

THE POLITICAL ECONOMY OF THE FOREIGN CORRUPT PRACTICES ACT: AN EXPLORATORY ANALYSIS

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ABSTRACT

Critics of the Foreign Corrupt Practices Act (FCPA) have frequently claimed that it puts U.S. firms at a competitive disadvantage. This critique suggests that the beneficiaries of FCPA enforcement are foreign competitors of U.S. firms, and foreign economies that suffer fewer of the inefficiencies associated with corruption. Yet enforcement of the Act has increased dramatically since it first passed in the post-Watergate, anti-corruption era. If the FCPA really promotes foreign interests over the interests of U.S. firms doing business abroad, and if there are no obvious domestic beneficiaries of aggressive enforcement, why have domestic business interests been unable to push back successfully against growing enforcement? This article suggests several reasons why the adverse effects of FCPA enforcement on U.S. business may be considerably smaller than some FCPA critics suggest, and why significant numbers of U.S. firms may actually benefit from enforcement. Our hypotheses find support in Congressional testimony, business surveys, and interviews with prominent FCPA practitioners and compliance officers.

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The Foreign Corrupt Practices Act¹ (FCPA) creates an extensive network of obligations aimed at discouraging foreign bribery by firms subject to its jurisdiction. It criminalizes “willful” payments (including “anything of value”) to “foreign officials” made “corruptly” to obtain or retain business opportunities. It also creates elaborate accounting requirements to track foreign transactions, and includes provisions to encourage and reward whistleblowers. Potential liability exists for illicit payments by third-party contractors or intermediaries, and foreign subsidiaries. Successor liability can attach for prior illicit acts by acquired firms. Enforcement is divided between the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).²

Conventional accounts of the enactment of the FCPA portray it as a moralistic, post-Watergate reaction to the problem of corruption in government. A wide range of U.S. companies paid bribes to secure business abroad, the bribes were discovered,³ the companies were called on the carpet before Congress (Koehler 2012), and legislation followed soon. Congressional statements relating to the Act emphasized how bribery distorts resource allocation and can undermine U.S. foreign policy objectives (Church 1976).

From the outset, however, a counter-narrative emphasized the possible risks to U.S. competitiveness from a policy of disabling U.S. firms from using a business tactic that their foreign competitors could still use freely. This concern yielded pressure on the U.S. government to soften the Act somewhat through 1988 amendments (Seitzinger 2016), to encourage foreign governments to adopt similar anti-bribery policies, and ultimately to the 1997 Organization for Economic Cooperation and Development (OECD) anti-bribery convention (Davis 2012 p. 502). It also fueled portions of the 1998 amendments to U.S. law that expanded the ability of U.S. enforcers to charge foreign corporations with bribery if the proscribed conduct has a U.S. nexus (often quite a modest one).⁴

Concerns about the Act’s impact on American competitiveness were dampened for many years, however, by the fact that enforcement was sparse. The first enforcement action came in 1978, with only 52 actions by the end of 2000 (Stanford Foreign Corrupt Practices Clearinghouse 2018, hereinafter SFCPCAC 2018). But enforcement efforts expanded rapidly thereafter, with a total of 461

1 15 U.S.C. §§ 78dd-1, et seq.

2 See DOJ/SEC (2012) for a detailed discussion of the Act’s provisions and the agencies’ enforcement priorities.

3 See Crites (2012) and *Unlawful Corporate Payments Act of 1977* (1977) for further background.

4 See Bixby (2010). The act applies to U.S. nationals wherever located, to “issuers” who list securities on U.S. exchanges, and to “any person” acting within the United States. For the argument that the United States now exercises extraterritorial jurisdiction to an extent that clashes with customary international law, see Leibold (2014).

additional actions to date. The substantial uptick in enforcement began during the George W. Bush administration and accelerated during the Obama administration, with 2016 seeing more enforcement actions (55) than any prior year except 2010 (56). Enforcement has tailed off somewhat during the first year of the Trump administration, although 31 enforcement actions were initiated in 2017. The magnitude of enforcement penalties has also grown dramatically over time, with negligible monetary penalties imposed in the early years and a huge uptick beginning roughly a decade ago. Aggregate total sanctions are now approaching \$11 billion (SFCPAC 2018).

The growth in enforcement activity has turned FCPA investigation and compliance work into big business for major U.S. law firms and reignited concerns about an adverse impact on American business abroad. Segments of U.S. business continue to insist that the FCPA places them at an unacceptable competitive disadvantage, and calls to narrow or limit the Act's scope and enforcement have come from entities such as the U.S. Chamber of Commerce (Weissmann & Smith 2010) and an NYC Bar panel chaired by Jay Clayton, now the Chairman of the Securities and Exchange Commission (SEC) (New York City Bar 2011). Among other things, advocates for reform have argued that enforcement of anti-bribery rules by foreign governments has been minimal notwithstanding the OECD convention (Brewster 2014).

Collectively, these developments pose an intriguing political economy puzzle. The initial passage of the FCPA in the post-Watergate anti-corruption climate may be understandable despite the possible threat to U.S. business interests. But if the Act systematically harms American exporters and overseas investors, why have these seemingly well-organized domestic interests been unable to stem the rapid growth of enforcement decades later in Washington? While it is true that corruption causes inefficiency and waste, those costs are borne by the foreign economies that tolerate corruption. The only other obvious beneficiaries of aggressive enforcement are the foreign competitors of U.S. firms that can continue to engage in bribery and secure more business opportunities as a result. A political equilibrium in Washington in which the economic interests of foreigners systematically win out over domestic interests seems mysterious.

This article wrestles with various possible answers to the puzzle. Ultimately, we argue that the FCPA may not impose a large net burden on American business abroad. Critics of the FCPA are correct to say that enforcement can place U.S. businesses at a competitive disadvantage in securing business opportunities and that their next-best opportunities may well be less profitable in many instances. Yet, as we discuss more below, survey data and other evidence suggest that business opinions about the FCPA are quite divided regarding its impact. We offer four reasons why many firms may see significant benefits as well as costs associated with FCPA enforcement.

First, the standard business critique of the FCPA focuses on a loss of business opportunities *ex ante*. Firms competing for lucrative contracts with foreign governments, for example, lose out because they cannot make illicit payments to foreign officials who award such contracts.⁵ But if the FCPA makes illicit payments unprofitable, it also alters the bargaining game between businesses and corrupt foreign officials. Depending on the circumstances, firms exposed to demands for illicit payments may be in a better position to resist those demands without losing valuable business opportunities. This possibility may be particularly important to firms that have already incurred substantial sunk investments in a host country and that face “*ex post*” holdup situations. Such firms may be especially vulnerable to demands for illicit payments, which are tantamount to partial expropriation of the returns on investment. Firms with longer time horizons in their relationships with host countries may be in a similar position due to the importance of relationship specific investments.

Second, compliance costs related to the FCPA can be large. These costs include the costs of investigation into alleged illicit payments, the costs of compliance programs to prevent them, and the costs of compliance with the demanding accounting rules under the Act. These costs can entail significant fixed components, making them lower on a per unit basis for larger companies, giving these companies a competitive advantage over their smaller counterparts. Similarly, larger companies may have in-house specialists who can absorb FCPA-related compliance tasks into their existing work. The distinct possibility arises that larger companies may gain a competitive edge over small and medium-sized competitors as a result of FCPA obligations. Likewise, incumbent firms may find that FCPA enforcement creates entry barriers for potential new competitors.

