012501	0.0003137	3.99	0.000	0.0006353	0.0018649
Industry	-0.0779489	0.3314282	-0.24	0.814	-0.7275362	0.5716384
Monitor	0.9612105	0.2532589	3.80	0.000	0.4648322	1.4575890
BPIndex	0.9941965	0.4605542	2.16	0.031	0.0915269	1.8968660
Issuer	0.0005075	0.3927758	0.00	0.999	-0.7693189	0.7703339
CPI	0.0101765	0.0103822	0.98	0.327	-0.0101723	0.0305253
Repeat	0.4294685	0.2713348	2.58	0.113	-0.1023380	0.9612749
_cons	-9.2606460	3.8127190	-2.43	0.015	-16.7334400	-1.7878540

Note: 0 failures and 18 successes completely determined.

EXHIBIT 5: GDP MARGIN ANALYSIS

GDP	Margin	Difference
0	0.4727207	
250	0.5964214	12.4%
500	0.7111073	11.5%
750	0.8076174	9.7%
1000	0.8813331	7.4%
1250	0.9324389	5.1%
1500	0.964598	3.2%
1750	0.9829657	1.8%
2000	0.9924877	1.0%
2250	0.9969681	0.4%
2500	0.9988816	0.2%

EXHIBIT 6: BPINDEX MARGIN ANALYSIS

BPIndex	Margin	Difference
7.0	0.6874678	
7.5	0.8378804	15.0%
8.0	0.9309471	9.3%
8.5	0.9761471	4.5%
9.0	0.9933769	1.7%

EXHIBIT 7: TRANSPARENCY INTERNATIONAL'S CORRUPTION PERCEPTION INDEX SCORE, TIME PERIOD OF CORRUPT ACTIVITY, AND GDP FOR COUNTRIES IMPLICATED BY ALCATEL-LUCENT'S FCPA ENFORCEMENT ACTIONS

Country	CPI	Time	GDP
First Enforcement Action			
China	**39**	**3**	**$ 7,991.7**
Second Enforcement Action			
Angola	22	2	$ 121.5
Bangladesh	26	9	118.4
Costa Rica	54	4	44.3
Ecuador	32	5	72.5
Honduras	28	2	18.3
Ivory Coast	29	7	25.2
Kenya	27	2	42.4
Malaysia	49	2	305.8
Mali	34	2	11.1
Nicaragua	29	2	7.7
Nigeria	27	8	273.0
Taiwan	61	4	480.5
Uganda	29	3	19.4
Average	**34**	**4**	**$ 118.5**
Average of Invested	**40.0**	**3.86**	**$ 171.7**
Average of Divested	**27.8**	**4.17**	**$ 48.3**