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**An Analysis of the Effectiveness of the Foreign Corrupt Practices Act in
Combating Corruption**

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Abstract

An Analysis of the Effectiveness of the Foreign Corrupt Practices Act in Combating Corruption

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The Foreign Corrupt Practices Act (FCPA) has a dual purpose of protecting United States businesses (and importantly, their investors) and combating corruption abroad. The latter purpose is the focus of this study. Reduced corruption has been linked to improving human rights conditions and supporting development projects; thus, if the FCPA reduces corruption, it can positively impact other United States' concerns. Given this importance, this study seeks to determine whether the FCPA reduces corruption in targeted countries. FCPA enforcement actions brought by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) from 1998 to 2012 were compiled and allocated by country where the underlying bribery took place. The top ten countries from which the most FCPA enforcement actions arose were selected for individual case study. The level of corruption in each country was approximated with the World Bank's Control of Corruption Indicator (CCI) for the relevant time period of 1998 to 2012. The number of FCPA enforcement actions are compared to this CCI score to determine if the FCPA reduced corruption in those countries relative to countries without

as many FCPA enforcement actions. This comparison, both individually and collectively, is not able to demonstrate that FCPA enforcement reduced levels of corruption in those countries that gave rise to the most enforcement actions. Thus, although the FCPA may be an important tool in the toolbox of international regulations the United States uses in combatting corruption, as well as promoting human rights and international development, it alone does not appear to significantly reduce corruption abroad.

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Chapter One: The Importance of Combating Bribery

“Bribery is bad for business” is a common refrain among anti-corruption advocates.¹ Yet, bribery also impacts a number of human rights and development objectives.² Furthermore, corruption caused by business bribes to government officials does not have a limited impact on business concerns: Corruption leads to more corruption.³ Thus, bribery of foreign officials by a business often can have the effect of creating an overall culture of corruption.⁴

This negative impact for businesses, governments, and citizens has led to an increasing web of regulations intended to reduce the incentive to bribe. In the United States (U.S.), this goal is furthered by the Foreign Corrupt Practices Act (FCPA), which broadly prohibits bribery of government officials.⁵ The FCPA penalizes those that pay bribes and, since 1998, has been enforced against a wide-range of businesses and individuals who have violated its provisions.

This enforcement ties back to the human rights and development concerns implicated by the effects of bribery. FCPA enforcement actions are predominately brought against alleged corruption in developing countries.⁶ One reason for this result may be that “[c]orruption is a major issue in developing countries[.]”⁷ The

¹ See, e.g., U.S. DEP’T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM’N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (2012) [hereinafter RESOURCE GUIDE] (“Corruption is . . . bad for business.”).

² *Id.* at 2–3.

³ See *id.* at 3 (noting that paying bribes “results in ever-increasing demands”).

⁴ *Id.* at 2–3.

⁵ For a detailed discussion of the FCPA’s provisions and enforcement mechanisms, see Chapter Two.

⁶ Andrew Brady Spalding, *Four Unchartered Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, 2012 WIS. L. REV 661, 663 (2012).

⁷ C. Raj Kumar, *National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights*, 28 HUMAN RIGHTS QUARTERLY 755, 768 (2006).

disproportionate impact of the FCPA on firms conducting business in developing countries—and, of course, on investment in those countries themselves—may hinder other U.S.-led efforts to aid in development and human rights, which leads to a salient question: Does the FCPA measurably reduce corruption?

This study aims to determine whether the FCPA reduces the levels of corruption in countries where alleged bribes have given rise to FCPA enforcement actions. It is important to note that this study is not concerned with whether or not the FCPA is wise legislation and implements good U.S. policy, nor does this study consider if the FCPA helps U.S. investors or harms U.S. businesses. Rather, this study is concerned with determining if the FCPA measurably reduces corruption. If there is a reduction in bribery as a result of FCPA enforcement actions, it can be concluded that the FCPA is providing one crucial piece of the human rights and development puzzle.

A. BRIBERY’S IMPACT ON HUMAN DEVELOPMENT

Bribery “benefits a powerful few while imposing costs on large swathes of society.”⁸ The Economist reported that, above a certain measurement of corruption, a reduction of corruption is correlated with an increase in the United Nation’s (U.N.) Human Development Index.⁹ Ultimately, these connections have meant that “[h]uman rights activists are learning to grapple with the human rights impacts of corruption, and anti-corruption campaigners frequently deploy a human rights analysis to bolster their case for reform.”¹⁰

⁸ *Corruption and Development: Corrosive Corruption*, THE ECONOMIST ONLINE (Dec. 2, 2011 16:59), <http://www.economist.com/blogs/dailychart/2011/12/corruption-and-development>.

⁹ *Id.*

¹⁰ Chris Albin-Lackey, *Corruption, Human Rights, and Activism: Useful Connections and Their Limits*, in 5 JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION 139, 139 (Dustin N. Sharp ed., 2014).

The connection between corruption and human rights violations is cast in a strong light by the Obama Administration, which insists that “corruption is itself a human rights violation and an affront to human dignity.”¹¹ The White House’s May 2010 *National Security Strategy* states that “pervasive corruption is a violation of basic human rights and a severe impediment to development[.]”¹² Although other scholars disagree that corruption is itself a human rights violation in all circumstances—it depends on the nature of the bribe—its connection to human rights is well understood.¹³ An increase in human rights recognition may have an effect of reducing corruption—for example, access to information may reduce politicians’ ability to participate in corrupt practices.¹⁴ This connection may be effective in “rais[ing] awareness and hav[ing] a deterrent effect.”¹⁵

Another negative impact of corruption is economic inequality. One study found “evidence of reciprocal causation between inequality and corruption.”¹⁶ This means that “[g]reater inequality causes higher levels of corruption, and higher levels of corruption intensify inequality.”¹⁷ As a result of this relationship, “societies are likely to be trapped in vicious circles of inequality and corruption.”¹⁸ Reducing corruption, then, should have

¹¹ Samantha Power, Special Asst. to the Pres. and Sen. Director for Multilateral Affairs and Human Rights, The Obama Administration and Human Rights, Address at the Human Rights First Summit (Dec. 5, 2012), available at <http://www.humanrights.gov/2012/12/13/the-obama-administration-and-human-rights/>.

¹² WHITE HOUSE, NATIONAL SECURITY STRATEGY 38 (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

¹³ See, e.g., Julio Baccio-Terracino, Remarks at the Annual Meeting of the Am. Soc’y of Int’l Law (Mar. 26, 2010), in 104 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC’Y OF INT’L LAW) 243, 243 (2010).

¹⁴ *Id.* at 244.

¹⁵ *Id.* at 246.

¹⁶ Jong-Sung You & Sanjeev Khagram, *A Comparative Study of Inequality and Corruption*, 70 AM. SOCIOLOGICAL REV. 136, 153 (2005).

¹⁷ *Id.*

¹⁸ *Id.*

the effect of both reducing inequality and reducing one factor that creates more corruption.¹⁹

Seen through a human rights and economic development lens, corruption can be combated in many ways—for example, through the promotion of human rights, international aid, and criminal law. Despite these potential multi-faceted approaches to reducing bribery, “the FCPA is almost certainly the single biggest component of the U.S. government’s anti-corruption enforcement effort[s.]”²⁰

B. THE U.S.’ FIGHT AGAINST CORRUPTION: THE FOREIGN CORRUPT PRACTICES ACT

Chapter Two discusses the history and operation of the Foreign Corrupt Practices Act (FCPA) in detail, however, in order to adequately frame this study, it is important to understand two important aspects of the legislation: (1) the FCPA’s goals; and, (2) the manner in which the FCPA’s operation achieves those goals.

The United States proffers two main reasons for implementing the FCPA and broadly enforcing it: protection of business (including the investors in those businesses) and reducing corruption. In a jointly produced resource guide for practitioners, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) note that:

Corruption impedes economic growth by diverting public resources from important priorities such as health, education, and infrastructure. It undermines democratic values and public accountability and weakens the rule of law. And it threatens stability and security by facilitating criminal activity within and across borders, such as the illegal trafficking of people, weapons, and drugs. International corruption also undercuts good governance and impedes U.S. efforts to promote freedom and democracy, end poverty, and combat crime and terrorism across the globe.²¹

¹⁹ *See id.* at 154 (“Countries may thus be . . . liberated in virtuous circles of equality and integrity (freedom from corruption).”).

²⁰ Spalding, *supra* note 6, at 674.

²¹ RESOURCE GUIDE, *supra* note 1, at 2–3 (citations omitted).

Of particular note is the focus not only on corruption's effect on international crime, but also on the implication of U.S.' interest in its humanitarian initiatives. If programs implemented by the United States Agency for International Development (USAID)²² are to be successful, corruption needs to be eliminated as a hindrance. The USAID has insisted that “[n]o problem does more . . . to undermine political stability and economic development, than endemic corruption[.]”²³

The SEC and DOJ also indicate the importance of the FCPA in protecting business interests:

Corruption . . . increases the cost of doing business globally and inflates the cost of government contracts in developing countries. Corruption also introduces significant uncertainty into business transactions[.] . . . Bribery has destructive effects within a business as well, undermining employee confidence in a company's management and fostering a permissive atmosphere for other kinds of corporate misconduct[.] . . . Companies that pay bribes to win business ultimately undermine their own long-term interests and the best interests of their investors.²⁴

The agencies further note that corruption creates “an unfair playing field for honest businesses.”²⁵ Corruption not only hinders the operation of businesses—and increases costs, according to the DOJ and SEC—but also hurts investors. This results because “investors rely on a company's financial statements and internal accounting controls to ensure transparency in the financial health of the business, the risks undertaken, and the transactions between the company and its customers and business

²² Generally, these programs involve “investing in agriculture, health systems and democratic institutions.” *What We Do*, USAID (Feb. 19, 2014), <http://www.usaid.gov/what-we-do>. One method the USAID uses to accomplish this is “focusing on strengthening and promoting human rights, [as well as an] accountable and transparent government[.]” *Democracy, Human Rights and Governance*, USAID (Feb. 6, 2014), <http://www.usaid.gov/what-we-do/democracy-human-rights-and-governance>.

²³ RESOURCE GUIDE, *supra* note 1, at 3 (quoting the USAID Anti-Corruption Strategy).

²⁴ *Id.* (citations omitted).

²⁵ *Id.*

partners.”²⁶ Investors do not have knowledge of the bribes paid (and the potential liability resulting from these bribes) and are significantly harmed by these corrupt payments.

Given these goals of protecting businesses and investors, as well as aiding international development, it is important to understand the theoretical basis on which the FCPA could reduce corruption. First, bribers are either fined, jailed, or both—thus reducing the supply of potential bribe payers. In addition, the FCPA can reduce bribery through deterring future corrupt conduct by officials and businesspeople.

This deterrent effect can be felt through the highly publicized FCPA enforcement actions brought against corporations and individuals and the extensive sanctions placed on them. In fact, an “increased focus on individual prosecutions presents perhaps the greatest deterrent of all. Whereas a corporation might employ a simple cost-benefit analysis in whether to engage in bribery and merely suffer a large fine, an individual must choose whether the benefits of his actions are worth actual time in prison.”²⁷ Although it is unclear to what extent businesses make a simple cost-benefit determination with regards to FCPA violations, it is true that individuals may be particularly deterred. This may be demonstrated by the fact that the government is initiating fewer enforcement actions, while voluntary disclosures have increased.²⁸

If the FCPA’s deterrence effect operates successfully, there will be fewer corporations and individuals willing to pay any bribes demanded—that is, the supply-side of corruption will decrease. With fewer companies willing to pay bribes to invest, operate, and work in countries, there is economic pressure on a country to reform its

²⁶ *Id.* at 38.

²⁷ Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 Rev. Litig. 439, 467 (2010).

²⁸ *Id.*

bribe-paying practices in particular industries for fear of losing businesses unwilling to pay bribes. Fewer government agencies demanding bribes has a ripple effect through the governance of a country: good governance is reinforced and a culture of corruption is slowly eradicated.

One study suggests that—although corruption decreases foreign direct investment in the way a tax does—U.S. investors are “not necessarily more” averse to investment in a more corrupt country than non-U.S. investors, even though, at the time of the study, FCPA enforcement was “unique” to U.S. investors.²⁹ This may lead to a “sanctioning effect” against developing countries when U.S. investors decide not to pursue a project in a given country due to the risk of an FCPA action.³⁰ There are certainly questions as to what extent corruption is deterred by the FCPA, as some claim that the FCPA merely provides an extra cost to be considered.³¹

The FCPA does not operate in a regulatory vacuum, but is rather “part of a cumulative effort to deter through legislation corrupt and unethical corporate behavior—a cumulative effort imposing penalties that substantially increase the chances for successful deterrence of corporate misconduct,” an effort that may ultimately “reduce the number of executives willing to risk the penalties and the public censure.”³² The FCPA is one tool in the U.S.’ toolbox for combating overall corporate misconduct.

²⁹ Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 REV. OF ECON. & STAT. 1, 8 (2000).

³⁰ Spalding, *supra* note 6, at 667.

³¹ See Miriam F. Weismann, *The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment*, 88 J. BUS. ETHICS 615, 615–16 (2009).

³² Kathleen A. Lacey et al., *Addressing the Deterrent Effect of the Sarbanes-Oxley Act’s Certification Provisions: A Comparative Analysis Using the Foreign Corrupt Practices Act*, 38 VAND. J. TRANSNAT’L L. 397, 440 (2005).

C. THE STUDY

This study intends to determine if FCPA actions have led to a reduction in corruption. Specifically, this study evaluates the effectiveness of the Act in combating bribery abroad and accomplishing its human development goals: Does the FCPA actually reduce corruption in targeted countries (as opposed to protecting U.S. investors from businesses doing business in those targeted countries)?

Given the importance of combating corruption—for both human rights development and for business—it is important to understand whether or not the FCPA is a successful tool in doing so. This study evaluates whether the FCPA significantly reduces corruption in targeted countries to see if the FCPA is accomplishing its goal of reducing bribery alongside its protection of U.S. investors.

This study proceeds in five parts. Chapter Two provides a brief history of the FCPA to explain the way enforcement actions are brought and how these provisions operate to discourage bribery of foreign government officials. Chapter Three discusses the data used in this study and indicates how the case countries were selected. Chapter Four analyzes the impact of the FCPA on the targeted countries. Chapter Five considers general conclusions to be drawn about the FCPA's impact on corruption from combining the case studies, as well as explains the limitations of this study. Chapter Six concludes the study.

Chapter Two: The Foreign Corrupt Practices Act¹

The FCPA is the legislative mechanism through which the U.S. government combats foreign corruption, authorizing the DOJ and the SEC to bring enforcement actions against a broad range of actors furthering corruption. Initially, the FCPA was applied primarily to U.S.' companies and individuals. Twenty-two years after the statute was adopted—as a result of international cooperation through the Organization for Economic Cooperation and Development (OECD) convention on anti-bribery—Congress passed the 1998 Amendments to the FCPA. As a result, the FCPA is currently applied broadly to both foreign and domestic individuals and companies.

A. FCPA ADOPTION IN 1977

The FCPA² was “unanimously passed” in 1977 in response to an SEC “report disclosing that over 400 U.S. companies[] . . . made ‘questionable payments’ to foreign officials.”³ In total, those companies paid over \$300 million to foreign officials.⁴ Although the exact time period in which these payments were made is unclear, these disclosures followed SEC investigations during the 1970s.⁵ The FCPA, to combat these corrupt payments, provides the DOJ and the SEC with enforcement authority against

¹ This Chapter is an edited and modified version of the background section of a paper I wrote in Professor Jay L. Westbrook’s Spring 2013 International Business Litigation Writing Seminar.

² Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 102-104, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (Supp. I 1977)) [hereinafter 1977 FCPA].

³ JEFFREY P. BIALOS & GREGORY HUSISIAN, *THE FOREIGN CORRUPT PRACTICE ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES* 24 (1997).

⁴ *Id.* at 24 n.77.

⁵ Florian A. Stamm, *The Foreign Corrupt Practices Act: Keeping All Hands on the Table*, 15 TRUST THE LEADERS, Spring 2006, http://www.sgmlaw.com/resources/trust_the_leaders/leaders_issues/ttl15/836/.

bribery, which is accomplished through two major provisions: one prohibits bribery and the other regulates accounting.⁶

The anti-bribery provisions work by prohibiting “corrupt payments to foreign officials to obtain or retain business.”⁷ The FCPA makes it unlawful for “any officer, director, employee, or agent . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of . . . anything of value” to foreign officials for prohibited purposes.⁸ The enumerated purposes include the attempt to influence an “act or decision” of an official in his or her official capacity; “inducing such foreign official to use his influence . . . to affect or influence any act or decision of such government[;]” and bribing a foreign official “in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person[.]”⁹ Many crucial terms in this prohibition were left without adequate working definitions, including “foreign official,” “corruptly” and “obtaining or retaining business.”¹⁰

The record-keeping provisions require companies to maintain accurate financial records. They prohibit “knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls.”¹¹ These provisions apply to “[e]very issuer which has a class of securities registered pursuant to section 12

⁶ U.S. DEP’T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM’N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2 (2012) [hereinafter RESOURCE GUIDE].

⁷ *Id.*

⁸ 1977 FCPA, *supra* note 2, §103.