Third, any competitive detriment to American businesses will be ameliorated when anti-bribery rules are applied to their foreign competitors. To some degree, foreign enforcement efforts following the OECD convention have this effect, although such efforts are fairly modest to date (but growing). More important may be the aggressive extension of U.S. jurisdiction to foreign companies. At a minimum, these policies reduce the extent to which the FCPA creates a “tilted playing field” for U.S. business abroad.

Finally, FCPA enforcement might discourage firms in an imperfectly competitive industry from dissipating supra-competitive returns by competing with each other to secure business opportunities through illicit payments. It might thereby serve as a rough analogue to a cartel-facilitating device.

5 Similarly, Graham & Stroup (2015) find that FCPA enforcement actions grounded on successor liability following cross-border mergers tend to scare off future U.S. acquirers contemplating acquisitions in the same country.

These observations suggest a possible explanation for the FCPA's staying power and growth: as some businesses have come to recognize the potential benefits of the Act, increased enforcement has become politically more tenable. Although there no doubt remain American businesses that are disadvantaged by the Act, regulatory policies favoring influential firms can emerge and survive even when industry is divided (Gilligan, Marshall, & Weingast 1989).

The rest of the article proceeds as follows. The next section offers a brief review of the literature. Section 2 notes some alternative hypotheses that purport to explain the rise in FCPA enforcement while accepting the premise that it systematically injures American business interests. Section 3 offers our primary contribution, exploring the theoretical underpinnings of the four possible sources of benefit to American business from the FCPA outlined above. This section also provides some preliminary empirical support that we have gathered from legislative history, existing survey data, and interviews with prominent practitioners and compliance officers. The final section concludes.

We emphasize that all of the hypothesized explanations regarding the growth and economic impact of FCPA enforcement may have some merit; the various hypotheses are by no means mutually exclusive. Likewise, we cannot show that the FCPA is systematically good or bad for American business as a whole, nor can we offer a definitive assessment of its welfare effects from a national or global perspective. The goal is much more modest—to ensure that the potential benefits of the FCPA for American business are not overlooked, to suggest some important insights into why business attitudes toward the FCPA are mixed, and thereby to indicate why the political economy issues are much more complex than the threat to competitiveness narrative might suggest.

1. PRIOR LITERATURE

Prior academic work on the FCPA with a political or economic focus is quite limited. In this section we briefly review the most important contributions that we have uncovered.

In an early study conducted prior to the advent of significant enforcement efforts, Graham (1984) found no evidence that the FCPA had created a competitive disadvantage for U.S. exporters. He found that the U.S. share of imports into countries where the FCPA had been deemed an export disincentive, based on a U.S. Commerce Department report, behaved similarly to the U.S. share of imports into other countries.

Rose-Ackerman & Hunt (2012) push back on the importance of the competitiveness problem from a different perspective, emphasizing the welfare effects of enforcement. They make two primary points. First, they observe that

U.S. firms that lose business opportunities because of a corrupt competitor may often have alternative opportunities that are more or less comparably profitable. Second, they argue that in certain industries such as the extractive industries, resources will often come to market one way or another, and bribery may simply shift business around among competitors for the opportunity to extract the resource. Bribery then affects the distribution of economic rents among companies and host country nationals, but not the quantity of the resource coming to market or the world price. In their view, any rents lost by U.S. companies are not terribly important in this setting, as they may have little impact on employment in the USA or on global economic welfare.

Kevin Davis has done the most to consider possible sources of benefits to the USA from FCPA enforcement. Davis (2002) entertains the possibility that anti-bribery law might in theory be tailored to target only instances in which anti-bribery law benefits U.S. companies. He observes that “payor states have no incentive to penalize their nationals for engaging in transnational bribery when paying a bribe represents the cheapest method of obtaining a given service,” while it may make sense for “payor states to punish their nationals for paying too high a price for services.” He rejects any notion that the statute was designed to achieve these objectives, however, because the requirements of the FCPA do not appear to limit violations to circumstances that might allow U.S. actors to pay bribes when they are beneficial to them. He goes on to suggest, however, that selective enforcement of the FCPA may occur and be more tailored to the promotion of the national interest.⁶

Davis (2012) further observes that “it is in the United States’ economic interest to tie its firms’ hands by preventing them from paying bribes for favors that they might otherwise be able to obtain by less costly and more legitimate means.” He questions whether this “self-interest” rationale prevails in practice, observing that “moralism” and “altruism” (the promotion of economic development abroad) have had an important role in the design and enforcement of the FCPA. He also worries that U.S. enforcement may hinder the development of local anti-corruption efforts. The relationship between the FCPA and economic development is also the focus of Davis (2010).

Choi & Davis (2014) conduct an empirical analysis of U.S. enforcement actions, testing various hypotheses that would explain the level of sanctions on the basis of “legalism,” self-interest, altruism and “coordination.” They find strong support for the importance of “legalism” (such as greater sanctions for

6 In support of this latter proposition, Davis relies on the fact that enforcement actions tend to target bribes paid to secure government procurement contracts. We are unable to agree with the suggestion, however, that payments to secure procurement contracts are systematically illustrative of instances where the payor is paying “too high a price.”

larger transgressions) and “coordination” (greater sanctions where foreign governments have become involved in investigating or sanctioning the same transaction). They also find limited evidence for “altruism” (greater sanctions for transgressions in countries with lower per capita incomes and more serious corruption problems). They find mixed evidence for sanctions based on “self-interest,” suggesting that foreign defendants tend to pay higher fines, other things being equal, but that there is no disproportionate targeting of foreign firms for the filing of enforcement actions.

As this brief literature review indicates, much of the existing commentary on the FCPA focuses on its normative consequences and rationale, and to a lesser degree on explanators of U.S. and global enforcement patterns. Our emphasis, however, is on the political equilibrium that has sustained the FCPA and has seen its enforcement ramp up dramatically over time. One group of hypotheses in this regard accepts the premise that the FCPA is broadly harmful to American business interests, but suggests that other factors have muted or overcome the resulting business opposition. We consider these hypotheses in Section 2, indicating why we do not find them fully convincing. In Section 3, we put forward a second group of hypotheses challenging the proposition that FCPA enforcement is necessarily harmful to U.S. business interests. Section 3 also lays out some empirical support for these ideas.

2. ANTI-BUSINESS EXPLANATIONS FOR THE FCPA: CAN OTHER INTERESTS AND VALUES PREVAIL OVER CONCERTED BUSINESS OPPOSITION?

As noted, during Congressional hearings leading up to the passage of the FCPA, business leaders voiced concerns that unilateral legislation outlawing bribery might put U.S. businesses at a competitive disadvantage relative to their foreign counterparts. Such fears continue to be expressed regularly. In a 2012 interview with CNBC, for example, Donald Trump complained that other countries are able to “do what they have to do” when operating in corrupt markets. He went on to call the FCPA a “horrible” law that “has to be changed.”⁷ It thus comes as no surprise that the Trump administration has so far proven less aggressive in its FCPA enforcement activity than its immediate predecessor,⁸ though

7 Available at: <http://www.cnn.com/video/2012/05/15/trump-dimons-woes-zuckerbergs-preuptial.html?play=1> (at 15:28).

8 It is too early to tell whether the drop in enforcement actions under the Trump administration will persist. If it does, however, we do not view it as a problem for our thesis or analysis. We do not argue that American business is uniformly in favor of aggressive enforcement or rule out the possibility that pro- and anti-FCPA business factions may have greater or lesser influence depending on the

enforcement activity has still been robust, with activity roughly comparable to that seen under George W. Bush (SFCPAC 2018).