⁹ *Id.* This provision, which the District Court notes is “not a model of precision in legislative drafting[.]” is implicated in *SEC v. Straub*. See Order Dismissing Def.’s Mot. Dismiss, *SEC v. Straub*, No. 11 Civ. 9645 (RJS), 2013 WL 466600, at *14 (S.D.N.Y. Feb. 8, 2013) [hereinafter *Straub Order*].

¹⁰ Mark Romaneski, *The Foreign Corrupt Practice Act of 1977: An Analysis of its Impact and Uncertain Future*, 5 B.C. INT’L & COMP. L. REV. 405, 406 (1982).

¹¹ RESOURCE GUIDE, *supra* note 6, at 2.

of [the Securities Exchange Act of 1934.]”¹² The FCPA imposes an affirmative duty on issuers to “make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer[.]”¹³ The issuer is also required to develop and run an internal accounting system that reasonably assures transactions are made with management’s authorization and are recorded to “permit preparation of financial statements in conformity with generally accepted accounting principles” and “to maintain accountability for assets[.]”¹⁴ This provision was meant to combat the practice of hiding corrupt payments by falsifying financial statements.¹⁵

For over two decades, the U.S. had a “lonely vigil against corruption[.]”¹⁶ This may be part of the reason that the FCPA was rarely applied to foreign nationals before the 1998 Amendments. Before the Amendments, it was conceded that the statute, “in theory, could be applied to foreign individuals who are directors, employees, or agents of domestic concerns or issuers[.]”¹⁷ This analysis would have to track the traditional federal procedural requirement of establishing minimum contacts with the jurisdiction.¹⁸ The United States’ lone role changed in 1994 when “the OECD finally agreed . . . to take ‘concrete’ measures . . . to combat bribery of foreign officials[.]”¹⁹

¹² 1977 FCPA, *supra* note 2, § 102.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ RESOURCE GUIDE, *supra* note 6, at 3.

¹⁶ BIALOS & HUSISIAN, *supra* note 3, at 25.

¹⁷ *Id.* at 31.

¹⁸ *Id.* at 31–32 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

¹⁹ *Id.*

B. CONVENTION ON COMBATING BRIBERY ADOPTED BY THE OECD

In 1988, Congress requested that the President secure an international treaty with the OECD to “prohibit bribery in international business transactions by many of the United States’ major trading partners.”²⁰ This request led to negotiations with OECD countries and, ultimately, the Convention on Combating Bribery of Foreign Officials in International Business Transactions.²¹ The agreement reached at this convention led to the FCPA’s 1998 Amendments.²²

The United States’ previous attempts to establish international consensus on anti-bribery mechanisms failed because there was no “support from the industrialized countries of Europe.”²³ Thus, the OECD Convention was “a sweeping change in the way . . . Europe regarded international bribery.”²⁴ The Convention criminalized bribery, provided sanctions, and “established mechanisms for monitoring compliance and for enforcement.”²⁵ This included—like the FCPA—“accounting and internal controls requirements allowing greater visibility into corporate transactions and dispositions of assets.”²⁶ The Convention called for signatories to “aggressively assert both territorial jurisdiction and nationality jurisdiction.”²⁷

The Convention states that signatories should “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the

²⁰ RESOURCE GUIDE, *supra* note 6, at 3.

²¹ *Id.*

²² *Id.*

²³ 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 LAW & COM. REG. 239, 263 (Spring 2001) [hereinafter Brown, *Jurisdiction Under the 1998 Amendments*].

²⁴ *Id.* at 267.

²⁵ *Id.* at 267–68.

²⁶ *Id.*

²⁷ *Id.*

offence is committed in whole or in part in its territory.”²⁸ Further, each nation should “prosecute its nationals for offenses committed abroad” by taking “such measures as may be necessary to establish its jurisdiction[.]”²⁹ International cooperation is also sponsored by the Convention, as two parties that have jurisdiction over an alleged offence “shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.”³⁰ Interestingly, the Convention requires a signing party to “review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, [the party] shall take remedial steps.”³¹

The Commentaries to the Convention make clear that its jurisdictional reach is expansive: “The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.”³² The jurisdictional reach is such that:

Jurisdiction is established over offenses that are committed in whole or in part by ‘any person’ acting within a party’s territory. This means that, regardless of citizenship, any individual or entity acting within a party’s territory will be subject to its anti-bribery prohibitions. Whether based on principles of nationality or territoriality, each party is to apply its law extraterritorially in accordance with the legal principles recognized by its legal system.³³

As noted above, the Convention even calls for a jurisdiction’s traditional legal principles to change if they are ineffective in combating international bribery.

²⁸ Org. for Econ. Co-operation and Dev. [OECD], Convention on Combating Bribery of Foreign Officials in International Business Transactions art. 4, § 1, Dec. 18, 1997, 37 I.L.M. 4 (1998) [hereinafter OECD Convention].

²⁹ *Id.* art. 4, § 2.

³⁰ *Id.* art. 4, § 3.

³¹ *Id.* art. 4, § 4.

³² OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS 16 (2011), available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/38028044.pdf>.

³³ STUART H. DEMING, THE FOREIGN CORRUPT PRACTICE ACT AND THE NEW INTERNATIONAL NORMS 310 (2 ed., 2010).

The Convention was completed on December 18, 1997.³⁴ By the end of 1998, ten countries—including the United States—had ratified the Convention.³⁵ As of November 20, 2012, forty nations had ratified the Convention.³⁶ With Russia’s ratification of the Convention in February 2012, this number includes all members of the Group of 8 (G8).³⁷ Notable absences include the People’s Republic of China, the Middle East (except for Turkey and Israel), and Africa (except for South Africa).³⁸ The “Convention came into force on February 15, 1999, with the United States as a founding party.”³⁹

The Convention’s implementation meant “the U.S. government’s twenty-year campaign against international bribery [was] largely realized.”⁴⁰ The Convention’s principles are now “so widespread that it can be stated unequivocally that international legal norms now prohibit the making of improper inducements to foreign officials.”⁴¹ The result is that “[m]ost developed countries have implemented legislation prohibiting their nationals from making improper inducements to foreign officials[, and] [v]irtually all other countries are parties to international conventions prohibiting improper inducements to foreign officials.”⁴²

³⁴ OECD Convention, *supra* note 28, at 37 I.L.M 1.

³⁵ OECD, *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 20 November 2012*, <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf> [hereinafter Convention Ratification Status].

³⁶ *Id.*

³⁷ *See id.*, and Evan P. Lestelle, *The Foreign Corrupt Practices, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 543 (2008).

³⁸ *See* Convention Ratification Status, *supra* note 35, and Lestelle, *supra* note 37, at 543. The United Nations Convention Against Corruption (UNCAC) is a similar convention, but has more signatories. *Id.* at 544. However, much like with the OECD Convention, countries from the Middle East, Africa, and Asia are absent. *Id.*

³⁹ RESOURCE GUIDE, *supra* note 6, at 4.

⁴⁰ H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government’s Campaign Against International Bribery*, 22 HASTINGS INT’L & COMP. L. REV. 407, 522 (1999).

⁴¹ *Id.* at 306.

⁴² DEMING, *supra* note 33, at 306.

In order to implement the OECD Convention, Congress passed the International Anti-Bribery and Fair Competition Act of 1998, which amended the FCPA and allowed broader extraterritorial jurisdiction.⁴³

C. THE 1998 AMENDMENTS TO THE FCPA

The 1998 Amendments extended the reach of the FCPA to cover foreign corporations and individuals.⁴⁴ As a result, the “FCPA’s influence extends all over the world.”⁴⁵ Indeed, “taken to its apparent limits, the amended FCPA would in effect be a general warrant against international bribery.”⁴⁶

The FCPA was amended to:

(1) include payments made to secure “any improper advantage”; (2) reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States; (3) cover public international organizations in the definition of “foreign official”; (4) add an alternative basis for jurisdiction based on nationality; and (5) apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.⁴⁷

These changes represent an increase in the scope and jurisdictional reach of the statute. Since more types of payments are included as violations and the definition of foreign official was broadened, the Amendments can reach more conduct.

The Amendment allows for nationality-based jurisdiction, which means that a court can assert “jurisdiction . . . predicated on the domicile, the residence, and the nationality or national character, of the person committing the offense[.]”⁴⁸ This type of

⁴³ ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS* 56 (2 ed., 2012).

⁴⁴ *Id.* at 45.

⁴⁵ DEMING, *supra* note 33, at 3.

⁴⁶ Brown, *Jurisdiction Under the 1998 Amendments*, *supra* note 23, at 359.

⁴⁷ RESOURCE GUIDE, *supra* note 6, at 4.

⁴⁸ Brown, *Jurisdiction Under the 1998 Amendments*, *supra* note 23, at 279.

jurisdiction is “‘discrete and independent’ from territorial jurisdiction[.]”⁴⁹ Thus, a U.S. corporation or individual is subject to the FCPA for conduct anywhere in the world.⁵⁰

The Amendments also provide extended jurisdiction over foreign nationals. Foreign individuals and entities became subject to U.S. “territorial jurisdiction . . . [for] violations of the FCPA[.]”⁵¹ This jurisdiction is “solely predicated on an act in furtherance of the violation having been committed within the territorial United States.”⁵²

The 1998 Amendments’ extension of the FCPA fits the OECD Convention’s scheme of international anti-bribery regulation. This significant expansion allowed the U.S. to extend its territorial jurisdiction over foreign defendants, which in turn allowed the SEC and DOJ to increase enforcement of the FCPA.

D. FCPA ENFORCEMENT

The DOJ has authority to bring criminal actions under the FCPA, whereas the SEC is charged with bringing civil actions.⁵³ Although cases often involve use of joint resources between the agencies, the DOJ’s enforcement actions⁵⁴ are usually brought separately from the SEC’s enforcement.⁵⁵

Between 1998 and 2012, the SEC filed 114 FCPA claims.⁵⁶ In 2010, the SEC created a specialized unit to deal solely with FCPA enforcement actions.⁵⁷ That year,

⁴⁹ *Id.*

⁵⁰ See Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1317 (1985) (“[E]ntities deemed to be ‘controlled’ by United States persons—such as foreign-based subsidiaries of United States corporations—are subject to extraterritorial jurisdiction.”).

⁵¹ Brown, *Jurisdiction Under the 1998 Amendments*, *supra* note 23, at 288.

⁵² *Id.* at 288–89.

⁵³ RESOURCE GUIDE, *supra* note 6, at 4.

⁵⁴ See *FCPA and Related Enforcement Actions*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/cases/2014.html> [hereinafter *DOJ FCPA Enforcement Actions*] (listing the DOJ’s enforcement actions for the FCPA by year in which the action was brought).

⁵⁵ See *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM’N (Jan. 9, 2014), <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (listing the SEC’s FCPA enforcement actions).

⁵⁶ *Id.* Interestingly, the SEC only brought eight enforcement actions in the first twenty years of the FCPA. *Id.*

alone, the SEC brought nearly double the total for the FCPA's first twenty years and, since then, the SEC has brought at least ten FCPA enforcement actions a year.⁵⁸ The SEC brings many more actions under the record-keeping provisions than the anti-bribery provisions.⁵⁹

Between 1998 and 2012, the DOJ brought 175 cases related to the enforcement of the FCPA.⁶⁰ The DOJ filed nineteen FCPA cases in 2007 and has maintained at least ten actions per year since then.⁶¹ The number of cases brought by the DOJ peaked in 2009 and 2010, with more than thirty actions brought in each of those years.⁶²

In order to bring an action against a business or individual, the SEC and DOJ need to have jurisdiction over them. A cursory discussion of how jurisdiction is established under each of the provisions will aid in understanding the DOJ and SEC's authority to bring FCPA actions against both domestic and foreign nationals.

1. The FCPA's Anti-Bribery Provisions

The anti-bribery provisions prohibit an issuer from "mak[ing] use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance" of a prohibited bribe of a foreign official.⁶³ For foreign nationals, territorial jurisdiction comes through this use of interstate commerce.⁶⁴ This element is not difficult to establish.⁶⁵ Given "the critical role that the various forms of the use of Internet and

⁵⁷ Press Release, Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-5.htm>.

⁵⁸ *SEC Enforcement Actions*, *supra* note 55.

⁵⁹ DEMING, *supra* note 33, at 4.

⁶⁰ *DOJ FCPA Enforcement Actions*, *supra* note 54.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2012).

⁶⁴ DEMING, *supra* note 33, at 8.

⁶⁵ *Id.* at 9.

telecommunications now play in the conduct of international business, it will be a rare situation where the use . . . of interstate commerce cannot be established.”⁶⁶ Thus, if personal jurisdiction can also be established over foreign corporations or individuals, an FCPA action can be maintained under the anti-bribery provision.

2. The FCPA’s Record-Keeping Provisions

The SEC primarily enforces the record-keeping provisions of the FCPA. The record-keeping provisions apply only to securities issuers,⁶⁷ and not to private companies.⁶⁸ The term issuer “include[s] foreign entities, including a foreign entity with American Depositary Receipts (ADRs), that are registered pursuant to Section 12 [of the Securities Exchange Act of 1934] or required to file reports pursuant to Section 15(d).”⁶⁹ The provisions also apply “to companies whose stock trades in the over-the-counter market in the United States and which file periodic reports with the Commission, such as annual and quarterly reports.”⁷⁰

These provisions include two major components:

First, . . . issuers must make and keep books, records and accounts that, in reasonable detail, accurately and fairly reflect an issuer’s transactions and dispositions of an issuer’s assets. Second, . . . issuers must devise and maintain a system of internal accounting controls sufficient to assure management’s control, authority, and responsibility over the firm’s assets.⁷¹

⁶⁶ *Id.*

⁶⁷ *Id.* at 42.

⁶⁸ RESOURCE GUIDE, *supra* note 6, at 43.

⁶⁹ DEMING, *supra* note 33, at 42.

⁷⁰ RESOURCE GUIDE, *supra* note 6, at 42–43.

⁷¹ *Id.* at 38. These provisions can be found in Section 13(b)(2)(A) and (B) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(b)(2)(A)–(B) (2012).

The record-keeping provisions operate to combat corruption and bribery by “ensur[ing] that all public companies account for all of their assets and liabilities accurately and in reasonable detail[.]”⁷²

The SEC takes a zero-tolerance approach to falsifying disclosures.⁷³ These provisions are “directly applicable to officers and directors.”⁷⁴ However, “individuals and entities not otherwise subject to the terms of the accounting and record-keeping provisions can become subject to them to the extent that they may be accomplices to a violation[.]”⁷⁵ This includes “a supplier . . . who knowingly provides or facilitates the making of a false invoice to conceal the true nature of the underlying transaction[.]”⁷⁶

There is no materiality requirement in the record-keeping and accounting provisions of the FCPA.⁷⁷ The lack of a materiality requirement “represents a dramatic departure” because “[h]istorically, except for disclosures as to certain aspects of an issuer’s activities, materiality was the overriding consideration as to . . . what constituted a violation.”⁷⁸ As a result, the FCPA’s record-keeping provisions are highly inclusive and can reach many more issuers than if there were a materiality requirement.

Two recent laws augment the record-keeping provisions. First, the Sarbanes–Oxley Act of 2002 made the FCPA’s accounting provisions more robust.⁷⁹ This includes

⁷² RESOURCE GUIDE, *supra* note 6, at 38.

⁷³ DEMING, *supra* note 33, at 45.

⁷⁴ *Id.* at 43.

⁷⁵ *Id.*

⁷⁶ *Id.*; See also RESOURCE GUIDE, *supra* note 6, at 43 (discussing a DOJ and SEC enforcement action against a California company, who was a partner in a venture with two Chinese companies, when those companies paid bribes—although the alleged payments made were exclusively in China—and the California company “failed to have adequate internal controls and failed to act on red flags indicating that its affiliates were engaged in bribery”).

⁷⁷ DEMING, *supra* note 33, at 43.

⁷⁸ *Id.* at 45.

⁷⁹ RESOURCE GUIDE, *supra* note 6, at 42.

stricter rules for accuracy of financial reports and stronger internal controls.⁸⁰ Second, the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 contains a whistleblower provision applicable to the FCPA: A whistleblower that alerts the DOJ or SEC to a violation of the FCPA is “entitled to between 10% and 30% of any government recovery in excess of \$1 million.”⁸¹ These laws strengthen enforcement actions brought under the FCPA and increase their application.

⁸⁰ *See id.* (discussing the Sarbanes-Oxley Act Section 302, 15 U.S.C. § 7241, which covers corporate officers’ responsibility for accurate financial reports, and Section 404, 15 U.S.C. § 7262, which covers reporting requirements on internal controls).

⁸¹ Ben Kerschberg, *The Dodd-Frank Act’s Robust Whistleblowing Incentives*, FORBES (April 14, 2011, 9:20 AM), <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/>.

Chapter Three: Study Data and Case Selection

In order to determine whether or not the FCPA measurably reduces the levels of corruption in a given country, relevant countries must first be selected. After coding FCPA enforcement actions from 1998 to 2012¹ for analysis, the ten countries against whom the most FCPA actions were brought are studied to determine if the FCPA actions lead to a reduction in corruption. Finally, individual results will be compared to determine what factors explain variations in results.

Unlike other recent FCPA studies, which have examined FCPA enforcement globally but not in targeted cases, this study focuses analysis on specific country cases. These studies are different in key respects.