If one accepts the premise of such critiques, however, the substantial growth in FCPA enforcement since the year 2000 is indeed puzzling. It is certainly not unusual for business interests to lose out at times in the Washington political process. But when that happens, one typically observes a well-organized domestic interest group on the other side of the issue, or at least a large number of domestic beneficiaries of the policy that domestic business interests oppose. Yet, as noted earlier, the obvious beneficiaries of anti-bribery enforcement abroad are foreigners who benefit from reduced corruption and greater efficiency in their local economies, as well as foreign firms who gain enhanced business opportunities at the expense of U.S. competitors.

So what explains the durability of the FCPA and the long-term upward trend in enforcement? We have already noted the possibility that in the immediate aftermath of Watergate, anticorruption sentiments were at their zenith, and the time may have been ripe for a statutory reform grounded in moralizing about the importance of corporate integrity rather than practical business realities. In addition, a scandal involving a large bribe by Lockheed to former Japanese Prime Minister Tanaka was a national embarrassment and was thought to have enhanced the position of communist politicians in places like Italy, who could point to “corrupt capitalism” (Church 1976). But such political sentiments inevitably abate with time and seem unlikely to explain what is happening 20, 30, or 40 years later.

Are there other plausible explanations for the durability of the FCPA and growth in its enforcement, notwithstanding the substantial net detriment to U.S. business interests suggested by the threat to competitiveness narrative? The remainder of this section considers, and in substantial measure rejects, several such hypotheses.

One possibility suggested by some of our interviews with prominent practitioners is that even if all or most U.S. companies operating abroad are hurt by the FCPA, it is too awkward politically to come out in opposition to the enforcement of a statute that purports to eliminate international bribery. In other words, business interests dislike FCPA enforcement but understand that fighting it could damage their reputations. Correlatively, key players in Congress may find it too difficult politically to advocate changes in the Act that would reduce enforcement—who wants to make a case for allowing “bribery?” One

President or party in power. We simply observe that the long-term, substantial uptick in enforcement relative to the pre-2000 era is difficult to reconcile with the thesis that the FCPA does great damage to American business interests as a whole.

shortcoming with this account, however, is the fact that a great deal of lobbying can be done behind the scenes, and enforcement can be curtailed in ways and through mechanisms that are not transparent. Moreover, business interests have expressed public opposition to the FCPA on numerous occasions, as noted, and Congress has passed amendments cutting it back, most notably in 1988.

Another possibility is that business opposition to the FCPA is substantially dampened because the law is ineffective. The capacity of a statute such as the FCPA to police bribery effectively is by no means obvious. Not only are “bribes” difficult to observe, doubly so abroad, but they can take many forms beyond under the table payments to public officials. Political contributions, charitable donations, the provision of goods and services at hefty discounts, and so on can all be used to benefit foreign officials in ways that are not always transparent or readily detectable. Given the array of mechanisms available, one can certainly wonder whether the practices that enforcers can detect and sanction are broad enough to make a major dent in corruption.

While this explanation may also have an element of truth, it overlooks the fact that the U.S. government has indeed prosecuted numerous companies for FCPA violations. Even if some firms continue to engage in illicit behavior because they expect to avoid detection, the threat of punishment is real and its prospect quite expensive. That threat undeniably adds risk to unlawful behavior, and it provides an opening for competitors to report suspicions of illegal dealings if they believe such dealings have interfered with their business opportunities. Moreover, the Dodd-Frank Act in 2010 contained provisions prohibiting retaliation against “whistleblowers” who report FCPA violations to the U.S. SEC, and it established a system of monetary rewards for whistleblowers that afford them a significant percentage of any monetary recovery from a violator (Morgan & Morgan 2018). In the face of these developments, U.S. companies routinely spend millions of dollars on compliance programs and often self-report suspected violations in the hope of leniency. In this context, it seems implausible to imagine that business fails to push back on FCPA enforcement because it has little economic consequence.

Another hypothesis, also suggested by some of our practitioner interviews, is that the growth of FCPA enforcement has been driven by the self-interest of lawyers. As FCPA enforcement has grown, the FCPA practice at major law firms has become increasingly lucrative. Enforcement actions are brought by DOJ and SEC attorneys, and who better to bring in as highly-paid senior partners at top law firms than these government lawyers who have fashioned policy and know the major players remaining in government? The incentive for the government attorneys is clear—ramp up enforcement efforts, and thereby enhance the demand for your services on the outside. Moreover, firms with large FCPA

compliance programs now employ compliance professionals with a vested interest in ongoing FCPA enforcement, and who thus comprise a constituency within the firm in support of the FCPA.

One difficulty with this explanation, however, is that it has a tail wagging the dog quality about it. As much as FCPA attorneys and compliance professionals may profit from the growth in enforcement, the costs to business of lengthy investigations, fines, and compliance programs seem much greater. It is unlikely that the managers and corporate boards of companies engaged in paying these massive sums would not act as a hefty political counterweight. Therefore, even if this explanation might provide a partial explanation for the sharp increase in prosecutions in the past 15 years or so, it cannot explain why business did not fight back vigorously and successfully once the increased prosecutions began to impact their bottom line.

Finally, it has been suggested that the modern increase in enforcement is the result in part of better information about corrupt practices taking place abroad, which has allowed U.S. authorities to prosecute more aggressively. Mark Mendelsohn, former Deputy Chief of the Fraud Section of the Department of Justice, suggested during a speech to the American Bar Association (Mendelsohn 2008) that a combination of technological developments and increased incentives for firms to self-disclose had made it easier for officials to uncover and punish wrongdoing.

This observation can help to explain why the increase in cases occurred when it did, but it fails to offer a complete account. Enforcement priorities at the DOJ and SEC are affected by the political appointees that run these agencies. We would expect such appointees (and their marching orders) to be sensitive to the interest groups that their policies affect, a standard observation in the literature on public choice and regulation. Even if it has become easier to prosecute corruption in recent years, the decision to do so far more aggressively is difficult to explain if it results in unmitigated harm to U.S. business interests.

A further, final consideration undercuts all of the hypotheses above. Various indicators of business attitudes toward the FCPA suggest decidedly mixed views. It is not difficult, for example, to find expressions of support for the Act from business interests. The U.S. Chamber of Commerce, while often a critic of certain aspects of the FCPA, has also referred to the FCPA as “a valuable statute that helps reduce corruption and reinforce public and investor confidence in markets here and abroad (Foreign Corrupt Practices Act: Hearing 2011).” Similarly, an executive at Next Digital based in Hong Kong recently labeled the FCPA “a real gift for Americans” (Haldevang & Timmons 2017).