First, Nicholas M. McLean (McLean study) focuses on determining if the level of U.S. foreign direct investment and the level of corruption in a country can explain FCPA enforcement patterns.² In contrast to the McLean study, this study focuses not on what explains the patterns of FCPA enforcement, but rather on whether enforcement in targeted countries has reduced levels of corruption. Furthermore, the time frame for cases examined is wider in this study than the McLean study.³

Second, Anne H. Lippitt (Lippitt study) analyzes FCPA actions against businesses to determine if FCPA actions are correlated with a reduction in corruption, as well as which economies are relatively prone to FCPA actions.⁴ In contrast, this study focuses

¹ 1998 was chosen as the start date because that is when the FCPA was amended to allow the DOJ and SEC broader enforcement capabilities. As corruption data is reliable up until 2012, but has yet to be aggregated for later years, 2012 is the relevant end point for this analysis.

² Nicholas M. McLean, Note, *Cross National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970, 1974–75 (2012).

³ See *id.* at 1989 (noting that the study examines FCPA actions from January 1, 2000 to July 1, 2011).

⁴ Anne H. Lippitt, Note, *An Empirical Analysis of the Foreign Corrupt Practices Act*, 99 VA. L. REV. 1893, 1895–96 (2013).

on FCPA enforcement actions brought against individual, as well as against businesses, because both have important, yet distinct, signaling functions. This study codes FCPA actions differently than the Lippitt study.⁵ The time frame of FCPA enforcement actions is wider in this study than in the Lippitt study.⁶ Finally, this study relies on different measures of corruption and governance.⁷

This study proceeds by first coding FCPA enforcement actions by year and country in which the underlying acts of bribery occurred. After this data is aggregated, the top ten countries are determined to comprise the relevant cases for this study. Finally, enforcement data was compared to levels of corruption to determine the effect of the FCPA on corruption levels.

A. FCPA ENFORCEMENT ACTIONS DATA

The data for enforcement actions is derived from the separate websites of the SEC⁸ and the DOJ,⁹ which list enforcement actions by year. Each agency lists enforcement actions differently. The DOJ lists individual cases separately.¹⁰ Although the SEC generally follows this format, SEC enforcements can also be grouped by related action—and, thus, one listed action may represent several cases.¹¹

⁵ See *id.* at 1902–03 n.50 (noting that data on FCPA violations were drawn from Shearman & Sterling). It is important to note that Shearman & Sterling tend to list FCPA violations by separate defendant and not by enforcement action (docket number). See Shearman & Sterling LLP, *FCPA.Shearman.com: The One-Stop Resource on the Foreign Corrupt Practices Act*, <http://fcpa.shearman.com/?s=matter&mode=list&tab=list>.

⁶ See Lippitt, *supra* note 4, at 1902 (noting that the study examines FCPA violations from 2000 to 2011).

⁷ See *id.* at 1899 (explaining that the study uses Transparency International’s Corruption Perceptions Index).

⁸ *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM’N (Jan. 9, 2014), <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.

⁹ *FCPA and Related Enforcement Actions*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/cases/2014.html> [hereinafter *DOJ FCPA Enforcement Actions*].

¹⁰ See *id.* (listing cases by year with separate entries for different case numbers).

¹¹ See *SEC Enforcement Actions: FCPA Cases*, *supra* note 8.

To develop the relevant list of FCPA enforcement actions, it was necessary to first determine a time frame. As noted in Chapter Two, the FCPA was amended heavily in 1998, leading to both extended jurisdiction over businesses and individuals and a dramatic increase in enforcement. Because these amendments created the modern FCPA enforcement environment and were implemented to increase enforcement, 1998 provides the relevant start date for this study. Furthermore, since governance data and the effects of corruption require a certain amount of time for collection and evaluation, most reliable and consistent data for one of the sources of corruption indicators¹² ends at 2012. Therefore, in order to compare enforcement actions to corruption indicators, 2012 is selected as an endpoint for evaluation.

B. CODING THE ENFORCEMENT ACTIONS FOR ANALYSIS

In total, 289 enforcement actions brought by the DOJ and SEC were examined from the period of 1998 to 2012. The separate docket numbers or settlement actions brought by each agency are counted as separate enforcement actions. In this time frame, the DOJ brought 175 enforcement actions and the SEC brought 114 enforcement actions.

First, cases that were dismissed or where the accused was acquitted were removed. These cases were excluded because the relevant enforcement action for this study is one that is effective—i.e. that resulted in some form of settlement or legal remedy. Although these cases could arguably be included in this analysis—as they provide notice to individuals and businesses operating within a given country—these cases are ultimately excluded because they do not indicate an effective enforcement action. Effective enforcement actions are examined because they can be seen as a

¹² See *Worldwide Governance Indicators*, WORLD BANK, <http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=worldwide-governance-indicators> (providing data on World Bank governance indicators until 2012).

measurable and tangible successful attempt by the U.S. government to combat bribery abroad. Furthermore, dismissal and acquittal can result from a variety of errors made by the agency (whether legal or factual) that are not the focus of this study.

Second, this study excludes cases brought after an undercover agent—acting on behalf of the government—posed as a foreign government official.¹³ Although these cases provide notice to businesses and individuals engaged in bribery—and arguably have a deterrent effect—the country the undercover agent was representing is more incidental than actual. Although the agent presumably picked countries that the alleged briber would believe accepted bribes, the agent’s decision is not indicative of the location of foreign bribery and, thus, has the potential to skew the analysis of FCPA actions and should be excluded.

Finally, the DOJ and SEC listed some enforcement actions that were related to FCPA enforcement, but did not allege violations of the FCPA. As this study is concerned with FCPA enforcement actions, these cases are excluded.

Enforcement actions that resulted in settlements were included. Though oftentimes the settlement admits guilt,¹⁴ occasionally the terms of the settlement includes a clause that the business or individual neither admits nor denies the allegations of corrupt payments.¹⁵ Since it may be impossible to determine if bribery actually occurred

¹³ See, e.g., Press Release, U.S. Dept. of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html> (“The indictments stem from an FBI undercover operation that focused on allegations of foreign bribery in the military and law enforcement products industry.”).

¹⁴ See, e.g., Press Release, U.S. Dept. of Justice, UTStarcom Inc. Agrees to Pay \$1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 30, 2009), *available at* <http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html> (noting that UTStarcom “acknowledged responsibility” for bribes).

¹⁵ See, e.g., Press Release, U.S. Sec. & Exch. Comm’n, Litigation Release No. 21920: SEC Files Settled Case Against Comverse (Apr. 7, 2011), *available at* <http://www.sec.gov/litigation/litreleases/2011/lr21920.htm> (noting that Comverse settled without either “admitting or denying the SEC’s allegations”).

in the circumstances when a settlement is reached without admitting or denying the allegations, these cases could arguably be excluded. However, they are included in this study because the effect the settlement has on corruption in a given country is similar to the effect when the allegations are admitted. Potential bribers and bribe-payers do not know if the underlying allegations are factual—thus leading to a strong deterrent effect of the settlement. Furthermore, the frequently high price of settlement is particularly effective at deterring businesses and individuals from bribery.

Ultimately, 264 of the 289 cases initially examined were used as effective FCPA enforcement actions in the analysis of FCPA actions. These actions were brought against alleged briberies in eighty-two separate countries.¹⁶

Some of these cases overlap. For example, often the SEC and the DOJ will bring separate actions against the same individual or business for the same alleged corrupt payment. These cases were counted separately because they reflect violations of different FCPA provisions and increase deterrent effects.¹⁷

Furthermore, some separate cases involve related businesses (for example, parent and daughter corporations) and individuals (for example, a separate case will be brought against a chief executive officer (CEO) and the business). Although these cases are

¹⁶ Although eighty-two countries are relevant to this study, there are eighty-three “locations” of bribery in the analysis, as an effective enforcement action was used to bribe the United Nations (U.N.). *See, e.g.*, Complaint at 1–2, Sec. & Exch. Comm’n v. Armor Holdings, Inc., No. 1:11-cv-01271 (D.D.C. July 13, 2011), available at <https://www.sec.gov/litigation/complaints/2011/comp22037.pdf> (describing the bribery scheme). These countries are: Angola, Argentina, Azerbaijan, Bangladesh, Belgium, Benin, Bolivia, Bosnia, Brazil, Bulgaria, Costa Rica, China, Columbia, Republic of the Congo, Croatia, Czech Republic, Ecuador, Egypt, Equatorial Guinea, France, Gabon, Germany, Ghana, Greece, Haiti, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Ivory Coast, Kazakhstan, Kenya, Kyrgyzstan, Laos, Latvia, Liberia, Libya, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Mali, Mauritania, Mexico, Mongolia, Montenegro, Mozambique, Myanmar, Nicaragua, Niger, Nigeria, North Korea, Panama, Philippines, Poland, Romania, Russia, Rwanda, Saudi Arabia, Senegal, Serbia, South Korea, Spain, Sweden, Syria, Taiwan, Thailand, Turkey, Turkmenistan, Uganda, United Arab Emirates, United Kingdom, Uzbekistan, Vietnam, Venezuela, and Yemen.

¹⁷ This practice is consistent with the Lippitt study. Lippitt, *supra* note 4, at 1903.

related, they are counted separately for the purposes of this study.¹⁸ The reason for this is that the focal point of the study is the relationship of enforcement actions to a reduction in levels of corruption. Thus, the intensity or tenacity with which an FCPA violation is pursued (including bringing actions against individuals as well as businesses) will cause a greater response to enforcement actions and reduce the likelihood of conducting bribery in the future.

Finally, some enforcement actions involved alleged bribery in multiple jurisdictions. Since this study is focused on the effect of enforcement actions on corruption levels in particular countries, these cases are counted as separate observations.¹⁹

C. DEVELOPING THE TARGETED COUNTRIES FOR THIS STUDY

Given that enforcement actions were counted separately for each country where an alleged bribery occurred, there were a total of 527 observations. As noted above, these observations come from a total of 264 effective enforcement actions. The average number of enforcement actions per country was 6.35, with a median of four.

Twenty-one of the eighty-two countries had only one enforcement action brought for underlying bribery within their borders, which comprises approximately one-quarter of the countries examined. Nigeria had the most FCPA actions with forty-nine enforcement actions. China is a close second with forty-seven enforcement actions.

Iraq has the third most bribery actions, but has a unique history in the context of FCPA enforcement actions. Of the thirty-nine enforcement actions relating to Iraq, all

¹⁸ The Lippitt study only focused on legal entities. Lippitt, *supra* note 4, at 1903. Although not stated explicitly, it appears that the McLean study counts FCPA enforcement actions against both businesses and individuals. McLean, *supra* note 2, at 1989–90.

¹⁹ This method of counting enforcement actions in each of the countries where bribery occurred was also adopted in the Lippitt study. Lippitt, *supra* note 4, at 1903.

but one were a result of bribery under the U.N. Oil for Food Program. This U.N. program was originally created to enable Iraq to sell oil for money to be used for humanitarian purposes.²⁰ The Iraqi government demanded “companies wishing to sell humanitarian goods to government ministries to pay a kickback, often mischaracterized as an ‘after sales services fee,’ to the government in order to be granted a contract.”²¹ Ultimately, approximately \$1.8 billion was paid to the Iraqi government by as many as 2,253 firms.²² Investigations into the program led to FCPA enforcement actions by the SEC and DOJ.²³ All of the alleged bribes occurred during Saddam Hussein’s regime.²⁴

The top ten countries (excluding Iraq), which comprise just over ten percent of the total number of countries in which bribery led to FCPA actions, were chosen for case study. Although Iraq is included in Figure 1 below, because of its numerous special circumstances resulting from the U.S. investigation and the regime change, it is not included in the case study analysis in Chapter Four. Figure 1 displays the top ten countries (plus Iraq) in which effective FCPA enforcement actions were brought from 1998 to 2012. As Figure 1 shows, eight of the eleven countries are within a relatively small range (from thirteen enforcement actions to eighteen), with Nigeria, China, and Iraq as three outliers.

²⁰ Press Release, U.S. Dept. of Justice, Flowserve Corporation to Pay \$4 Million Penalty for Kickback Payments to the Iraqi Government under the U.N. Oil for Food Program (Feb. 21, 2008) [hereinafter Flowserve Press Release], available at http://www.justice.gov/opa/pr/2008/February/08_crm_132.html; see also Office of the Iraq Programme Oil-for-Food, *About the Programme*, UNITED NATIONS (Feb. 15, 2014), <http://www.un.org/Depts/oip/background/index.html> (describing the U.N. Oil for Food Program).

²¹ Flowserve Press Release, *supra* note 20.

²² *The UN’s Oil-for-Food Scandal: Rolling up the Culprits*, THE ECONOMIST (Mar. 13, 2008), <http://www.economist.com/node/10853611> (citing the October 2005 report from an investigation committee, headed by Paul Volcker, into the program).

²³ See Flowserve Press Release, *supra* note 20 (noting the “ongoing assistance provided by . . . the SEC in the Department’s Oil for Food investigations”).

²⁴ See *id.*

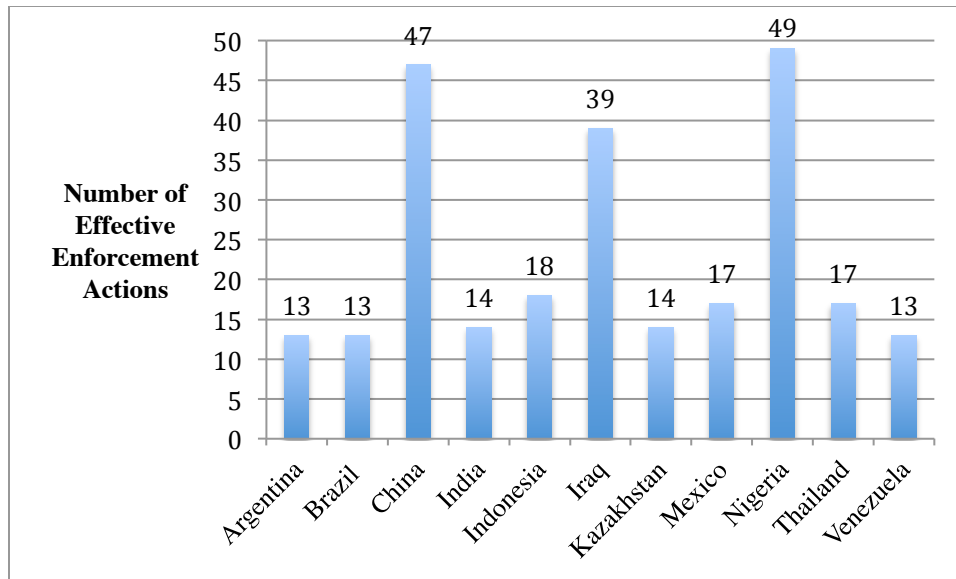


Figure 1: DOJ and SEC FCPA Enforcement 1998–2012

The number of FCPA enforcement actions in these eleven countries is 254, which comprises 48.1973% of the total observations examined in this study. Excluding Iraq from this total, the ten countries examined in this study gave rise to 215 observations, or 40.7970% of the observations examined.

D. MEASURING CORRUPTION

Corruption is notoriously difficult to measure, partially as a result of its nature: Bribers structure payments so that they are not widely known, recognizable, or reported.²⁵ Despite this difficulty, two perception-based corruption measures have become popular for use in academic studies: Transparency International’s Corruption Perception Index (CPI)²⁶ and the World Bank’s Control of Corruption Indicator (CCI).²⁷ Truly objective

²⁵ Lippitt, *supra* note 4, at 1900–01; McLean, *supra* note 2, at 2005.

²⁶ “The CPI ranks more than 150 countries in terms of perceived levels of corruption, as determined by expert assessments and opinion surveys.” *Surveys and Indices*, TRANSPARENCY INTERNATIONAL (last visited Feb. 21, 2014), http://archive.transparency.org/policy_research/surveys_indices/about.

²⁷ The CCI is one of six worldwide governance indicators aggregated from underlying data generated from surveys. *World Governance Indicators*, WORLD BANK (last visited Feb. 21, 2014),

measures are nearly impossible to obtain: Corruption “almost by definition leaves no ‘paper trail’ that can be captured by purely objective measures.”²⁸

Interestingly, the CPI and the CCI are highly correlated, meaning that—although they derive from different sources—they reflect similar results.²⁹ Throughout the relevant time period of this study, the CCI has derived data from more countries than the CPI.³⁰ Although some recently developed measures may be helpful, the CCI and CPI are the only comprehensive corruption measures that span the relevant time period for this study.³¹

The CCI was chosen as the corruption measure for this study because it takes into account more countries and more disparate sources.³² The CCI uses subjective indicia of corruption in a country by aggregating data “from surveys of households and firms[,] as well as expert assessments produced by various organizations.”³³ There may be some overlap between these perceptions and the FCPA enforcement actions—that is, the individuals who are surveyed may consider countries more corrupt as a result of FCPA enforcement actions.

The collaborators who compile the CCI (Kaufmann, Kraay & Mastruzzi) have identified three values of using perception-based measures for governance indicators

<http://info.worldbank.org/governance/wgi/index.aspx#doc>. For a detailed discussion of the methodology for generating the CCI, see Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *The Worldwide Governance Indicators: Methodology and Analytical Issues* (World Bank, Policy Research Working Paper 5430, 2010).

²⁸ See Kaufmann, Kraay & Mastruzzi, *supra* note 27, at 18.

²⁹ Daniel Treisman, *What Have We Learned About the Causes of Corruption from Ten Years of Cross-National Empirical Research?*, 10 ANNUAL REV. OF POL. SCI. 211, 213 (2007).

³⁰ *Id.*

³¹ See *id.* at 214, 242 (noting some more recent corruption measures and claiming they may be useful in future analysis).

³² Although the CCI is more comprehensive than the CPI, the CCI does not contain data for 1999 and 2001. These years are omitted from the analysis below.

³³ Kaufmann, Kraay & Mastruzzi, *supra* note 27, at 18.

generally (as well as corruption specifically). First, “agents base their actions on their perceptions, impression, and views.”³⁴ In the context of the FCPA, businesses will likely perceive a country as more corrupt if they have felt the need to pay bribes or have been approached by an official to pay bribes—thus, the business perceptions used in the CCI may reflect underlying corruption.

Second, Kaufmann, Kraay, and Mastruzzi note that “there are few alternatives to relying on perceptions data.”³⁵ As noted above, corruption is difficult to assess objectively because corruption, by its nature, is a secretive affair. As a result, objective data on the number of bribes paid would necessarily capture too few data points. The data would skew toward countries where enforcement has increased or the competency of corruption enforcement has increased, rather than the countries where more bribes are paid. Thus, perception-based measures may more accurately reflect levels of corruption.

Finally, one could consider coding corruption levels based on a country’s laws, jurisdiction of local enforcement entities, or regulatory framework. However, “even when objective or fact-based data are available, often such data may capture the *de jure* notion of laws ‘on the books’, which often differs substantially from the *de facto* reality[.]”³⁶ In fact, an earlier study by Kaufmann, Kraay, and Mastruzzi “document[s] sharp divergences between *de jure* and *de facto* measures of business entry regulation and find[s] that corruption is important in explaining the extent to which the former differ from the latter.”³⁷ Corruption is, by definition, one explanatory factor for a business or

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* (citation omitted).

government environment that does not accurately reflect the legislation that is supposed to control it.³⁸

There are several disadvantages to using perception-based measures: They are imprecise, may include bias, and may be explained by factors other than level of corruption (such as positive economic performance).³⁹ However, these disadvantages have been mitigated by the CCI. Imprecision, though present in any subjective measure, is countered with statistical margins of error.⁴⁰ Kaufmann, Kraay, and Mastruzzi have found—in further studies on multiple forms of biases that could potentially skew governance data—“little evidence of such biases.”⁴¹ Although biases creep into all data analyses—whether through measurement or presentation—biases in the CCI do not appear to measurably skew the data. Finally, with regard to positive economic performance as an explanatory factor, Kaufmann, Kraay, and Mastruzzi found that the concept of equating good governance to positive economic performance “does not withstand empirical scrutiny.”⁴²

The CCI is particularly useful for this study, as the measure facilitates cross-country comparisons over time to discover general trends.⁴³ The CCI does not measure global averages of corruption (that is, if the world is becoming less corrupt as a whole), but rather is “informative about the relative performance of individual (or groups of) countries over time[.]”⁴⁴

³⁸ *Id.* at 18–19.

³⁹ Kaufmann, Kraay & Mastruzzi, *supra* note 27, at 19.

⁴⁰ *Id.*

⁴¹ *Id.* (citation omitted).

⁴² *Id.* (citation omitted).

⁴³ Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VII: Aggregate and Individual Governance Indicators 1996-2007* 19–20 (World Bank, Policy Research Working Paper 4654, 2008) [hereinafter *Governance Matters VII*].

⁴⁴ *Id.* at 23. Interestingly, the authors note that “appears not to be strong evidence of a significant trend of improvements in governance worldwide over the 12 years of data covered[.]” *Id.* at 24.

This relative performance is precisely of interest in this study. If the FCPA has had a positive effect on reducing corruption, one would expect to see the levels of corruption in a country with a high number of FCPA enforcement actions reduced relative to countries with fewer FCPA enforcement actions. This is true regardless of whether that country is getting better relative to other countries or remains at the same level (or gets worse at a slower rate) and the rest of the countries increase in corruption. However, there may be a lag in time between the FCPA enforcement action and this reduction in relative corruption.

Finally, given that the CCI has been chosen as the corruption measure for this study, it is important to understand what the CCI score is. The CCI “measure[s] perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as ‘capture’ of the state by elites and private interests.”⁴⁵ A country’s CCI is a “score on the aggregate indicator, in units of a standard normal distribution, i.e. ranging from approximately -2.5 to 2.5.”⁴⁶ This means that higher scores (those more toward a positive 2.5) reflect “better outcomes”—which in the context of the CCI means less corruption.⁴⁷ Thus, if FCPA enforcement actions reduce corruption, a country’s CCI score should move toward 2.5 as the number of enforcement actions increases.

⁴⁵ *Id.* at 8.

⁴⁶ *Worldwide Governance Indicators*, WORLD BANK, <http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=worldwide-governance-indicators> (click on “Series” and then click on the logo next to “Control of Corruption: Estimate”). See also *Governance Matters VII*, *supra* note 43, at 16 (noting that “the units in which governance is measured follow a normal distribution with a mean of zero and a standard deviation of one in each period”).

⁴⁷ *Governance Matters VII*, *supra* note 43, at 16.

E. EVALUATING THE IMPACT OF FCPA ENFORCEMENT ON CORRUPTION

In order to evaluate whether FCPA enforcement reduces corruption levels in countries where the underlying bribes took place, the number of enforcement actions will be compared to the CCI in a given year. However, since the theory is that the cumulative effect of FCPA enforcement actions will reduce corruption, the number of enforcement actions used in the comparison will reflect the total number of enforcement actions brought from 1998 (the beginning point of this study) to the denoted year.⁴⁸ This use of cumulative FCPA enforcement actions represents the deterrence effect of sustained actions on actors in a given country.

The analysis of cumulative FCPA enforcement actions and CCI scores is compared to data from the 2010–2011 Global Corruption Barometer, compiled and published by Transparency International.⁴⁹ The Barometer is a corruption survey that asks “tens of thousands of people . . . about their views and experiences[.]”⁵⁰ This survey data is used to inform and test the conclusions drawn by this study.

This study presents the FCPA and CCI data in two ways. First, for each country, the number of FCPA enforcement actions per year, the cumulative FCPA enforcement actions, and the CCI score are compared. These charts appear in alphabetical order in the Appendix. Second, to combine all the countries’ individual data, the cumulative FCPA enforcement actions (on the y-axis) are plotted along with the CCI score (along the x-axis) so that each point represents a year. On both charts, if FCPA enforcement actions have a positive effect on reducing corruption, the data points (or lines-of-best-fit) should

⁴⁸ For example, if one enforcement action is brought each year for 1998, 1999, and 2000, the data points in the comparisons for 1998 will be one total enforcement action, for 1999 will be two cumulative enforcement actions, and for 2000 will be three cumulative enforcement actions.

⁴⁹ See *Global Corruption Barometer*, TRANSPARENCY INT’L (last visited Feb. 27, 2014), <http://www.transparency.org/research/gcb> (describing the Global Corruption Barometer).

⁵⁰ *Id.*

move up the y-axis as it progresses toward positive numbers on the x-axis (or, the data should move up and to the right).

For the first chart—which graphs CCI scores and FCPA enforcement actions separately by year—the slope of the CCI scores’ line-of-best-fit is compared to average FCPA enforcement actions. If FCPA enforcement reduces corruption, the CCI line—at a minimum—should have a positive slope. Furthermore, in cross-country analysis, a greater average of FCPA enforcement actions should equate to a steeper positive slope of CCI scores.

Finally, conceptually, there may be a lag in the improvement of CCI scores and FCPA enforcement action. That is, if FCPA enforcement actions do reduce levels of corruption in a given country, the effect may take some time to be recognized and reflected in the CCI data. Although this lag may very well exist, the fact that general trends are being analyzed should mitigate the risk of ignoring the time lapse between FCPA enforcement and a reduction in corruption. The question is not *when* FCPA enforcement actions improve corruption, the question is *if* the number of FCPA enforcement actions brought reduce corruption.

This comparative analysis proceeds in two parts. Chapter Four presents the case studies for the ten countries with the most FCPA enforcement actions brought for underlying bribery. Chapter Five compares the individual country analysis results and aggregates the analysis to determine, as a whole, if FCPA enforcement actions have led to reduced levels of corruption, as well as discusses limitations in this study.

Chapter Four: FCPA Enforcement Case Studies

The case studies are analyzed collectively in this chapter by whether the trend of CCI Scores was positive or negative. However, individual graphs of each country's CCI score and cumulative FCPA enforcement actions for the relevant time period are listed in alphabetical order in the Appendix. As noted in Chapter Three, this analysis excludes Iraq. In evaluating these case studies, it is important to remember that the CCI score measures the perceptions about corruption in a country relative to the average perception of corruption (of all the countries surveyed). Thus, if the FCPA deters bribery in these countries, the CCI score will increase (reflecting a reduction in corruption as perceived). This study is unable to conclude that FCPA enforcement actions reduce corruption.

A. COUNTRIES WITH NEGATIVE TRENDS IN CCI SCORES

In total, seven countries had negative trends in their CCI Scores: Argentina, Brazil, China, India, Mexico, Thailand, and Venezuela. The slopes of the trend lines for these countries ranged from -0.0322 (Venezuela) to -0.0033 (Brazil). Mexico provides a good example of this group, as enforcement has steadily risen since 2006, the CCI score has noticeably decreased in that time period. Furthermore, Mexico had the median total number of enforcement actions in the ten countries examined and a near-average negative trend slope of the countries with negative trends.

Mexico's average CCI score for 1998 to 2012 is -0.2898 and its 2012 score is 0.0286 lower than its 1998 CCI score. Mexico has a slightly negative CCI score trend line with a slope of -0.0085. However, Mexico's CCI score has been consistently dropping since 2008, with a 2012 CCI score 0.1682 lower than its 2008 CCI score. Thus, corruption is perceived to be getting worse in Mexico relative to other countries. The average number of FCPA enforcements brought per year is 1.1333 and a total 17 FCPA

enforcement actions were brought during the relevant time period. As most of the FCPA enforcement actions have been brought since 2008, one would expect that if FCPA enforcement had a positive impact on reducing corruption, the post-2008 CCI scores would improve—which has not been the case.

Transparency International survey data confirms this negative trend. In a 2010 survey, 52% of Mexican respondents stated that “their government’s efforts to fight corruption” were ineffective.¹ Furthermore, 31% of survey respondents reported paying a bribe in 2010 to Mexican officials.² A vast majority of respondents—75%—reported that Mexico’s corruption had worsened.³ These results are consistent with this study’s findings that FCPA enforcement did not lead to a reduction in corruption in Mexico.

For each country with a negative trend in CCI scores, Transparency International’s surveys confirmed this study’s finding that perceptions of corruption have not improved in these targeted countries. For these seven countries, this study was unable to determine that FCPA enforcement actions had reduced corruption levels in the countries where bribery gave rise to the enforcement action.

B. COUNTRIES WITH POSITIVE TRENDS IN CCI SCORES

Three countries exhibited a positive trend in CCI Scores: Indonesia, Kazakhstan, and Nigeria. The positive slopes of the CCI score trend lines in this group ranged from Kazakhstan’s 0.0087 to Indonesia’s 0.0323, with Nigeria in the middle with a trend-line slope of 0.0141. Indonesia provides the best representation of this group, as its improvement is striking and the score rose consistently with the total number of FCPA

¹ *Corruption by Country/Territory*, TRANSPARENCY INT’L (last visited Feb. 25, 2014), <http://www.transparency.org/country> (click dropdown box to select “Mexico” and select “Public Opinion” tab from page tabs selections).

² *Id.*

³ *Id.*

enforcement actions. In fact, Indonesia performed the best in this study and, thus, is the best case for FCPA enforcement actions leading to reduced corruption.

Indonesia had the fourth worst average score over the relevant time period with -0.8206. However, Indonesia had the greatest positive change in scores, with its 2012 score 0.4264 higher than its 1998 score—although that appears to be a result of the fact that the 1998 CCI score for Indonesia is lower than most of its CCI scores. From 1998 to 2012, eighteen FCPA enforcement actions were brought as a result of bribery occurring in Indonesia, which is the third highest (excluding Iraq) in this study. With a slope of 0.0323, Indonesia has the steepest positive slope out of all the countries in this study. This positive CCI score slope is compared to an average of 1.2 FCPA enforcement actions per year. Although there is variation, the positive trend in CCI scores reflects reduced levels of corruption in Indonesia.

Surprisingly, Indonesian respondents to Transparency International's 2010 survey on corruption did not reflect the World Bank's CCI score. A total of 43% believed that corruption had increased, whereas only 27% thought that corruption levels had decreased.⁴ As to the government's efforts in reducing corruption, 35% of Indonesian respondents believed that the efforts had been ineffective.⁵ Thus, these results do not support the finding that the FCPA may have reduced corruption in Indonesia.

The Transparency International survey data did not confirm the positive trend for Nigeria. Nigeria had the most striking disparity, given that, although a relatively low 40% of Nigerian respondents said that their government's efforts to combat bribery were

⁴ *Corruption by Country/Territory*, TRANSPARENCY INT'L (last visited Feb. 25, 2014), <http://www.transparency.org/country> (click dropdown box to select "Indonesia" and select "Public Opinion" tab from page tabs selections).

⁵ *Id.*

ineffective in a 2010 survey, 63% of respondents reported paying a bribe in 2010.⁶ Furthermore, 73% of respondents reported that they thought corruption had gotten worse in Nigeria.⁷

Interestingly, Kazakhstan—which had the flattest positive CCI score trend line, appears to be reducing corruption levels. Although corruption is still a major problem, Kazakhstan was one of the twenty countries with the greatest improvements on a score in the 2012 Heritage Foundation’s Index of Economic Freedom, which measures, *inter alia*, “freedom from corruption[.]”⁸

Although Indonesia, Kazakhstan, and Nigeria had positive trends in their CCI scores in this study, these results could not be confirmed with other sources. Transparency International survey data for Indonesia did not contradict this study, but also indicated that improvement may not be as dramatic as this study indicates. The survey data for Nigeria indicated a much bleaker picture of corruption in that country than this study found. Finally, Kazakhstan’s reduction in corruption seems to be confirmed by another study.

C. AN OVERVIEW OF PENALTIES IMPOSED IN FCPA ENFORCEMENT ACTIONS

In order to understand the FCPA enforcement actions in the targeted countries better, this Part examines the penalties imposed for the bribery that gave rise to an action. This discussion is limited to the countries used to exemplify the positive and negative trend in CCI scores in the preceding sections: Mexico and Indonesia. The factors examined include: the nationality of the corporation or individual, the position an

⁶ *Corruption by Country/Territory*, TRANSPARENCY INT’L (last visited Feb. 25, 2014), <http://www.transparency.org/country> (click dropdown box to select “Nigeria” and select “Public Opinion” tab from page tabs selections).

⁷ *Id.*

⁸ *Doing Business in Kazakhstan*, U.S. DIPLOMATIC MISSION TO KAZAKHSTAN (Feb. 25, 2014), <http://kazakhstan.usembassy.gov/doing-business-local.html>.

individual occupies at a corporation, the fine amount, imprisonment, and whether a non-prosecution agreement (NPA) or deferred-prosecution agreement (DPA) were signed. This discussion helps understand the severity of the FCPA enforcement action and contextualize this study.

However, it must be cautioned that it is impossible to apportion the fines to the separate countries implicated in the action if bribery in more than one country was involved. That is, if one country is implicated in an FCPA enforcement action where many other countries are implicated, the penalty paid or served is combined for every violation of the FCPA. The penalty will be much higher if multiple countries are implicated than if only one country is implicated. This inability to apportion the fines may skew this discussion.

Bribery in Mexico gave rise to fourteen separate actions brought against corporations and three actions brought against individuals. There were a total of eleven corporations and four individuals implicated by these actions. There was one Dutch, one French subsidiary, one Swiss, one corporation headquartered in Japan, two German, and five U.S. corporations involved. All but one of these corporations is a major international corporation. Six actions gave rise to DPAs and two gave rise to NPAs. A total of \$516,470,644 in fines was paid, with the largest being \$350 million paid by a German corporation. Of the four individuals implicated, three are U.S. and one is a Mexican citizen. These individuals paid a total of \$2,150,076.74 in fines. One individual served at least two years in jail (and one served an unstated amount of time before the order was issued that was deemed sufficient). These individuals held the following senior positions at their corporations: General Manager of International Engineered Products Division, General Manager, a principal of the company, and Vice President of Western Hemisphere Operations.

Of the eighteen enforcement actions brought for bribery occurring in Indonesia, fifteen were brought against corporations and six were brought against individuals. Due to crossover between SEC and DOJ enforcement, this includes thirteen separate corporations and five different individuals. Of the corporations, one is Swiss, one is an Indonesian subsidiary, two are German, one is Dutch, and eight are U.S. These corporations paid a total of \$239,847,932 in fines for bribery in Indonesia. Three cases had penalties that only included injunctions and cease-and-desist orders. Three cases resulted in a DPA, with \$38.72 million paid in fines to settle and get those DPAs, and one case resulted in a NPA. The greatest fine was \$91.4 million paid by a German corporation to the SEC. Individuals receiving penalties for bribery in Indonesia include one Indonesian, one dual U.S. and United Kingdom citizen, two United Kingdom citizens, and one U.S. citizen. Two of these cases ended in an injunction. One individual's penalty was undeterminable. A total of \$299,037 in fines were paid by individuals as FCPA violation penalties. These individuals occupied senior positions in their firms, including: senior partner, Business Development Manager, Government Affairs Director of Asia, Business Director, and CEO.