To be sure, such public statements may be colored by the awkward politics of saying something negative about an anti-bribery statute. But a similar mixed picture comes from anonymous surveys undertaken by entities such as Control

Risks.⁹ When asked anonymously in a 2015/2016 survey,¹⁰ 84 percent of international respondents, including in-house legal counsel and compliance professionals, either “agreed” or “strongly agreed” with the statement that anti-corruption laws including the FCPA and others enacted by countries such as the UK “improve the business environment for everyone.” In the same survey, 57 percent of respondents either agreed or strongly agreed that the laws “make it easier for good companies to do business in high risk markets.” And 68 percent of respondents either agreed or strongly agreed that the laws “serve as a deterrent to corrupt competitors.” Although the survey does not refer to the FCPA alone, and one cannot be certain that survey respondents always reflect the interests of their firms as a whole, it suggests that despite the costs of compliance and variable cross-national enforcement of anti-bribery laws, not all firms perceive these laws to be a net negative, and many firms see important positives. The attitudes of respondents to the Control Risks survey also accord with some of the evidence about the long-term impact of corruption on companies’ prospects in a market,¹¹ suggesting that these answers may indeed reflect market realities.

In sum, the best, although concededly limited, evidence we have concerning business attitudes toward anticorruption laws reveals considerable differences of opinion over their effects on the business environment. In the next section, we turn back to the possible reasons why important segments of the business community may enjoy significant benefits from the FCPA.

3. COULD THE FCPA BE GOOD FOR U.S. BUSINESS?

This section explores several hypotheses suggesting ways that American businesses abroad may actually benefit from FCPA enforcement. If these hypotheses are correct and empirically important, the political economy “puzzle” that motivates this article becomes far less puzzling.

9 In addition, in a now quite dated anonymous survey of Fortune 1,000 businesses conducted by the General Accounting Office in 1981, 55 percent of respondents said that the costs of the FCPA exceeded its benefits, while 45 percent said that the benefits exceeded the costs. Comptroller General of the U.S. (1981).

10 This was an internet-based survey with 824 respondents spread across a variety of different countries and sectors (Control Risks, “International Business Attitudes to Corruption” 2015/2016).

11 Hellman, Jones, & Kaufmann (2000), for example, show that although some firms may gain through bribes, the growth of corruption can contribute to under-performance by firms in that market overall, suggesting that any laws that prevent corruption should indeed “improve the business environment for everyone.”

At the outset, we note that certain purported benefits of the FCPA suggested by other commentators seem unlikely to play much of a role in the background political economy. Some commentators suggest, for example, that if a corporation permits its agents to engage in bribery, a corporate culture of corruption emerges that may diminish the efficiency of the corporation. Even if true, it is unclear why corporations would seek government involvement in addressing the problem, rather than engaging in self-policing. Similarly, it has been suggested that anti-corruption efforts promote development and growth in developing countries, leading to more business opportunities over the long run. While plausible, this notion likewise seems unlikely to play much of a role in the background political economy. The U.S. beneficiaries of long-term economic growth abroad are diffuse and difficult to identify, and all benefits lie in the discounted future. Accordingly, we focus here on more immediate and identifiable benefits to firms that may motivate them to support or at least acquiesce in growing FCPA enforcement.

3.1. Changing the Bargaining Game: *Ex Ante* versus *Ex Post*

As noted earlier, Kevin Davis has argued that the FCPA may serve a useful “hands-tying” device for firms doing business abroad. We concur, and in this section develop the argument further, introducing a key distinction between the *ex ante* and *ex post* consequences of the FCPA.

Theory. The FCPA imposes punishment on those found guilty of (or pleading guilty to) providing illicit payments. The obvious economic effect of FCPA enforcement is to reduce the returns to making such payments by an amount that will depend on the probability that illicit payments are detected and sanctioned and the magnitude of the sanction (Becker 1968; Stigler 1970). The probability of sanction, in particular, will be a function of the enforcement effort put forward by enforcers, as well as the likelihood that private actors will be motivated to come forward with information about violations. Under the FCPA, this probability is enhanced in three ways: (i) whistleblowers are protected and rewarded as noted above, (ii) competitors may have an incentive to inform on illicit activity by other competitors (Fisman & Golden 2016), and (iii) self-reporting in connection with corporate compliance programs can result in more lenient sanctions.

Conceivably, the expected sanction for making illicit payments becomes so high that it becomes irrational to make such payments altogether. Indeed, several factors hint that penalties may be prohibitive much of the time. In particular, the probability of detection may be substantial for the reasons just noted, and fines can and do run into the hundreds of millions of dollars (SFCPAC 2018). Further, disgorgement of “ill gotten gains” serves as a

benchmark for calibrating the fine (Conroy & Hunter 2011). Finally, empirical research suggests that the potential reputational costs to corporations go well beyond the direct financial costs of enforcement actions (Martin, Karpoff, & Lee 2014).

But even if the expected sanction is not always high enough to make illicit payments irrational, the threat of enforcement clearly reduces the expected surplus to the payor in any transaction involving such payments. A reduction in the expected surplus will tend to shrink the size of any illicit payments when the bargaining surplus is split between the payor and the payee.¹² Furthermore, if Choi and Davis (2014) are correct in their finding that the size of the sanction rises with the size of the illicit payment, such a marginal increase in the expected sanction will further reduce the likely magnitude of payments. Concomitantly, if small payments can be hidden and escape detection while larger payments are likely to leave a trail that auditors or investigators will find, still further incentives exist to keep payments small.

Similar analysis applies if we conceptualize firms not as unitary actors but in a principal-agent framework and we suppose that agents may profit from illicit payments even if the payments are not in the best interests of the principal. FCPA enforcement will induce greater monitoring by principals to curtail undesirable payments by agents, and will induce agents to reduce the size of payments to the extent that smaller payments are less likely to be detected. Indeed, some of our practitioner contacts suggested that the greatest deterrent to bribery under the FCPA results from the risk that it will be detected by an in-house compliance program.

Of course, the fact that FCPA enforcement will cause a reduction or elimination of illicit payments is not enough to establish that it benefits the firms that are subject to it. One must weigh the loss of profitable business opportunities

12 To be sure, there is no definitive economic theory of bargaining that robustly predicts how the outcome of bargaining will change, but standard models tend to support the statements in the text. Consider the Nash bargaining model. Let the amount of the illicit payment from payor to payee be x . The payor enjoys utility of U^* in exchange for the payment (say, the profit on a government contract), less the expected sanction for making the payment denoted by $s(x)$ which can increase with the size of the payment [$s'(x) \geq 0$], and less the payment itself. The payee simply receives the payment x . For simplicity, we further assume that if the payor and payee cannot agree on the amount of the payment, they each receive utility of zero.

The Nash bargaining solution then requires a choice of x to maximize $\{U^* - s(x) - x\}x$, subject to the constraint that x be non-negative. The solution is

$$x^* = [U^* - s(x^*)]/[2 + s'(x^*)]$$

for $U^* \geq s(x^*)$; otherwise the payment is zero. If the payment is positive, its value declines as the expected sanction $s(x^*)$ increases and as the rate of increase in the sanction as a function of the size of the payment [$s'(x^*)$] increases.

and FCPA compliance costs against the reduction in illicit payments to ascertain the net impact of the FCPA on firm profitability.

In this regard, we think it critical to distinguish the *ex ante* effects of enforcement from what we will term the *ex post* effects. By *ex ante*, we mean the effects on firms that are competing with each other for initial business opportunities. Several competing firms may be vying for a lucrative procurement contract, for example, and may wish to bribe the procurement officer to secure the contract. In this setting, firms subject to FCPA enforcement may be placed at a disadvantage if they cannot make illicit payments comparable to those of their competitors. They may simply lose out on the contracting opportunity and any surplus that would remain net of the required illicit payment.¹³

Accordingly, we suspect that firms whose primary concern is to secure new business opportunities abroad will often find themselves disadvantaged by FCPA enforcement, especially if they face competition from firms that are not subject to FCPA jurisdiction (more on this issue in sub-Section 3.3. below). The loss of profit may be modest, of course, in any setting where competition drives down the economic profits from new business opportunities toward zero.

The situation is importantly different *ex post*. In many cases, the firms subject to FCPA enforcement make expensive capital investments to serve or exploit opportunities in foreign countries. They may invest in public utilities, industrial factories, natural resource exploration and production, and so on. Many of these investments are “sunk,” in the sense that once the costs are incurred, it is not possible to sell the investment to recover the initial cost. A waterworks built to serve a major city cannot be picked up and moved to another location, nor can a factory, an oil well or a pipeline. Once these investments become unprofitable, their fair market value plummets.

It is important to note that “sunk investments” are not limited to physical capital. When businesses enter into long-term relationships with parties overseas, it will be common for them to make a variety of relationship-specific investments (Yarbrough & Yarbrough 2014). These may include such things as learning the local language and customs, training local workers to assist in their operations, developing local sales and advertising forces, and so forth. These costs are analytically similar to sunk physical capital in that they

13 To be sure, some cases may arise in which firms subject to FCPA enforcement can outcompete those who are not for initial business opportunities even without making illicit payments. If a firm has a large cost advantage, for example, it may underbid the competition for a contract by so much that the procurement officer may feel compelled to award that firm the contract even without an illicit payment. It is also possible that some foreign governments wish to stamp out corruption by their agents, and that senior officials will be drawn to dealing with firms that are less likely to indulge corruption by subordinates.

cannot be recovered if the business relationship fails. Accordingly, firms with longer time horizons in their foreign markets may be in much the same position analytically as firms with sizeable sunk physical capital investments.¹⁴

It is well known in the economic literature that the owners of sunk investments are vulnerable to *ex post* “hold up” or “expropriation.” A host country government can exploit sunk investments through various tax, regulatory or takings measures that capture the returns to those sunk investments. Such measures not only reduce any true economic profits from business operations abroad, but they may erode the quasi-rents necessary for investors to break even with a competitive return on their investments. As long as the investor’s stream of returns remains sufficient to cover the marginal costs of operating an investment, it is rational to continue operation. Foreign officials know this fact and may thus be able to appropriate a substantial portion of the quasi-rents associated with sunk investments without causing the investor to shut down.

Of course, investors are not ignorant of these risks *ex ante*, and will build risk premia into their required rates of return before undertaking sunk investments. These risk premia may raise the cost of imported capital to the host country inefficiently, however, which affords a common explanation for investment treaties that provide investors with rights of action against host countries that engage in expropriation and other opportunistic behavior that impairs the value of foreign investments (Posner & Sykes 2013, ch. 19).

The FCPA can provide a similar type of protection for sunk investments. If the owner of a sunk investment is approached by a corrupt public official seeking a bribe to allow continued operation (or to avoid some significant cost to continued operation), the FCPA may enable the investor to resist paying the bribe for the reasons noted above or enable the investor to bargain for a less costly bribe.

Of course, the corrupt official may respond by taking actions that damage the investor, and the net impact on the investor could be unfavorable. But when investments are important to the host country—waterworks, road construction, extractive industry operations, factories that employ local workers, and so on—we suspect that corrupt officials will often be reluctant to shut down or disrupt investor operations when they are refused an illicit payment.

Furthermore, if a corrupt official does retaliate when a demand for bribery is refused, the investor can turn the corrupt official into local authorities or otherwise publicize the retaliation, assuming that local anti-corruption laws

14 Sunk investments may also be as simple as irrecoverable transportation costs. A container of goods awaiting clearance at customs, for example, is vulnerable to hold up behavior because the cost of shipping to goods from their place of origin is sunk. If the delivery is time-sensitive for some reason the problem is even greater.

or norms exist. This strategy may be inferior to paying a reasonable bribe in the absence of the FCPA but can become the best option in the face of FCPA liability exposure.

Here too, the *ex ante/ex post* distinction seems important. If a firm loses out on an initial business opportunity because it does not pay a bribe, the firm may not know or be able to prove that the refusal to pay a bribe was the reason. When a spurned corrupt official retaliates by interfering with the operations of an ongoing business concern, by contrast, a link to the refusal to make illicit payments may be much more clear and demonstrable.

If these observations are correct, the benefits of the FCPA to investors with sunk investments can parallel those of investment treaties. A dynamic effect may arise as well if investors are better able to resist corrupt demands as the influence of corrupt officials diminishes over time, and host country interests that support transparent and law-based markets may strengthen their position in the host country.

The analogy to investment treaties suggests another observation. Just as investment treaties can benefit a capital-importing nation by curtailing *ex post* opportunism and thereby lowering the *ex ante* cost of imported capital, anti-bribery rules potentially confer the same benefit. If so, host countries themselves will benefit from anti-bribery laws, and might be expected to enact them. Indeed, laws against domestic bribery are commonplace globally. If they were universal and functioned well, regimes such as the FCPA might be unnecessary. But domestic anti-bribery rules, and their enforcement, tend to be quite imperfect, especially in developing countries. We conjecture that part of the reason lies in limited resources and the broader problem of domestic corruption, which results from behavior by public officials that is not always in the best interests of the host country. Another factor is that extraction of bribes *ex ante* by host countries (as distinguished from *ex post* opportunism toward sunk investments) need not disadvantage them. If a company pays a bribe to secure a procurement contract, for example, the proceeds may come from economic rents that the company would otherwise earn, and represent a net gain for the host country.¹⁵ General anti-bribery rules applicable to foreign firms may thus be a mixed blessing from the host country perspective, and may impede their enactment or enforcement.

On a final note, the *ex ante/ex post* distinction that we draw in this section has a collateral implication regarding enforcement of the FCPA against foreign versus domestic (U.S.) firms (see sub-Section 3.3 below). U.S. firms will benefit

15 The rough analogy is to the 'optimal tariff'—if an importing country has a degree of monopsony power over the good or service that it imports, it can exploit that power through taxation of imports. Johnson (1953).

if their foreign competitors are discouraged from paying bribes *ex ante* in competition with U.S. firms. Once foreign firms have secured business opportunities and incurred sunk costs, however, U.S. firms do not benefit from enforcement that “ties the hands” of foreign firms and protects them against efforts by foreign officials to extract bribes. Indeed, *ex post* exploitation of foreign firms raises their costs *ex ante* and advantages their U.S. competitors. When enforcing the FCPA against *foreign firms*, therefore, purely parochial U.S. enforcers might tend to focus on *ex ante* illicit payments rather than on *ex post* illicit payments. Conversely, purely self-interested enforcement against *U.S. firms* might tend to focus on protecting their sunk investments *ex post*, while giving them more freedom to make illicit payments *ex ante*, at least under circumstances where they are competing with foreign firms for business opportunities (and not just among themselves).

Of course, the FCPA itself draws no such distinctions in its enforcement standards, and we would be surprised if U.S. enforcers behaved in such a transparently parochial fashion. Furthermore, the issues that we raise in sub-Sections 3.2–3.4 below would not tend to support this type of enforcement pattern, and we are not aware of any evidence to suggest that it prevails in practice.