The total penalties paid by companies and individuals throughout the time period are small relative to the 2012 gross domestic product (GDP) of the countries (regardless of whether current U.S. dollars are used for the comparison, or 2005 dollars⁹). Compared to GDP denominated in current U.S. dollars, the penalties paid in Indonesia were 0.0274% of GDP and the penalties paid in Mexico were 0.0440% of GDP. When this comparison is made to 2012 GDP in 2005 dollars—to compensate for the fact that the

⁹ Information on countries' gross domestic product (GDP) in both current and 2005 dollars is available through the World Bank. See *World Development Indicators*, WORLD BANK, <http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=world-development-indicators> (click on "Series" and then "GDP (constant 2005 US\$)" and "GDP (current US\$)" after selecting relevant countries and time series to generate data on GDP).

penalties are considered cumulatively and, thus, include dollars paid in previous years with lower purchasing power—the penalties paid by Indonesia and Mexico both comprise only approximately 0.05% of their country’s GDP. The fact that these penalties—though apparently quite large—are small relative to the country’s GDP may explain why the FCPA has not been more effective in reducing corruption.

Although Indonesia showed improvement in CCI scores and Mexico did not, the penalties paid by corporations were over twice the amount in Mexico than they were in Indonesia. Furthermore, fines paid by individuals in Mexico were nearly ten times the amount of the fines paid by individuals in Indonesia, as well as included jail time. Causal conclusions cannot be drawn from these two cases about intensity of fines predicting the success of the FCPA. However, the penalties paid for FCPA violations in Indonesia and Mexico provide interesting anecdotes of the cost of bribery for individuals and corporations, as well as two isolated examples of intensity of penalty not necessarily resulting in greater corruption reduction.

D. COMPARING THIS STUDY’S RESULTS WITH THE LIPPITT STUDY

It is important to note that this study’s inability to find a reduction in levels of corruption contrasts with the findings of the Lippitt study, which had a similar aim. The Lippitt study found a correlation between FCPA enforcement and reduced perceptions of corruption.¹⁰ Key differences in the methodologies of the studies may help explain this variation.

Not only do the Lippitt study and this study use different corruption measurements (the Lippitt study uses the Transparency International measure, or the CPI score), but the studies also measure the change of corruption over time differently.

¹⁰ Anne H. Lippitt, Note, *An Empirical Analysis of the Foreign Corrupt Practices Act*, 99 Va. L. Rev. 1893, 1912 (2013).

Lippitt measures change in corruption by subtracting the 2000 CPI score for a country from its 2011 score (after reversing the score to make higher numbers equate to more corruption instead of less), and dividing that number by the 2000 CPI score.¹¹ This methodology increases the chance that margin of error will skew the results. Margin of error in the scores may lead to misleading results.¹² Like CCI scores, the CPI scores are also subject to margins of error.¹³ For example, if a particular country's 2011 CPI score is high (within its margin of error) and the 2000 CPI score is relatively low (within its margin of error), the difference (and resulting change over time) will appear to be much greater than it actually is (and the results may not be statistically significant). This study tries to avoid this pitfall by looking at CCI scores over time—that is looking at CCI scores for every year for which that data is available. Thus, although comparisons between any two years may skew the data, the broad trend over time of scores increasing or decreasing is significant.¹⁴

Furthermore, Lippitt only examines FCPA enforcement actions brought against companies and not, like this study, those brought against individuals.¹⁵ Although it is unclear in the Lippitt study why individuals were excluded, the inclusion may not affect results. If the distribution of FCPA actions against individuals is proportionate to that of corporations in countries, the Lippitt study would still show a correlation between FCPA enforcement and reduced corruption. However, if the distribution was not related to that

¹¹ *Id.* at 1900.

¹² See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VII: Aggregate and Individual Governance Indicators 1996-2007* 1–2 (World Bank, Policy Research Working Paper 4654, 2008) [hereinafter *Governance Matters VII*] (discussing margin of error in data analysis).

¹³ *Id.* at 2 n.3. See also *Corruption Perceptions Index 2013*, TRANSPARENCY INTERNATIONAL (last visited Mar. 28, 2013), <http://cpi.transparency.org/cpi2013/results/> (listing confidence intervals for Corruption Perception Index scores).

¹⁴ See *Governance Matters VII*, *supra* note 12, at 2 (discussing the use of governance indicator scores to discover trends across time).

¹⁵ Lippitt, *supra* note 10, at 1903.

of the corporations (that is, if more FCPA enforcement actions were brought against individuals paying bribes in one country rather than another, even if the corporation paid bribes in both countries), the number of FCPA enforcement actions in a given country may alter the Lippitt study's finding of a correlation.

It is plausible, however, considering this and the Lippitt study together, that FCPA enforcement actions against corporations are particularly effective in reducing corruption. Further analysis on this question is needed, as neither this study nor the Lippitt study can answer that question. Furthermore, such a result does not fit the theory that actions against individuals have particularly strong deterrence because they make the decision on whether or not to pay a bribe more than a cost-benefit analysis.

Ultimately, the variation in results between this study and the Lippitt study may reflect the complexity of the causes of corruption in given countries. Although much variation may be due to the differences in methodology of determining change in corruption over time, part of this difference may be due to underlying variation in explanatory factors that give rise to the CCI score or the CPI score. As discussed in further detail in Chapter Five, corruption can plausibly result from a confluence of factors not taken into account by this study.

Chapter Five: FCPA Enforcement and Corruption

Out of the ten case studies examined in Chapter Four, seven of the cases showed no positive effect on reducing levels of perceived corruption. Aggregating the data from each of the case studies does not show apparent reduction of corruption levels in countries where underlying bribery gave rise to FCPA enforcement actions.

A. COMBINING THE DATA: A COMPREHENSIVE VIEW OF THE FCPA'S IMPACT ON CORRUPTION IN THE TARGETED COUNTRIES

Another way to analyze this study's data is to plot the country's average yearly FCPA enforcement actions with the slope of the CCI score trend line. Figure 2, below, displays this graph, with the average FCPA enforcement actions on the y-axis and CCI scores on the x-axis.

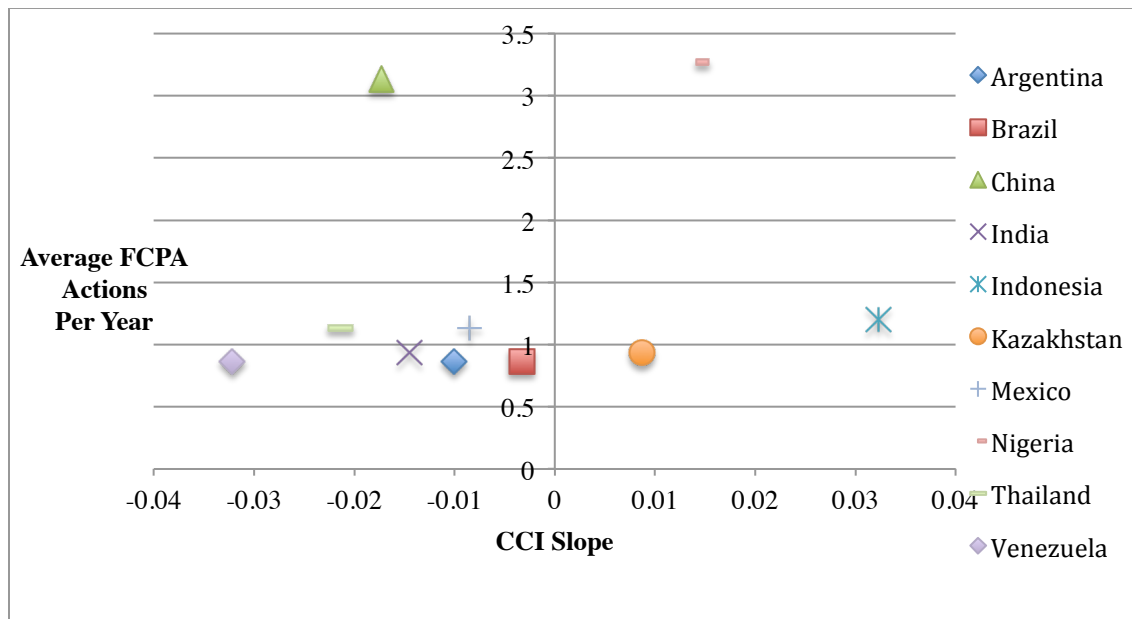


Figure 2: Average FCPA Enforcement Actions Compared with CCI Score Trend-line Slopes

If FCPA enforcement actions demonstrated a positive effect on reducing corruption, the graph would show points moving further to the right as the number of FCPA enforcement actions increased—thus if FCPA actions lowered corruption, the points would noticeably move up and to the right. As the chart shows, there are only three positive slopes for CCI scores and these slopes do not necessarily correspond with a greater number of average FCPA enforcement actions. This figure fails to support the hypothesis that the number of FCPA enforcement actions has a positive effect on the level of corruption in a given country.

Another way to portray this data is to compare the cumulative FCPA enforcement actions for a given year with the CCI score for that year. Figure 3 shows this data for each of the ten relevant cases in this study. As noted above, drawing conclusions on causation from this analysis is problematic. Each point represents one country’s cumulative FCPA enforcement actions and its CCI score for that year.

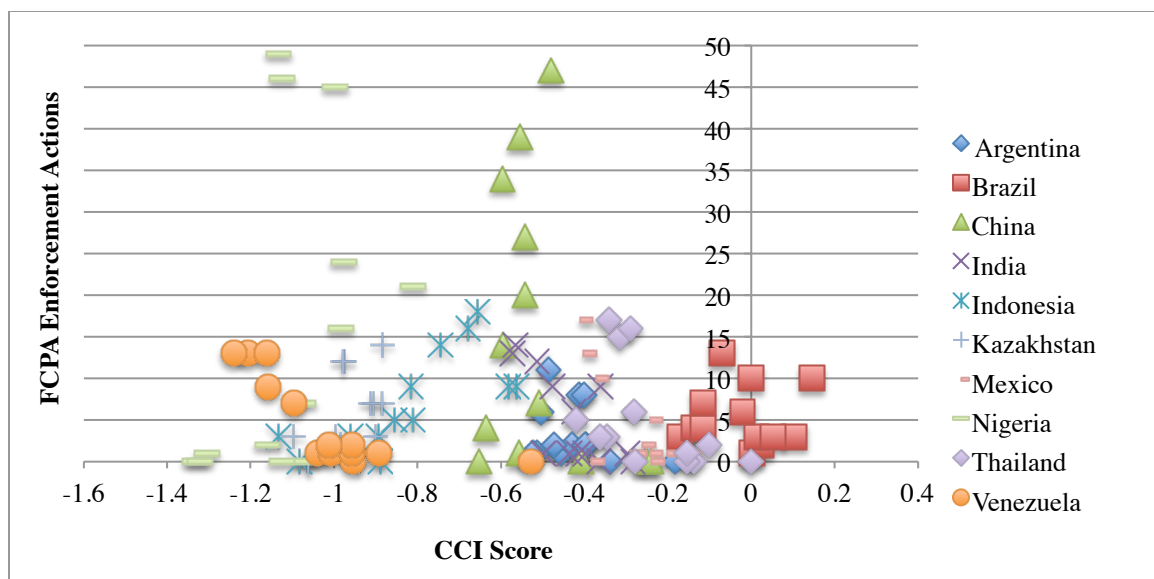


Figure 3: Cumulative FCPA Enforcement Actions Compared to CCI Scores

Once again, the data should portray a movement of the points up and to the right, as an increase in the cumulative number of FCPA enforcement actions should have the effect of raising the CCI score—reflecting a reduction in corruption as a result of FCPA enforcement—a trend that will hold even if there is a lag between enforcement and reduced corruption. The scattered points of the graph show that this general trend does not hold. Only Indonesia has a pronounced effect with a better CCI score as more FCPA enforcement actions are brought. This chart cannot demonstrate that the FCPA has the effect of reducing corruption in targeted countries.

Despite Indonesia’s positive performance, the thrust of the data is that FCPA enforcement does not have a measurable impact on reducing corruption in a given country. Most of the countries in this study displayed no improvement in CCI score as a result of increased FCPA enforcement. Thus, the data does not support the hypothesis that the FCPA reduces corruption in those countries whose bribery gave rise to the FCPA enforcement action.

B. OTHER EXPLANATIONS: CONTEXTUALIZING THE RESULTS OF THIS STUDY

It is important to understand the limitations of this study. First, this study isolates one aspect of combatting corruption: the FCPA. This study did not examine whether a recent increase in anti-corruption legislation enforcement by other countries have impacted corruption or are needed to meaningfully reduce corruption. Furthermore, this study does not—except for a cursory discussion in Chapter Four—examine the intensity of penalties and whether greater penalties would be more effective. This study also does not examine whether other potential country-specific explanatory factors, such as the size or state of the economy, are more important in predicting trends of corruption in a given

country. Finally, this study's limited time frame for analysis may not be wide enough to determine the effectiveness of FCPA enforcement.

1. An International Web: The FCPA in Context

The FCPA is one piece of legislation in an international web of both U.S. initiatives¹ and other countries' anti-bribery legislation.² The U.S.-led fight against corruption is now being taken up internationally. "For example, in France and Germany, as late as the 1990s, bribes were not only legal, but they were also tax deductible."³ Now, both of these countries prohibit bribery and have aided the U.S. in investigating major bribery allegations.⁴ Since these developments are so recent, it will perhaps take a much wider regulatory web—with many countries participating—to reduce corruption. This broad international consensus may be able to reduce a shifting effect—that is, from bribe-payers shifting from those listing on U.S. exchanges to those who do not without reducing the total number of bribe-payers. Furthermore, it may be able to create a greater negative impact for those paying bribes—one that can compete in the gigantic global economy that international businesses operate in. It increases both the risks of the corruption being detected and the penalty for that corruption, while reducing the number of accessible economies that do not prohibit corruption so broadly.

Similar experiences with other internationally-focused programs may help explain some of this experience. First, sanctions operate in a manner similar to the FCPA, in that

¹ See Ben W. Heineman, Jr., *Can America Lead the World's Fight Against Corruption?*, The Atlantic (Feb. 3, 2012, 7:02 AM), <http://www.theatlantic.com/international/archive/2012/02/can-america-lead-the-worlds-fight-against-corruption/252448/> (discussing the multiple approaches the U.S. takes to reduce corruption internationally).

² This legislation includes those passed in accordance with the OECD Convention, discussed in Chapter Two.

³ James M. Cole, Deputy Attorney General, Dep't of Justice, Address at the Foreign Corrupt Practices Act Conference (Nov. 19, 2013), *available at* <http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html>.

⁴ *Id.*

they regulate the business choices of companies. Second, the international development system may provide an understanding of what may cut against changing political behavior in individual countries.

Economic sanctions against countries have tended to be ineffective.⁵ Even when there is major intergovernmental organization implementing the sanction—such as the U.N.—sanctions have had mixed success.⁶ One reason for this may be that certain countries may “only [be] paying lip service to sanctions, making them less effective.”⁷ Another issue may be individual companies that bust sanctions through secretive measures, though the companies willing to take such a risk is reduced with increased penalties and enforcements for the sanction-busters.⁸ This latter method of sanctions-busting is akin to individual acts of corruption, which attempt to circumvent the general prohibition on bribery. Furthermore, despite these sanction-busting techniques, “[t]he most successful sanctions regimes are cooperative efforts[.]”⁹ It is this global approach that may ultimately reduce the amount of bribery in international business, along with FCPA enforcement.

The international development system may also provide an example of what is effective in reducing corruption. However successful, aid from Western countries has the

⁵ Glenn Kessler, *How Effective Are Sanctions in ‘Changing Behavior’?*, WASH. POST FACT CHECKER BLOG (Apr. 27, 2011 6:00 AM), http://www.washingtonpost.com/blogs/fact-checker/post/how-effective-are-sanctions-in-changing-behavior/2011/04/26/AFCwRktE_blog.html.

⁶ See Robert McMahon, *UN Sanctions: A Mixed Record*, Council on Foreign Relations (Nov. 17, 2006), <http://www.cfr.org/international-organizations-and-alliances/un-sanctions-mixed-record/p12045> (“Many studies have found the success rate of economic sanctions, both within the UN and without, to be poor.”).

⁷ Kessler, *supra* note 5.

⁸ See, e.g., Mark Dubowitz, *So You Want to Be A Sanctions-Buster*, FOREIGN POLICY (Aug. 10, 2012), http://www.foreignpolicy.com/articles/2012/08/10/so_you_want_to_be_a_sanctions_buster (discussing methods used by companies to avoid the sanctions on Iran).