Evidence. The ability of anti-bribery legislation to help companies resist demands for illicit payments was used in support of the Act’s initial passage. For example, Rep. Robert Eckhardt (D-TX) asserted that “many U.S. corporations would welcome a strong anti-bribery statute because it would make it easier to resist pressures from foreign officials” (Unlawful Corporate Payments Act 1977, p. 2). Likewise, while testifying before a Joint Committee in 1976, Ralph Nader noted that companies intending to remain in a market for an extended period faced particular risks. Nader observed, “An extortionist invariably comes back for more, and other officials may make additional demands when they perceive a company is known to be responsive” (Abuses of Corporate Power 1976, p. 93).

At least one of the companies accused of paying bribes prior to the FCPA’s enactment testified in favor of new legislation making future bribes illegal. Specifically, a representative from Gulf Oil Corp., a company that one would expect to be particularly susceptible to the holdup problem due to the large sunk costs associated with oil exploration and the long time horizon in foreign countries, testified as follows:

But you [Congress] can help us, and many other multinational companies which are confronted with this problem, by enacting legislation which would outlaw any foreign contribution by an American company. Such a statute on our books would make it easier to resist the very intense pressures which are placed upon us from time to time. If we could cite our law which says that we just may not do it, we

would be in a better position to resist these pressures and to refuse the requests (Multinational Corporations and US Foreign Policy 1975, p. 13).

In the course of our discussions with prominent FCPA practitioners, the sentiment that the FCPA helps companies to resist paying bribes was also commonplace. One individual, with experience in the Chinese market noted that, with the possible exception of very low-level officials, Chinese government agents know about the FCPA and know that bribes requested from American companies will not be provided. Another lawyer who was a compliance officer at a firm with operations in Asia noted that as companies become more physically entrenched in a location, the soliciting of bribes becomes increasingly problematic. He observed that the ability to tell foreign officials that by providing the bribe they would expose themselves to criminal penalties helped the company at which he worked avoid illicit payment requests. Similarly, a lawyer with a client operating in Russia said he had been told that the internal-compliance measures necessitated by the FCPA made it easier to avoid bribes by explaining to corrupt officials that it would be impossible to withdraw the necessary cash without detection. Finally, one attorney noted that he was actually surprised when new cases of suspected bribery came in, because the FCPA gave Americans such a strong ability to resist requests for bribes.

Our discussions with practitioners also suggested that there is a connection between sunk costs and time horizons. For example, one lawyer observed that “juniors” in the mining business, which tend to operate on shorter time horizons, getting in and out of markets quickly, tend to be less concerned about paying bribes. Although they may have some sunk costs, their brief exposure to bribe requests makes paying them more like a one-off, up front cost. By contrast, bigger players in the industry, which tend to stay in a country for substantially longer durations, have both the vulnerability to bribe requests, and the long-term outlook that makes acquiescence to bribery a potentially recurrent problem. There is also a sense that as companies remain in a location longer, they have more interactions with foreign officials, and the benefits of an ability to resist making payments compounds over time.

Finally, a 2013 article authored in part by the CFO of a mining company on a website devoted to mining matters echoes the notion that bribery is bad for business if the company’s time-horizon is significant. In that article the author observed, “Occasionally, you may lose a deal because someone made a bribe to a foreign public or private official. That person will be seen as a mark and continuously be hit up for more bribes. You have a better chance of establishing a *long-term* prospect in a host country because you are working within their laws in addition to those of your home country” (Edwards & Engele 2013, *emphasis added*).

In sum, although we do not wish to overstate a case based on anecdotal evidence, the proposition that firms can benefit from an ability to resist demands for bribery due to the threat of FCPA enforcement is a near universal theme among the attorneys and compliance officials with whom we have spoken. This benefit seems to be particularly associated with firms that have long-term connections to the host country, which offers support for our *ex ante/ex post* distinction and to the potential value of the FCPA to firms with important sunk investments.

3.2. Barriers to Entry

George Stigler once argued that “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit” (Stigler 1971, p. 3). He noted further that a primary means through which regulation could serve industry was by acting as a barrier to entry, thereby protecting established firms or groups against new competition.

Stigler’s focus at the time was on licensing requirements, but the FCPA may afford another example of the general phenomenon he describes. In particular, the FCPA can serve as an entry barrier for smaller firms with multinational aspirations through the imposition of costs that are disproportionately higher for smaller firms.

Under the FCPA, firms are required to ensure that none of their immediate employees engage in bribery, and they also must comply with elaborate accounting regulations relating to expenditures of funds abroad. Firms are also potentially responsible if their foreign contractors engage in illicit behavior, or when they acquire a foreign company that has behaved illicitly in the past. Meeting these requirements requires considerable resources, including the wherewithal to establish a credible corporate compliance program and the ability to vet foreign counterparties with which a firm does business. Many of the costs of hiring outside counsel to design compliance programs and those of setting up an accounting system to comply with FCPA requirements may be to a considerable degree “fixed,” in the sense that they do not rise proportionately with the size of the company undertaking them. Indeed, in a 1986 Senate hearing, the Vice President of the Emergency Committee for American Trade (ECAT) revealed that in a survey of ECAT members, a number of respondents noted that there was “a large start-up cost associated with complying with the FCPA’s accounting requirements” (Business Accounting and Foreign Trade Simplification Act 1986, p. 88).

Likewise, smaller businesses may be more vulnerable to liability, due to the fact that their foreign operations tend to be more dependent on third party contractors, over whom they exercise less control. In addition, senior executives

of small companies are more exposed to liability because of their greater involvement in day-to-day business decisions (Examining Enforcement of the Foreign Corrupt Practices Act 2010, p. 26). The combination of fixed costs and added exposure for small businesses may make them more hesitant to expand into risky markets, thereby advantaging the established, larger firms with a presence in those places.

The difficulties posed by the FCPA for smaller firms have indeed been a frequent theme of Congressional hearings about the Act. During the course of a 1986 Joint Hearing, Senator Mack Mattingly (R-GA) said, "If you look at the law through the eyes of a small businessman, you probably would give up wanting to trade overseas. The small businessman simply can't afford to abide by that law . . . a small businessman cannot afford, in many cases, the required separate accounting procedures or to monitor, with certainty, the activities of the necessary foreign agents" (Business Accounting and Foreign Trade Simplification Act 1986, 55-6). During a 1983 hearing, U.S. Trade Representative Bill Brock similarly observed, "Large major corporations have, as a matter of practice, a whole battery of corporate attorneys and accountants available to them all the time. The sheer number of experts alone helps in complying with the current law. Small companies simply do not have access to that kind of talent and expertise. Confronted with ambiguity and uncertainty in the law, small and medium-size companies would rather play it safe and simply not compete than risk critical injury to their companies" (Business Accounting and Foreign Trade Simplification Act 1983, 28-9).

Likewise, during a hearing Before the Subcommittee on Telecommunications, Consumer Protection, and Finance, the General Counsel of the Department of Commerce argued that "most small businesses aren't acquainted with agents they might be dealing with. They are learning how to get into the export business through strangers or referrals from other people. The act is vague The small businessman will stay away until we can write a law that is definitive, so he knows where he is going, he knows what he is doing, and he feels comfortable expanding into the export trade" (FCPA- Oversight 1981/1982, p. 312).

These hearings were also replete with statements by small business proprietors complaining that they were at a disadvantage relative to their larger competitors. For example, a representative for the National Small Business Association observed, "Small business must rely on commission merchants or become minority shareholders in foreign companies. As a small businessman, I have no control over the activities of my customers. And I surely have no control over the activities of companies in foreign countries in which I have a minority share My question to you is this: Must I give up 80 percent of my

U.S. business because I do not know exactly what my overseas customers or majority stockholder partners are doing?” (*id.*, 326–327).¹⁶

Our conversations with FCPA attorneys and compliance practitioners also offer support for the proposition that the FCPA can disadvantage smaller, less established firms. For example, a number of those we interviewed echoed the sentiment often voiced in Congressional hearings that the fixed cost components of FCPA compliance could serve to disadvantage smaller companies. In addition, one FCPA attorney observed that large companies already doing business in multiple markets have an advantage when entering new markets because of compliance programs already in place elsewhere. The same attorney noted that strong compliance programs reduce the risk of liability and may evoke some leniency from enforcers in the event of misbehavior by an agent or contractor, yet smaller companies may not have the resources to create a strong compliance program. To be sure, our contacts also noted that compliance costs can vary quite a bit, depending on company size and business locations. In addition, one attorney theorized that because investigations have tended to focus on larger companies, smaller firms may believe that they can fly under the radar. Nevertheless, even if small companies believe they can escape detection, as those companies try to grow in order to compete more effectively with their larger competitors, they will be forced to institute a more robust compliance program. The cost of doing so could act as a deterrent in specific markets.

On the whole, therefore, the limited evidence tends to support the proposition that the FCPA burdens larger firms to a lesser a degree than small and medium-sized firms. Larger companies have greater resources with which to address compliance issues, can spread fixed compliance costs over a larger base of activity, and may be less at risk of liability due to reduced reliance on unfamiliar foreign contractors and stronger and more effective compliance programs.

Moreover, large firms may also have an advantage over small firms when it comes to expressing their preferences to the U.S. government. This advantage partially stems from large firms’ reduced numbers and, hence, theoretically superior ability to organize (Olson 1965). These firms’ superior organizational capacity as well as their potential ability to influence members of Congress even

16 Likewise, Eamonn McGeady, President of Martin G. Imbach Inc., noted in the same hearing that “smaller businesses as a rule do not have the ability to staff a legal department or a foreign operations department . . . in order to be able to be reasonably assured that their activities meet all the terms of the law, not just the FCPA, but a broad spectrum” (p. 329). Finally, Bernard Featherman, President of Western Steel Co. put it rather bluntly when he said that “many times, legislation that is advantageous to large firms places small companies at a disadvantage” (p. 331).

when acting alone, could help some of these firms' support for the FCPA outweigh the opposition from their smaller counterparts.

To be sure, if the FCPA does create barriers to entry and advantage large, incumbent firms, consumers may be injured along with disadvantaged smaller businesses. Nevertheless, we would not expect consumers to offer significant political opposition to FCPA enforcement for two reasons. First, as to individual consumers, their personal stakes will be small, and the collective action problem associated with efforts to organize politically as a group will be large, a familiar observation from the public choice literature (*id.*). And as for consumers as a whole, including large industrial consumers, we doubt that any effect of FCPA-related entry barriers on prices is transparent enough for buyers to identify significant effects traceable to the FCPA. They are then unlikely to express concern even if they could overcome the organizational challenges.

3.3. FCPA Enforcement against Competitors of U.S. Firms

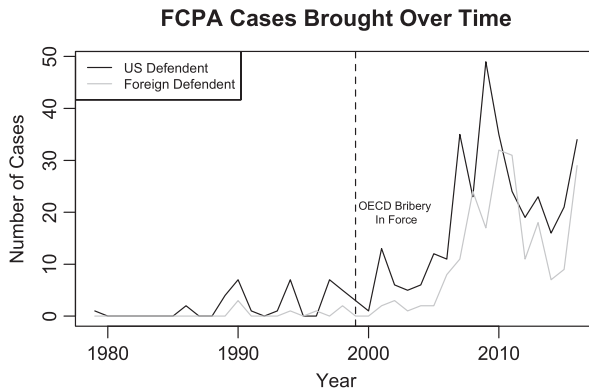
Perhaps the most obvious way in which FCPA enforcement can benefit the narrow U.S. economic interest is by transferring rents from foreign firms to the U.S. Treasury. Likewise, when enforcers go after foreign firms or their agents, they indirectly benefit U.S. competitors of such firms operating in the same foreign markets through two mechanisms. First, enforcement against foreign competitors directly increases their costs of doing business.¹⁷ Second, the threat of enforcement can deter them from paying bribes or induce them to pay smaller bribes, again enhancing the relative ability of U.S. firms to compete with them.

In short, the extension of enforcement jurisdiction to foreign firms tends to level the playing field and remove the competitive disadvantage that has worried U.S. business interests since the initial passage of the FCPA. Plainly, this effect will be greater, the greater the extent to which the important competitors of U.S. firms are subject to FCPA jurisdiction, and the greater the extent to which U.S. enforcers are willing to pursue violations by foreign firms.

In this regard, note that FCPA sanctions can be imposed on foreign interests in two important classes of cases—when the foreign firm is an issuer on U.S. securities exchanges, and when “any person” (foreign or domestic) engages in prohibited conduct in the USA. The latter requirement is interpreted quite liberally. It is enough, for example, that a wire transfer passes through the USA. One of our practitioner contacts even suggested that any transaction involving U.S. dollars might have sufficient “nexus” to the USA in the view of the DOJ to trigger U.S. jurisdiction.

17 See Salop & Scheffman (1983) on the value to firms of “raising rivals’ costs.”

Data Source: Shearman & Sterling LLP (2016).



Although we do not suggest that enforcement is “biased” against foreign firms, the evidence makes clear that U.S. enforcers do pursue foreign firms aggressively. Raw data on FCPA cases brought as a function of time show a clear tendency following the advent of the OECD anti-bribery convention for U.S. enforcers to bring cases against foreign defendants. In addition, increased prosecution of foreign firms has closely mirrored that of U.S. companies.

The uptick in enforcement against U.S. firms following the OECD bribery convention also raises the possibility that foreign enforcement against foreign firms, together with increased U.S. enforcement against foreign firms, combined to dampen domestic resistance to the FCPA. Indeed, Jensen & Malesky’s (2018) study of foreign investors operating in Vietnam suggests that firms from countries that are signatories to the OECD Convention reduced their payment of bribes following “Phase 3” implementation of the Convention, which entailed OECD review and publicity regarding the degree to which Convention signatories were actively enforcing their anti-bribery laws. While the authors chose to focus on Phase 3 of the Convention, which was not implemented until 2010, nothing in their analysis negates the possibility that the initial implementation of the Convention also helped reduce bribery by foreign firms abroad.¹⁸

The limited evidence also suggests that foreign firms may be vulnerable to higher penalties, which ought to placate domestic opponents. Fuchs (2012)

¹⁸ Brewster (2014) takes a more skeptical view of the Convention, however, arguing that a lack of clear rules for the internal enforcement of national laws required by the Convention has led to weak enforcement outside the USA. Moreover, she contends that the absence of clear requirements for internal enforcement makes it difficult to say when a signatory is out of compliance, undermining the capacity for reciprocity or reputation to support self-enforcing multilateral commitments to attack corruption.

Business Insider story identified the ten largest corporate penalties to date in the history of FCPA enforcement. The ten companies identified in the story, paying penalties ranging from \$81.5 million to \$800 million, were Panalpina (Swiss), Magyar Telekom (Hungarian and German), Alcatel-Lucent (French), Daimler AG (German), JGC Corp. (Japanese), Technip S.A. (French), Snamprogetti Netherlands B.V. (Dutch and Italian), BAE Systems PLC (British), KBR/Haliburton (U.S.), and Siemens (German). Only one of the “top ten” is a U.S. headquartered company.