⁹ Christopher R. Dittmeier, *The Problem of Cooperation in Sanctions Regimes*, UNIV. OF NORTH CAROLINA 2 (Apr. 23, 2009), <http://www.unc.edu/~cdittm/cooperation-sanctions.pdf>.

goal of promoting transparency and strengthening governmental institutions.¹⁰ Conditional aid, although not without controversy, is effective at accomplishing these goals.¹¹ In contrast to this, Chinese foreign aid has been increasing and does not follow OECD definitions or practice of foreign aid.¹² China's aid has been criticized due to the lack of transparency surrounding it and because it is unconditional.¹³ Critics of Chinese foreign aid have suggested that these practices undercut international aid programs' effectiveness and policy.¹⁴ As with sanctions, the problem appears to be one of collective action: countries providing aid need to work in unison if international development goals are to be accomplished.

Experiences with sanctions and international development seem to suggest that enforcing norms internationally requires global consensus. The successes and pitfalls of both suggest that when shifting to non-participating entities and countries occurs, policy objectives are not fulfilled. The same may very well be true of the FCPA. Isolated,

¹⁰ See Robert Calderisi, *Why Foreign Aid and Africa Don't Mix*, CNN OPINION (Aug. 18, 2010 6:16 AM), <http://www.cnn.com/2010/OPINION/08/12/africa.aid.calderisi/> (discussing difficulties Western countries experience with weak government institutions in trying to promote development and attempts to overcome these problems).

¹¹ *Conditional Aid: Carrots All Around*, THE ECONOMIST (Mar. 2, 2013), <http://www.economist.com/news/international/21572754-controversial-approach-helping-poor-countries-seems-work-after-all-carrots-all>.

¹² Yun Sun, *China's Aid to Africa: Monster or Messiah*, BROOKINGS (Feb. 2014), http://www.brookings.edu/research/opinions/2014/02/07-china-aid-to-africa-sun#_ftn4.

¹³ See *id.* ("This directly contributes to the negative perception that China is pouring aid, funding, and infrastructure projects to prop up corrupt governments in exchange for natural resources."); Ariel Armony, *Exporting Corruption*, AMERICAS QUARTERLY (Winter 2012), <http://www.americasquarterly.org/Armony> ("China has delivered assistance without following bureaucratic procedures and with an aura of secrecy But Western observers say that China's foreign aid program lacks transparency and accountability . . . and they also criticize the non-conditionality[.]"). See also Mark Kapchanga, *China's Aid to Africa Needs Transparency*, Global Times (Jan. 27, 2013), <http://www.globaltimes.cn/content/758428.shtml> ("Unlike Western countries, China's aid doesn't come with conditions.").

¹⁴ See, e.g., Chris McGreal, *Chinese Aid to Africa May Do More Harm Than Good, Warns Benn*, THE GUARDIAN (Feb. 7, 2007), <http://www.theguardian.com/world/2007/feb/08/development.topstories3> ("Britain has warned China that its offer of billions of dollars in unconditional aid and cheap loans to African governments risks driving back into debt countries that have only just benefited from debt relief, and undermines efforts to create democratic and accountable administrations.").

shifting can defeat its objectives and bribe-seekers will seek companies from non-participating countries. Perhaps with a new, more global focus on anti-bribery, the objectives of the FCPA can be realized and corruption will be reduced.

2. Penalty Size

The intensity or amount of penalties has not been examined in this study. If the general theory is that penalties change the cost calculus for corporations and individuals, which causes them to reduce the supply of bribe-payers and thus corruption overall, then the intensity of penalties assessed may increase or decrease the FCPA's effectiveness in a given country. One explanation for the inability of this study to find reduced corruption could be that the penalties may need to be greater to truly deter corruption—which may in turn come at the price of U.S. businesses and investors.

In order to test this, trends in foreign direct investment (FDI)¹⁵ inflows by country of origin of that FDI was examined for each of the ten countries in this study by country. The inflows from the U.S., China, Russia, Qatar, and United Arab Emirates (UAE) were examined¹⁶ to see if investment is shifting from the U.S. to countries that may not have extensive anti-bribery measures, which may partially explain a lack of reduction in corruption in the targeted countries. The data measures FDI beginning in 2001 and ending in 2012, which is an ample time frame for this study.

Out of the ten countries examined in this study, the U.S. was the top source of FDI in all but two; China was the greatest source of FDI in Kazakhstan and Nigeria, as well as invested an amount equal to 97% of the U.S.' FDI in Mexico. The U.S. level of

¹⁵ Foreign direct investment (FDI) data used in this study is generated from the U.N. Conference on Trade and Development (UNCTAD). See *Bilateral FDI Statistics*, U.N. CONFERENCE ON TRADE & DEV., <http://unctad.org/en/Pages/DIAE/FDI%20Statistics/FDI-Statistics-Bilateral.aspx> (last visited Apr. 15, 2014) (click on “select one country” and choose country to generate information sheet on FDI for an individual country).

¹⁶ China's domestic investment in itself was not examined when looking at FDI in China.

FDI declined in three countries: China, Mexico, and Venezuela. China increased its FDI relative to the U.S. in each of the ten countries examined. Russia significantly increased its FDI relative to the U.S. in Kazakhstan and Thailand. The UAE increased FDI relative to U.S. in Kazakhstan, as well as slightly in Thailand, whereas Qatar's FDI was insignificant in the ten countries examined.

These results lend credence to the idea that corruption may not be reduced because the investment is shifting from the U.S. to China. However, it is interesting to note that China had the greatest FDI in 2012 in Kazakhstan and Nigeria, two countries whose CCI scores improved over that time period. It is plausible that FCPA penalties—alone and not in combination with an international system as described in the previous section—are not enough to alter behavior in targeted countries. However, this should not be seen as evidence that increased penalty size will reduce corruption, but rather as merely a contextualization of the penalties assessed by the FCPA.

3. Country-Specific Factors as Explanatory Variables

Country-specific factors were also not considered in this study. The state of the economy in a given country, which industry is largest, or other governance issues (e.g. drug wars, mass protests, etc.) were not examined, even though these factors have been linked to an impact on corruption in a given country. This section provides a brief overview of country-specific factors in Indonesia and Mexico, the two countries examined in depth in Chapter Four.

Mexico's recent history has been characterized by a brutal drug war that resulted in the deaths of approximately 24,000 Mexicans between 2006 and 2010.¹⁷ This number

¹⁷ John Burnett & Marisa Peñaloza, *Mexico's Drug War: A Rigged Fight?*, NPR (May 19, 2010 3:52 PM), <http://www.npr.org/templates/story/story.php?storyId=126890838>.

reached 63,000 individuals killed as a result of the drug war by April 2013.¹⁸ The war has led to suspicions of corruption; many believe that some members of the federal police and army are working with and for drug cartels.¹⁹ To fight this awful violence, several approaches have been tried and suggested, including the U.S.’ approach of training Mexican officials and conducting raids, as well as legalizing drugs as a manner of eliminating the cartel’s power.²⁰ One study suggests that changing the cost calculus of violence, to make it more expensive personally and economically than it currently is, would incentivize cartels to solve their problems in non-violent means.²¹ Interestingly, a new approach taken by the Mexican government employs a strategy similar to the FCPA: “Mexico is preparing to implement new regulations that will allow the government to identify individuals and businesses linked to drug trafficking and ban financial firms from doing business with them[.]”²²

Indonesia has had quite a different experience over the time period relevant to this study. In 1998, Indonesia’s democratization process began with “the end of President Suharto’s military-backed authoritarian rule[.]”²³ Although there are some concerns with the quality of the democracy,²⁴ there is also evidence of democratic consolidation and

¹⁸ Viridiana Rios, *How To Win the Mexican Drug War*, WASH. POST OPINIONS (April 12, 2013), http://www.washingtonpost.com/opinions/how-to-win-the-mexican-drug-war/2013/04/12/0c44342c-a395-11e2-9c03-6952ff305f35_story.html.

¹⁹ Burnett & Peñaloza, *supra* note 17.

²⁰ Conor Friedsdorf, *Mexico Is Ready to End Failed Drug-War Policies—Why Isn’t the U.S.?*, THE ATLANTIC (Apr. 30, 2013 6:30 AM), <http://www.theatlantic.com/politics/archive/2013/04/mexico-is-ready-to-end-failed-drug-war-policies-why-isnt-the-us/275410/>.

²¹ Rios, *supra* note 18.

²² *Mexico Prepares First Illegal Drug Financing Blacklist*, CBC NEWS (Apr. 13, 2014 9:20 AM), <http://www.cbc.ca/news/world/mexico-prepares-first-illegal-drug-financing-blacklist-1.2608580>.

²³ Michael Vatikiotis, Op-Ed., *Indonesian Democracy’s ‘Guiding Hand’*, N.Y. TIMES (Feb. 21, 2014), <http://www.nytimes.com/2014/02/22/opinion/indonesian-democracys-guiding-hand.html>.

²⁴ *See id.* (“[T]hough elections are held regularly, the system favors entrenched elites and interest groups. Democracy is widely believed to be more procedural than substantial.”).

stability in Indonesia.²⁵ Similarly, although there are concerns about corruption,²⁶ President Susilo Bambang Yudhoyono has remained committed to anti-corruption measures.²⁷ Interestingly, democratization in Indonesia may make the country more prone to corruption: Young democracies tend to lead to more corruption until democratic consolidation occurs.²⁸

Given the dramatic backgrounds in Mexico and Indonesia, the signal sent by the FCPA may be too weak. However, the combination of country data for all ten countries studied, which is discussed previously in this Chapter, mitigates the risk that country-specific factors have skewed the analysis. This data indicated that, if country-specific factors are skewing the data, they are doing so nearly equally among the ten countries studied, as similar results were found in countries with wide variations in political and cultural environments.

Similarly, although it could be assumed that the ten countries with the most FCPA enforcement actions might not improve (as they may be deemed the “worst offenders”), the theory is that a reduction in the supply-side of corruption would result in reduced corruption levels overall. Interestingly, Nigeria—the country whose corruption is perhaps most notorious and had the most FCPA enforcement actions—showed improvement in CCI scores, one of the few countries in this study to do so. Ultimately, the increased number of FCPA enforcement actions should increase the disincentive to pay bribes and, thus, corruption should reduce—even in these countries with the most

²⁵ Christian von Luebke, *Post-Suharto Indonesia: Democratic Consolidation and Continuing Challenges*, SPICE DIGEST, Fall 2009, available at <http://iis-db.stanford.edu/docs/381/Post-Suharto.pdf>.

²⁶ Vatikiotis, *supra* note 23.

²⁷ von Leubke, *supra* note 25.

²⁸ Michael T. Rock, *Corruption and Democracy* 2–3 (U.N. Dep’t of Econ. & Social Affairs, DESA Working Paper No. 55, 2007). This U.N. study found that “corruption follows an inverted U relationship with more process oriented definitions of democracy[.]” *Id.* at 2.

corruption giving rise to FCPA enforcement actions. That this did not occur in every country lends credence to the idea that other, country-specific factors may be more or as important as the FCPA in reducing corruption.

4. Time Frame for FCPA Enforcement to Reduce Corruption

The time frame for the FCPA to reduce corruption may be too narrow in this study. As global trends in all governance have not improved, as measured by the World Bank from 1996 to 2007,²⁹ it may be impossible to assume that corruption would be reduced. However, individual countries have improved within a decade—“31 percent of countries experience[d] a significant change in at least one of the six dimensions of governance” within a decade.³⁰ Thus, it is not unreasonable to expect countries facing FCPA enforcement actions to improve within the fifteen-year time frame examined by this study. However, it is also plausible that it may take longer than fifteen years to reap the benefits of increased FCPA enforcement.

C. FIGHTING CORRUPTION: WHAT THIS STUDY’S RESULTS SUGGEST ABOUT REDUCING CORRUPTION

This study was unable to find that FCPA enforcement actions reduced corruption in those countries where underlying bribery gave rise to the most actions. As detailed in the previous section, this study’s analysis was limited in reach and did not take into account a variety of other factors that may explain corruption levels. Although these other factors may be important in reducing corruption, it cannot be concluded that FCPA enforcement action is necessarily ineffective. This study was unable to determine if corruption would have been worse but for the FCPA enforcement. Furthermore, the

²⁹ Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VII: Aggregate and Individual Governance Indicators 1996-2007* 24 (World Bank, Policy Research Working Paper 4654, 2008).

³⁰ *Id.* at 20.

confluence of important factors in corruption indicates that the FCPA's place may be a crucial one in the fight against corruption.

This study does not prescribe any one solution to the international problem of corruption. It further does not indicate that the FCPA should be discarded. Rather, this study was not able to find that the FCPA alone reduced corruption. Given the complex nature of governance in individual countries, as well as the size of the global economy, this result is perhaps unsurprising. However, this study does suggest that a comprehensive approach that includes attacking the underlying causes of bribery (poor infrastructure, bad governance, etc.) along with the supply-side of corruption (through the FCPA) is what may ultimately be necessary to measurably reduce corruption worldwide.

Chapter Six: Conclusion

The FCPA was enacted with a dual purpose: to protect U.S. investors and to combat bribery abroad. As noted in Chapter One, this latter purpose has been connected to promoting international development and human rights. Given the importance of these claims, it is important to determine if the FCPA has the effect of reducing corruption levels. This study has been unable to find that FCPA enforcement actions led to a reduction in corruption.

However, this study has been limited. First, corruption data is notoriously difficult to measure. These measurements may get better in time and aid in both quantitative and qualitative studies in the future. Second, the expected time differential between FCPA enforcement actions and reduced levels of corruption—which in this study was contemplated to be within the time span of 1998 to 2012—may be too short. Perhaps, the FCPA will have a long-term, positive impact on reducing corruption, but one that will take decades before it becomes noticeable. Finally, given the number of factors that impact corruption levels in a given study, FCPA enforcement may positively reduce corruption, but nonetheless not outweigh the other factors that lead to corruption or sources of non-business sources of corruption.

These concerns aside, this study fits into the discourse surrounding the FCPA's effect on foreign countries. Other studies have shown what leads to FCPA actions in a given country¹ and that FCPA enforcement actions brought against businesses have the effect of reducing some measures of corruption, as well as which industries are

¹ See Nicholas M. McLean, Note, *Cross National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970 (2012).

particularly conducive to FCPA enforcement actions.² This study takes a comprehensive approach, looking at FCPA enforcement actions brought against both individuals and legal entities, to determine if—in the countries where the alleged bribes occurred that gave rise to the most FCPA enforcement actions—levels of corruption were measurably reduced. This study has been unable to find that FCPA enforcement action has reduced corruption levels in those targeted countries.

That the FCPA does not reduce corruption levels does not indicate a normative judgment on whether or not the FCPA is good public policy. Rather, it is merely an indication that one of the FCPA's stated goals—to reduce corruption abroad—is not accomplished in its current form. Whether or not the FCPA achieves its other policy objectives is beyond the scope of this study.

However, it does appear that the FCPA could be an important tool in the broader application of anti-corruption methods. Along with human rights and development aid, the normative pressure of the FCPA can help to change the cost-benefit calculus of both foreign officials and businesses. As a whole, this can help reduce corruption levels. That said, the FCPA is far from the panacea for fighting corruption abroad. Although reducing levels of corruption may aid international development and the promotion of human rights, the FCPA may not be the most effective vehicle to carry out those goals.

² See Anne H. Lippitt, Note, *An Empirical Analysis of the Foreign Corrupt Practices Act*, 99 VA. L. REV. 1893 (2013).

Appendix

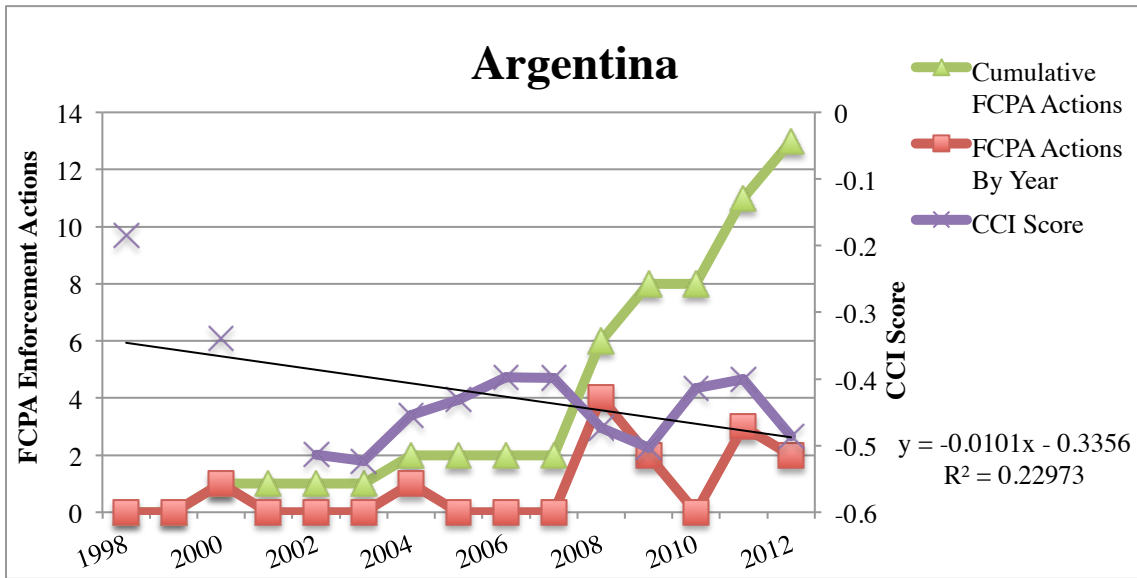


Figure 4: Argentina’s CCI Score Compared to FCPA Enforcement Actions

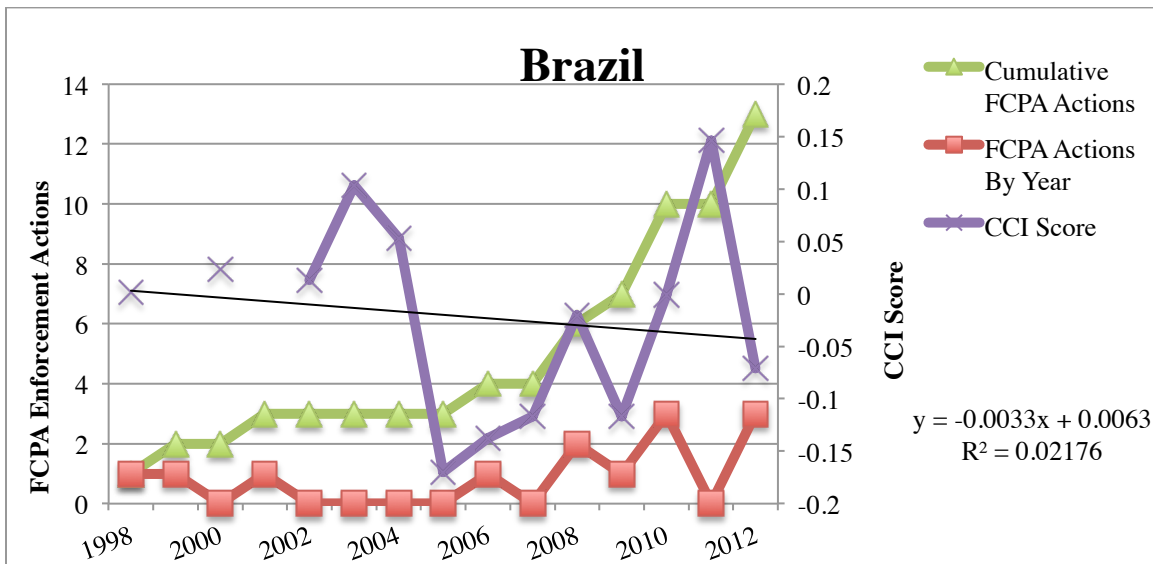


Figure 5: Brazil’s CCI Score Compared to FCPA Enforcement Actions

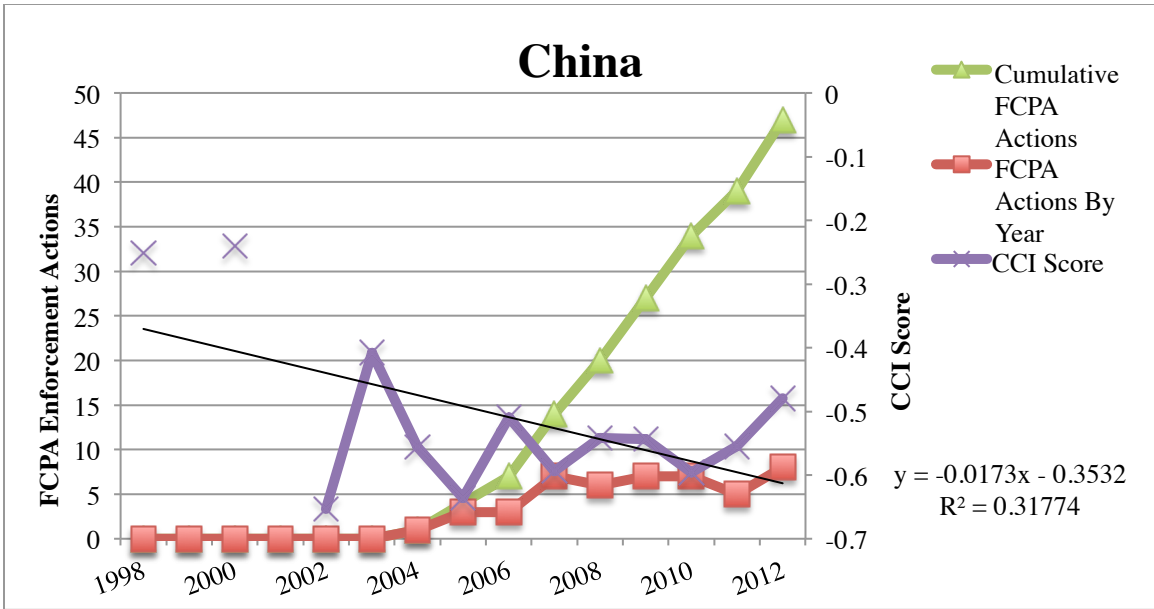


Figure 6: China's CCI Score Compared to FCPA Enforcement Actions

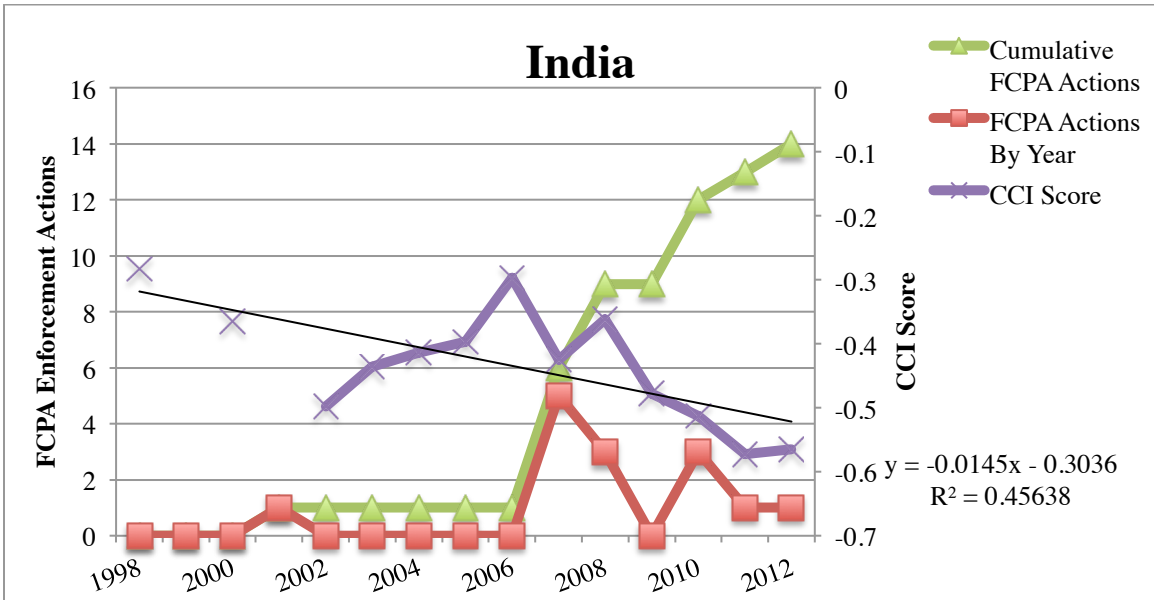


Figure 7: India's CCI Score Compared to FCPA Enforcement Actions

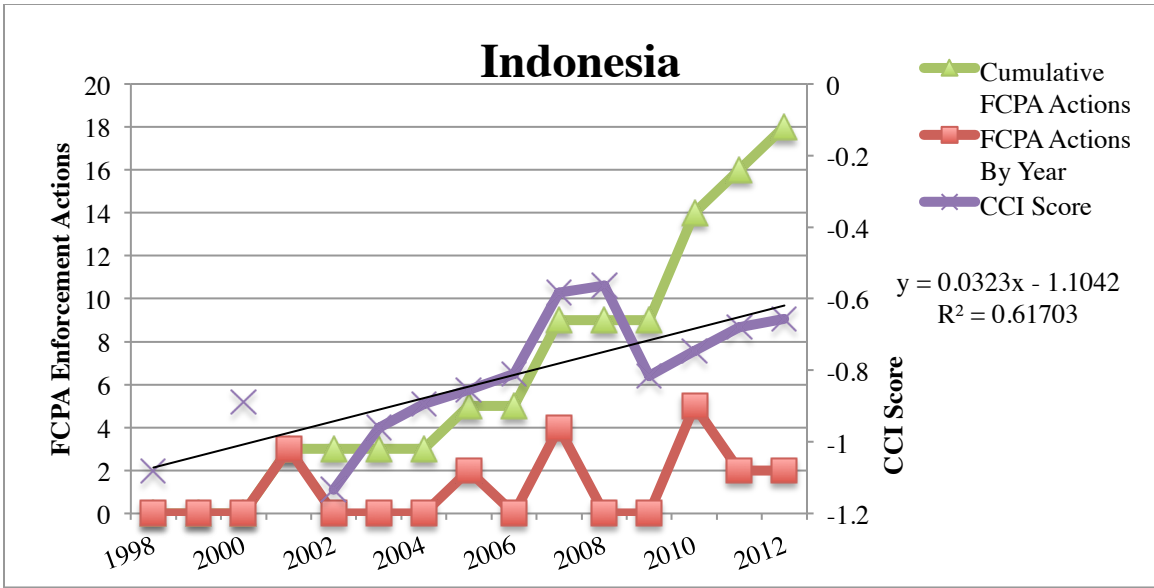


Figure 8: Indonesia's CCI Score Compared to FCPA Enforcement Actions

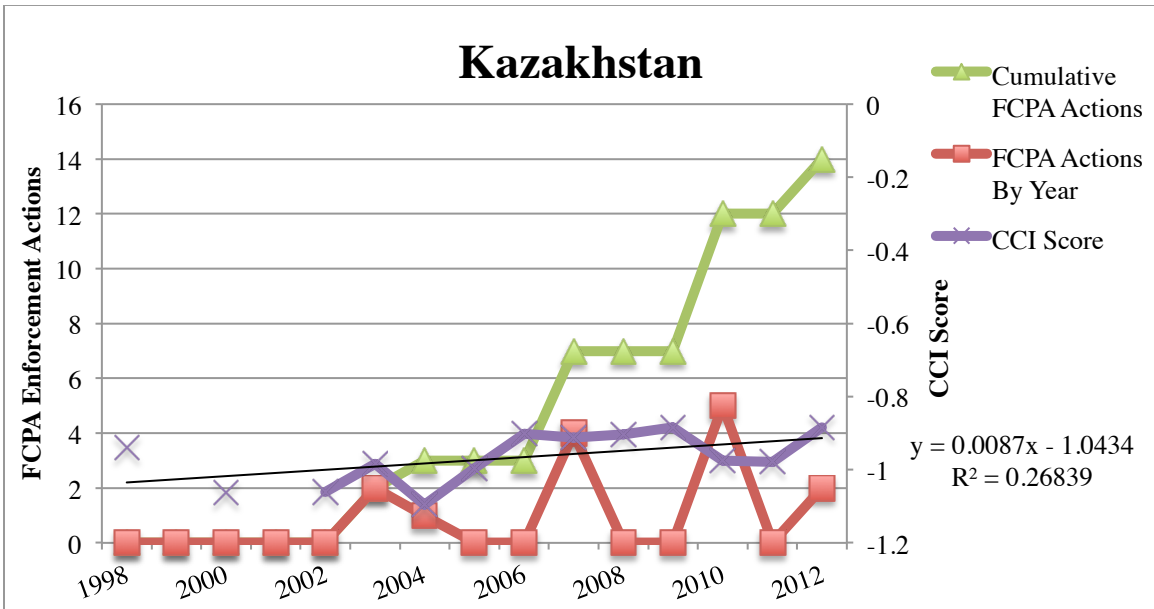


Figure 9: Kazakhstan's CCI Score Compared to FCPA Enforcement Actions

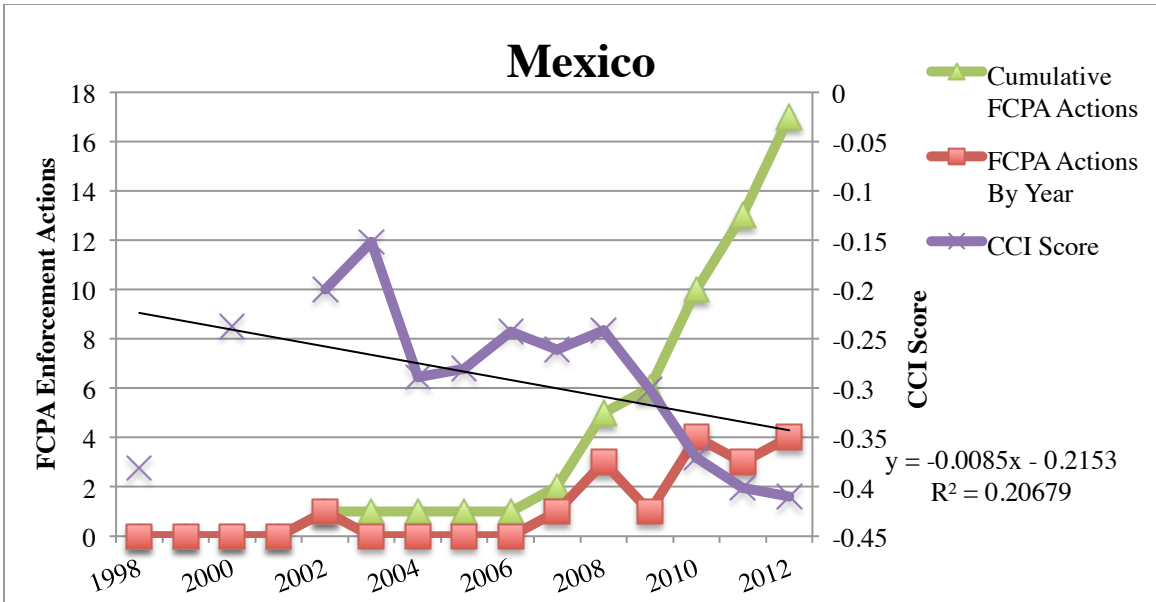


Figure 10: Mexico’s CCI Score Compared to FCPA Enforcement Actions

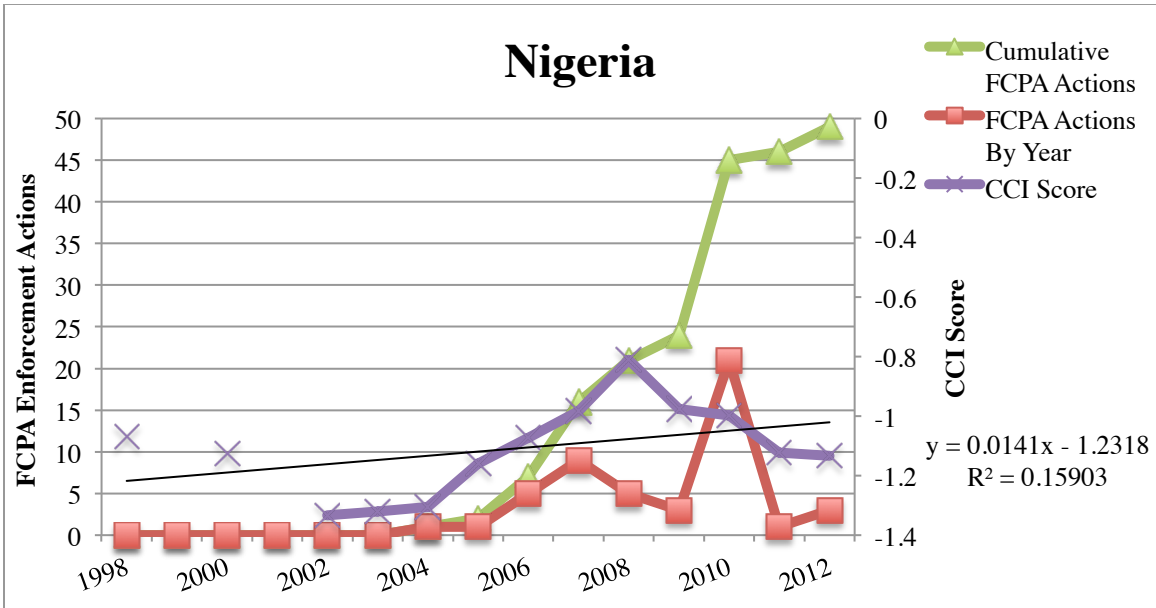


Figure 11: Nigeria’s CCI Score Compared to FCPA Enforcement Actions

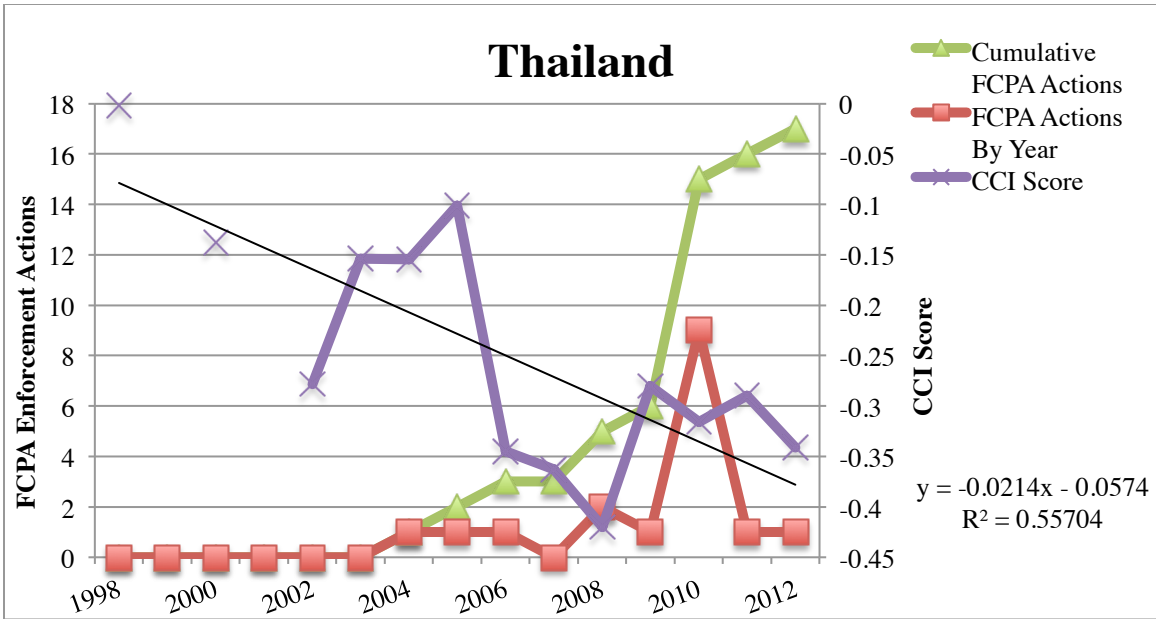


Figure 12: Thailand’s CCI Score Compared to FCPA Enforcement Actions

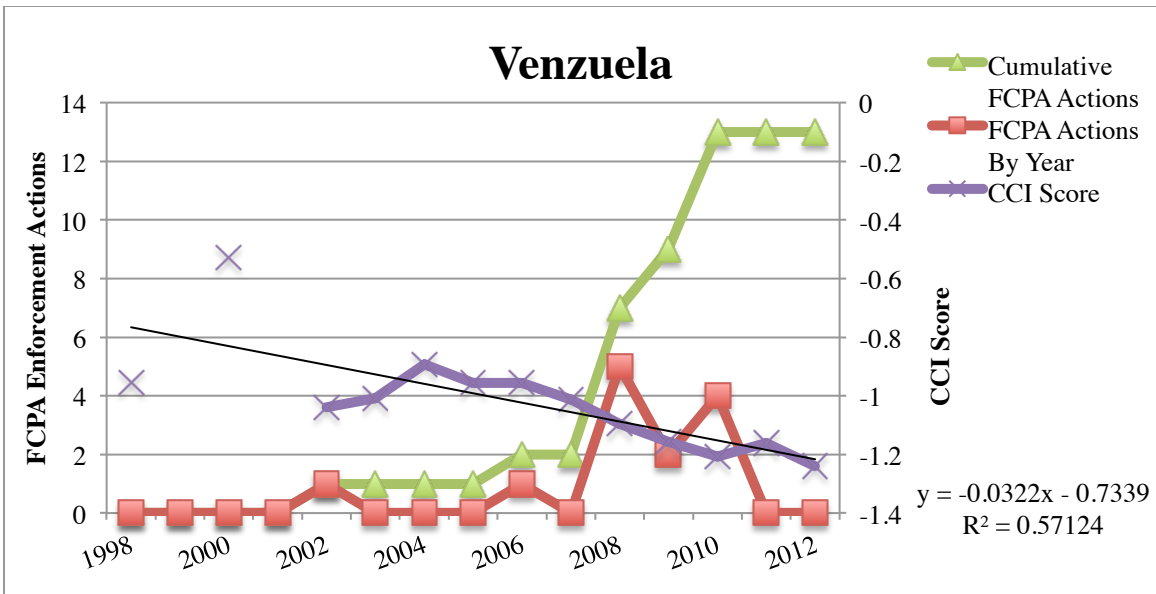


Figure 13: Venezuela’s CCI Score Compared to FCPA Enforcement Actions

References

Albin-Lackey, Chris

Chris Albin-Lackey, *Corruption, Human Rights, and Activism: Useful Connections and Their Limits*, in 5 JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION 139, 139–63 (Dustin N. Sharp ed., 2014).

Armony, Ariel

Ariel Armony, *Exporting Corruption*, AMERICAS QUARTERLY (Winter 2012), <http://www.americasquarterly.org/Armony>.

Baccio-Terracino, Julio

Julio Baccio-Terracino, Remarks at the Annual Meeting of the Am. Soc’y of Int’l Law (Mar. 26, 2010), in 104 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC’Y OF INT’L LAW) 243, 243–246 (2010).

Bialos, Jeffrey P. & Gregory Husisian

JEFFREY P. BIALOS & GREGORY HUSISIAN, THE FOREIGN CORRUPT PRACTICE ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES 24 (1997).

Brown, H. Lowell

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 LAW & COM. REG. 239, 239–360 (Spring 2001).

H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government’s Campaign Against International Bribery*, 22 HASTINGS INT’L & COMP. L. REV. 407, 407–522 (1999).

Burnett, John & Marisa Peñaloza

John Burnett & Marisa Peñaloza, *Mexico’s Drug War: A Rigged Fight?*, NPR (May 19, 2010 3:52 PM), <http://www.npr.org/templates/story/story.php?storyId=126890838>.

Calderisi, Robert

Robert Calderisi, *Why Foreign Aid and Africa Don’t Mix*, CNN OPINION (Aug. 18, 2010 6:16 AM), <http://www.cnn.com/2010/OPINION/08/12/africa.aid.calderisi/>.

CBC News

Mexico Prepares First Illegal Drug Financing Blacklist, CBC NEWS (Apr. 13, 2014 9:20 AM), <http://www.cbc.ca/news/world/mexico-prepares-first-illegal-drug-financing-blacklist-1.2608580>.

Cole, James M.

James M. Cole, Deputy Attorney General, Dep't of Justice, Address at the Foreign Corrupt Practices Act Conference (Nov. 19, 2013), *available at* <http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html>.

Deming, Stuart H.

STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICE ACT AND THE NEW INTERNATIONAL NORMS* (2 ed., 2010).

Dittmeier, Christopher R.

Christopher R. Dittmeier, *The Problem of Cooperation in Sanctions Regimes*, UNIV. OF NORTH CAROLINA 2 (Apr. 23, 2009), <http://www.unc.edu/~cdittm/cooperation-sanctions.pdf>.

Dubowitz, Mark

Mark Dubowitz, *So You Want to Be A Sanctions-Buster*, FOREIGN POLICY (Aug. 10, 2012), http://www.foreignpolicy.com/articles/2012/08/10/so_you_want_to_be_a_sanctions_buster.

Economist

Corruption and Development: Corrosive Corruption, THE ECONOMIST ONLINE (Dec. 2, 2011 16:59), <http://www.economist.com/blogs/dailychart/2011/12/corruption-and-development>.

The UN's Oil-for-Food Scandal: Rolling up the Culprits, THE ECONOMIST (Mar. 13, 2008), <http://www.economist.com/node/10853611>.

Conditional Aid: Carrots All Around, THE ECONOMIST (Mar. 2, 2013), <http://www.economist.com/news/international/21572754-controversial-approach-helping-poor-countries-seems-work-after-all-carrots-all>.

Foreign Corrupt Practices Act

Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 102-104, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (Supp. I 1977)).

Friedsdorf, Conor

Conor Friedsdorf, *Mexico Is Ready to End Failed Drug-War Policies—Why Isn't the U.S.?*, THE ATLANTIC (Apr. 30, 2013 6:30 AM), <http://www.theatlantic.com/politics/archive/2013/04/mexico-is-ready-to-end-failed-drug-war-policies-why-isnt-the-us/275410/>.

Harvard Law Review

Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1310–30 (1985).

Heineman, Jr., Ben W.

Ben W. Heineman, Jr., *Can America Lead the World's Fight Against Corruption?*, The Atlantic (Feb. 3, 2012, 7:02 AM), <http://www.theatlantic.com/international/archive/2012/02/can-america-lead-the-worlds-fight-against-corruption/252448/>.

Kapchanga, Mark

Mark Kapchanga, *China's Aid to Africa Needs Transparency*, Global Times (Jan. 27, 2013), <http://www.globaltimes.cn/content/758428.shtml>.

Kaufmann, Daniel, Aart Kraay & Massimo Mastruzzi

Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VII: Aggregate and Individual Governance Indicators 1996-2007* (World Bank, Policy Research Working Paper 4654, 2008).

Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *The Worldwide Governance Indicators: Methodology and Analytical Issues* (World Bank, Policy Research Working Paper 5430, 2010).

Kerschberg, Ben

Ben Kerschberg, *The Dodd-Frank Act's Robust Whistleblowing Incentives*, FORBES (April 14, 2011, 9:20 AM), <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/>.

Kessler, Glenn

Glenn Kessler, *How Effective Are Sanctions in 'Changing Behavior'?*, WASH. POST FACT CHECKER BLOG (Apr. 27, 2011 6:00 AM), http://www.washingtonpost.com/blogs/fact-checker/post/how-effective-are-sanctions-in-changing-behavior/2011/04/26/AFCwRktE_blog.html.

Kumar, C. Raj

C. Raj Kumar, *National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights*, 28 HUMAN RIGHTS QUARTERLY 755, 755–79 (2006).

Lacey, Kathleen A. et al.

Kathleen A. Lacey et al., *Addressing the Deterrent Effect of the Sarbanes-Oxley Act's Certification Provisions: A Comparative Analysis Using the Foreign Corrupt Practices Act*, 38 VAND. J. TRANSNAT'L L. 397, 440 (2005).

Lestelle, Evan P.

Evan P. Lestelle, *The Foreign Corrupt Practices, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 527–58 (2008).

Lippitt, Anne H.

Anne H. Lippitt, Note, *An Empirical Analysis of the Foreign Corrupt Practices Act*, 99 VA. L. REV. 1893, 1895–1930 (2013).

McGreal, Chris

Chris McGreal, *Chinese Aid to Africa May Do More Harm Than Good, Warns Benn*, THE GUARDIAN (Feb. 7, 2007), <http://www.theguardian.com/world/2007/feb/08/development.topstories3>.

McLean, Nicholas M.

Nicholas M. McLean, Note, *Cross National Patterns in FCPA Enforcement*, 121 YALE L.J. 1970, 1970–2012 (2012).

McMahon, Robert