An updated “top ten” list, current as of February, 2018 displays a nearly identical pattern SFCPAC (2018). Of the top ten largest monetary penalties imposed to date, only one was levied against a U.S.-based firm (Kellogg, Brown & Root, a former subsidiary of Haliburton).¹⁹ A more systematic empirical analysis by Choi & Davis (2014) also found that foreign corporations receive disproportionately larger penalties under the FCPA, after attempting to control for at least some of the relevant variables that affect the appropriate size of penalty.²⁰

One of our practitioner contacts further suggested that even if enforcement is not biased against foreign firms, increased actions against non-U.S. companies could confer a competitive advantage onto U.S. firms. Having operated under FCPA requirements for decades, U.S. companies already tend to have strong compliance measures in place. Foreign firms, by contrast, may not. This can act as an added cost for foreign firms relative to their U.S. competitors—in effect, U.S. firms may have gained a limited “first-mover advantage.”

3.4. FCPA Enforcement and Imperfect Competition

A final mechanism by which FCPA enforcement may benefit business abroad arises in imperfectly competitive industries. This mechanism draws on the hands-tying analysis in sub-Section 3.1 above, as well as the expansion of enforcement over foreign firms discussed in sub-Section 3.3. In particular, if the collective market share of the firms subject to FCPA jurisdiction is large enough in some imperfectly competitive market setting, FCPA enforcement may, in effect, serve as a cartel-facilitating device.

To explain, imagine a group of oligopolistic firms in some foreign market. Conceivably, they may have a formal cartel arrangement to support price, or

19 Turk (2013) argues in this regard that the payment of monetary penalties to the U.S. Treasury leads to overaggressive enforcement efforts, and urges a reform that would give such penalties to the host country or possibly to the OECD to support anti-corruption efforts.

20 Choi and Davis also note, however, that aggregate fines against U.S. companies exceed aggregate fines against foreign companies, and they make no attempt to take account of the fractional ownership of targeted foreign companies by U.S. and foreign shareholders or the number of U.S. and foreign workers hired by each.

perhaps they support price through “conscious parallelism,” observing each others’ pricing decisions and reacting accordingly. As long as each firm adheres to the oligopoly pricing umbrella, others do as well. It is well known that such arrangements are vulnerable to “cheating,” whereby members of the oligopoly secretly undercut each other for the purpose of stealing customers (Carlton & Perloff 2005, chs. 5–6).

One mechanism for cheating on an oligopoly is the payment of bribes or kickbacks to customers. A collective agreement to eschew bribery might then be in the oligopolists’ mutual interest yet be difficult for them to enforce because bribery by competitors is difficult for them to observe. They may then benefit from enlisting a government enforcer to assist. Government enforcement may increase the probability that bribery will be detected and ratchet up the sanction for bribery beyond what the competitors could impose on each other in any privately enforced arrangement, thus deterring it more effectively and enhancing the stability of oligopoly pricing. Plainly, this mechanism will not work unless the key players are all subject to enforcement jurisdiction.

Although we cannot point to specific evidence of this latter phenomenon, some limited historical evidence suggests that concern for wasteful competition among firms subject to enforcement jurisdiction may have played a role in the initial assessment of the FCPA by Congress. In the 1977 House Report accompanying the Unlawful Corporate Payments Act of 1977, the committee quoted from the testimony of former SEC Chairman Roderick Hills:

Despite the fact that the payments which this bill would prohibit are made to foreign officials, in many cases the resulting adverse competitive affects are entirely domestic. Former Secretary of Commerce Richardson pointed out that in a number of instances, “payments have been made not to ‘outcompete’ foreign competitors, but rather to gain an edge over other U.S. manufacturers.”

Thus, it was explicitly recognized that at least some bribery entailed competition among U.S. firms to see who would pay the largest bribe. As enforcement jurisdiction and activity has expanded over the years to reach more and more foreign firms, the suppression of such “wasteful” competition over bribery has plausibly expanded to more and more foreign markets, serving to protect rents in imperfectly competitive market settings against competitive erosion.

4. CONCLUSION AND EXTENSIONS

We began this article with a puzzle: if the FCPA truly harms U.S. business competitiveness, what explains its long-term staying power in the absence of an obvious domestic coalition that stands to benefit from its continuance? In

answer, we have suggested several ways that domestic firms may suffer less detriment from the FCPA than its critics suggest, and why domestic firms may even stand to gain from the Act. Each of these possibilities has received some support through interviews, Congressional testimony, and, in some cases, survey research. Of course, much more empirical research might be done to explore these ideas further.

The importance of understanding the effects on business of anti-bribery legislation goes beyond a mere academic interest in political economy. Enforcement of anti-corruption laws aimed at foreign bribery remains in relative infancy outside the USA. Many of our practitioner contacts also emphasized that in a variety of industries, their clients' foreign competitors remain outside U.S. jurisdiction under the FCPA. Accordingly, in the current international environment, the effect of vigorous FCPA enforcement on the national economic interest of the USA remains an important and unresolved issue.

It also seems likely that greater *foreign* enforcement of anti-bribery laws would tend to level the playing field and benefit U.S. companies. To encourage greater enforcement abroad, it may be necessary to convince political coalitions abroad that anti-bribery measures are in their interest, or at least not seriously adverse to them. By identifying the ways in which domestic firms may gain from the enforcement of laws such as the FCPA, it may become possible for other governments hoping to pass or to enforce similar laws to identify and win over potential supporters.

This last set of observations raises a broader question. If we are right that FCPA enforcement may yield significant benefits to U.S. firms operating abroad, why have other developed countries with substantial capacity to engage in extraterritorial enforcement not been more aggressive in enforcing anti-bribery laws abroad on behalf of their own firms? Is there some reason why U.S. firms benefit more from U.S. enforcement than foreign firms would benefit from enforcement by their own governments?

Part of the answer may relate to differences between the USA and other developed countries. Given the disproportionate size of the U.S. economy and the centrality of its financial system in international commerce, proportionally more foreign firms may have contacts with the USA that can support enforcement jurisdiction. A greater ability of domestic enforcers to go after foreign firms makes enforcement more palatable to domestic business interests, as we have argued. It is also plausible that the balance between larger and smaller firms, and the differential effects of enforcement on their interests, is different for the USA. Or perhaps it is more common for U.S. firms to be competing with each other in foreign markets, so that mutual hands-tying of U.S. firms is more valuable to them. These are all conjectures, of course, and more research might be done to explore them.

We also suspect that disproportionate enforcement by the USA may not be a long-term equilibrium. Various commentators have suggested to us that foreign enforcement is growing, even if it is not yet nearly as vigorous as U.S. enforcement. Brazil, for example, has recently been involved in substantial anti-corruption actions in cooperation with U.S. enforcers in cases relating to Embraer (Schoenberg & Moura 2016) and Odebrecht/Braskem (Reuters Staff 2017), and has collected substantial fines. Likewise, as mentioned previously, there is evidence that recent initiatives under the OECD Convention have been increasingly effective in deterring corruption by signatory countries (Jensen & Malesky 2018). These evolving anti-bribery enforcement efforts by foreign governments will no doubt afford interesting opportunities for further study.

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