Robert McMahon, *UN Sanctions: A Mixed Record*, Council on Foreign Relations (Nov. 17, 2006), <http://www.cfr.org/international-organizations-and-alliances/un-sanctions-mixed-record/p12045>.

Organization for Economic Co-Operation and Development (OECD)

OECD, *Convention on Combating Bribery of Foreign Officials in International Business Transactions*, Dec. 18, 1997, 37 I.L.M. 4 (1998).

OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS (2011), *available at* <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/38028044.pdf>.

OECD, *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 20 November 2012*, <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf>.

Power, Samantha

Samantha Power, Special Asst. to the Pres. and Sen. Director for Multilateral Affairs and Human Rights, The Obama Administration and Human Rights, Address at the Human Rights First Summit (Dec. 5, 2012), *available at* <http://www.humanrights.gov/2012/12/13/the-obama-administration-and-human-rights/>.

Rios, Viridiana

Viridiana Rios, *How To Win the Mexican Drug War*, WASH. POST OPINIONS (April 12, 2013), http://www.washingtonpost.com/opinions/how-to-win-the-mexican-drug-war/2013/04/12/0c44342c-a395-11e2-9c03-6952ff305f35_story.html.

Rock, Michael T.

Michael T. Rock, *Corruption and Democracy* 2–3 (U.N. Dep't of Econ. & Social Affairs, DESA Working Paper No. 55, 2007).

Romaneski, Mark

Mark Romaneski, *The Foreign Corrupt Practice Act of 1977: An Analysis of its Impact and Uncertain Future*, 5 B.C. INT'L & COMP. L. REV. 405, 405–30 (1982).

Sherman & Sterling LLP

Sherman & Sterling LLP, *FCPA.Shearman.com: The One-Stop Resource on the Foreign Corrupt Practices Act*, <http://fcpa.shearman.com/?s=matter&mode=list&tab=list>.

Spalding, Andrew Brady

Andrew Brady Spalding, *Four Unchartered Corners of Anti-Corruption Law: In Search of Remedies t the Sanctioning Effect*, 2012 WIS. L. REV 661, 661–88 (2012).

Stamm, Florian A.

Florian A. Stamm, *The Foreign Corrupt Practices Act: Keeping All Hands on the Table*, 15 TRUST THE LEADERS, Spring 2006, http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/tt115/836/.

Sun, Yun

Yun Sun, *China's Aid to Africa: Monster or Messiah*, BROOKINGS (Feb. 2014), http://www.brookings.edu/research/opinions/2014/02/07-china-aid-to-africa-sun#_ftn4.

Tarun, Robert W.

ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS* (2 ed., 2012).

Thomas, Cortney C.

Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 Rev. Litig. 439, 439–70 (2010).

Transparency International

Corruption by Country/Territory, TRANSPARENCY INT'L (last visited Feb. 25, 2014), <http://www.transparency.org/country>.

Corruption Perceptions Index 2013, TRANSPARENCY INTERNATIONAL (last visited Mar. 28, 2013), <http://cpi.transparency.org/cpi2013/results/>.

Global Corruption Barometer, TRANSPARENCY INT'L (last visited Feb. 27, 2014), <http://www.transparency.org/research/gcb>.

Treisman, Daniel

Daniel Treisman, *What Have We Learned About the Causes of Corruption from Ten Years of Cross-National Empirical Research?*, 10 ANNUAL REV. OF POL. SCI. 211, 211–44 (2007).

United Nations

Office of the Iraq Programme Oil-for-Food, *About the Programme*, UNITED NATIONS (Feb. 15, 2014), <http://www.un.org/Depts/oip/background/index.html>.

U.N. Conference on Trade and Development (UNCTAD)

Bilateral FDI Statistics, U.N. CONFERENCE ON TRADE & DEV., <http://unctad.org/en/Pages/DIAE/FDI%20Statistics/FDI-Statistics-Bilateral.aspx> (last visited Apr. 15, 2014).

U.S. Agency for International Development (USAID)

What We Do, USAID (Feb. 19, 2014), <http://www.usaid.gov/what-we-do>.

Democracy, Human Rights and Governance, USAID (Feb. 6, 2014), <http://www.usaid.gov/what-we-do/democracy-human-rights-and-governance>.

U. S. Department of Justice

FCPA and Related Enforcement Actions, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/cases/2014.html>.

Press Release, U.S. Dept. of Justice, Flowserve Corporation to Pay \$ 4 Million Penalty for Kickback Payments to the Iraqi Government under the U.N. Oil for Food Program (Feb. 21, 2008), *available at* http://www.justice.gov/opa/pr/2008/February/08_crm_132.html.

Press Release, U.S. Dept. of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

Press Release, U.S. Dept. of Justice, UTStarcom Inc. Agrees to Pay \$1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 30, 2009), *available at* <http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html>.

U.S. DEP'T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM'N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012).

U.S. Diplomatic Mission to Kazakhstan

Doing Business in Kazakhstan, U.S. DIPLOMATIC MISSION TO KAZAKHSTAN (Feb. 25, 2014), <http://kazakhstan.usembassy.gov/doing-business-local.html>.

U.S. District Court for the Southern District of New York

Order Dismissing Def.'s Mot. Dismiss, SEC v. Straub, No. 11 Civ. 9645 (RJS), 2013 WL 466600 (S.D.N.Y. Feb. 8, 2013).

U.S. Securities and Exchange Commission

Complaint, Sec. & Exch. Comm'n v. Armor Holdings, Inc., No. 1:11-cv-01271 (D.D.C. July 13, 2011), *available at* <https://www.sec.gov/litigation/complaints/2011/comp22037.pdf>.

Press Release, U.S. Sec. & Exch. Comm'n, Litigation Release No. 21920: SEC Files Settled Case Against Comverse (Apr. 7, 2011), *available at* <http://www.sec.gov/litigation/litreleases/2011/lr21920.htm>.

Press Release, Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-5.htm>.

SEC Enforcement Actions: FCPA Cases, U.S. Sec. & Exch. Comm'n (Jan. 9, 2014), <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.

U.S. DEP'T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM'N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012).

Vatikiotis, Michael

Michael Vatikiotis, Op-Ed., *Indonesian Democracy's 'Guiding Hand'*, N.Y. TIMES (Feb. 21, 2014), <http://www.nytimes.com/2014/02/22/opinion/indonesian-democracys-guiding-hand.html>.

von Luebke, Christian

Christian von Luebke, *Post-Suharto Indonesia: Democratic Consolidation and Continuing Challenges*, SPICE DIGEST, Fall 2009, available at <http://iis-db.stanford.edu/docs/381/Post-Suharto.pdf>.

Wei, Shang-Jin

Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 Rev. of Econ. & Statistics 1, 1–11 (2000).

Weismann, Miriam F.

Miriam F. Weismann, *The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment*, 88 J. BUS. ETHICS 615, 615–61 (2009).

White House

WHITE HOUSE, NATIONAL SECURITY STRATEGY (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

World Bank

Worldwide Governance Indicators, WORLD BANK,
<http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=worldwide-governance-indicators>.

World Development Indicators, WORLD BANK,
<http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=world-development-indicators>.

You, Jong-Sung & Sanjeev Khagram

Jong-Sung You & Sanjeev Khagram, *A Comparative Study of Inequality and Corruption*, 70 AM. SOCIOLOGICAL REV. 136, 136–57 (2005).