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Prosecuting Foreign Officials for Extortion Won't Stop Businesses Offering Bribes

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"It Takes Two to Tango" is certainly an apt phrase to describe the sharing of liability for illicit payments made by firms to foreign government officials to garner sales. Indeed, it is the basis of a new bill introduced this summer on a bipartisan basis in the U.S. Congress to address a well-known exclusion of the Foreign Corrupt Practices Act's (FCPA's) coverage. The reach of the FCPA does not include the ability of U.S. authorities to prosecute the "demand" side of overseas bribe transactions. However, not only is it dubious that in practice the extraterritorial enforcement of such a law will be effective in securing the punishment of non-U.S. public officeholders, it is also questionable as to whether it will make a real dent in neutralizing U.S. firms' zealotry to buy their way into markets abroad.

The FCPA, originally enacted in 1977, makes it unlawful for U.S. firms and their employees to make overseas payments or otherwise provide anything of value to foreign officials to secure any improper advantage to obtain or retain business abroad. Amendments in 1988 expanded the coverage of the law making it applicable to all payments by U.S. businesses whether they take place in foreign locations or at home. However, the prohibitions stipulated by the FCPA do not extend to the foreign officials who demand or accept such bribes, a view confirmed by a number of decisions handed down by U.S. courts over the years.

Based on the notion that U.S. firms pay overseas bribes when foreigners solicit or make them a condition for consummating a sale, two Democratic and two Republican members of the House of Representatives—Reps. Sheila Jackson Lee of Texas and Tom Malinowski of New Jersey, and Reps. John Curtis of Utah and Richard Hudson of North Carolina, respectively—co-authored the Foreign Extortion Prevention Act (FEPA). The draft legislation was introduced into the House on August 2, 2019. Put simply, if FEPA were to become law, both the so-called bribe *demanders* (foreign officials) and the so-called bribe *suppliers* (U.S. businesses) would be subject to prosecution under U.S. law.

The push by U.S. lawmakers to subject foreign bribe takers to domestic criminal disciplines on engaging in corrupt conduct is neither new nor unique. The Organization for Economic Cooperation and Development (OECD)'s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force in 1999 and has 44 signatories (all OECD countries and 8 non-OECD countries), has long advocated such provisions. So too does the United Nations Convention Against Corruption (UNCAC), which has 140 signatories and entered into force in 2005.

At the national level, France, Switzerland and the U.K. stand out as having in place for some time regimes along the lines of what is being contemplated for the U.S.

The key question is, however, can such regimes be effective in restraining corruption substantially beyond what penalizing the supply side alone engenders? The rationale on which they are based is surely logical and sound. But there are critical factors that may obviate the hoped for intensification of constraints.

For one, operationalizing their enforcement, especially succeeding in prosecution, could be quite challenging.

If the bill recently introduced in Congress were to become law, its effectiveness largely would turn on whether the foreign officials involved can be remanded to the U.S. to face criminal charges.

Overseas governments without extradition treaties with our country can always resist turning in persons to U.S. custody. This is especially likely to be the case if the person is still holding office.

In such circumstances, at worst, if the U.S. were to issue a criminal indictment, the official (whether or not he or she is still in office) would need to restrict their travel to countries with whom the U.S. does not have extradition treaties and not engage in monetary transactions involving any U.S.-related financial institution. What this at least can instill, however, are enforceable restrictions on where corrupt foreign officials can spend the gains from their abuse of the system.

In countries where enforcement of penalties against foreign government officials who took bribes has been attempted, the empirical evidence readily available paints a mixed picture of the success of such pursuits.

The OECD published in 2018 the results of an innovative—albeit small scale—survey of cases where bribes were known to have been paid by businesses over 2008-2013. The survey sought to determine whether the counterpart officials who received such payments were prosecuted.

Of the 30 cases in which the survey questionnaire was fully completed—so as to be able to assess and compare the incidence of demand-side actions taken—the OECD found that enforcement penalties had been exacted on officials involved in two-thirds of these cases. Of these, only about one-half was subject to criminal sanctions.

Perhaps even more important in assessing the value-added of introducing demand-side restraints is that the underlying incentives and disincentives at play inducing businesses to engage in corruption are far more complex than a *simple demand and supply framework* suggests. And, I say this as a Ph.D. economist, where such frameworks are the heart and soul of the profession!

In the real world, i.e., beyond economic textbooks, the forces of supply and demand, whether with respect to the traditional sales and purchases of typical merchandise or services—and yes, even bribes—do not always operate in a static or unidirectional fashion. Supply and demand interact dynamically and often through circuitous pathways. What do I mean by this in the case of the bribes?

First, there are certainly the cases in which it is the kleptocrats who explicitly demand or request bribes from businesses. However, it is not always extortion at work here: there are many situations where such transactions are initiated on the supply-side. I know this firsthand from years working throughout the former Soviet Union—as well as in many emerging markets in other parts of the world—that competition among businesses to get contracts from government agencies can be fierce.

I know it is hard to believe, but firms in such situations have been known to offer side-payments to government officials even if they are *not* requested to do so. Indeed, payments by businesses have been used to persuade bureaucrats to turn competitive tenders into sole-source purchases. When U.S. firms are caught in these situations, the FCPA and its associated whistle-blower incentives, work wonders.

In such circumstances, demand-side penalties—such as those embodied in the proposed FEPA—in and of themselves may have little added value. To this end, U.S. officials may want to look at the U.K. Bribery Act of 2010. That law makes it an offense for foreign government officials to request, *accept or agree to accept* a bribe. While the effective enforcement of such a provision would still be limited to countries where extradition treaties with the U.S. exist, the U.K. Bribery Act goes a step further: beyond sanctioning the involved foreign government officials themselves, it also provides for the incrimination of the organizations *overall* if they fail to prevent bribes from taking place.

Second, the ranking of *quality-price* tradeoffs in public procurement decisions *should* be the determinant of which firm is selected by government officials in a tender. But due to the often-short tenure of government officials, the quality—that is, durability—of the merchandise or services offered by business bidders takes a back seat to price. In such situations, the incentive for bureaucrats to choose the lowest cost option—regardless of its quality—is often too powerful to pass up, since government officials are typically rewarded for generating budget savings. By the time the product breaks down, the officials are long gone from government.

Businesses competing with one another to win government contracts are well aware of the phenomenon that "cost is all that matters". Because they, too, face internal pressures—in their case to *not* cut prices—they face pressure to provide back-channel "sweeteners" to out-compete their rivals in such tenders. Taken together, these factors can render demand-side sanctions on bribes relatively impotent.

Third, it is striking how few firms operating in emerging markets realize that "just saying no" to demands by government officials for bribes can be an effective deterrent. My experience is that in more cases than not, bureaucrats in such markets are often in "test mode."

If the product or service the vendor offers is, in fact, what the officials are keen to procure for whatever reason, they may well figure out a way to do so without putting the transaction in jeopardy.

To be sure, there is no naiveté here. There are certainly instances where corruption is the order of the day. The point I'm making is simple: too many businesses do not even *try* to push back the kleptocrats.

Finally, businesses operating in tough political economy environments abroad do not do enough to build coalitions of local allies in fighting back demand for bribes.

In a growing number of locales in emerging markets, substantial Non-Governmental Organizations (NGOs) exist or are sprouting up. Their objectives are not only to demand transparency and publicize corrupt practices undertaken by their government officials, but to publicly recognize businesses operating in their countries who follow the rule of law--and by the same token call attention to those who do not.

The emergence of many such NGOs in these markets derives from the realization that if the domestic citizenry is not empowered as a check on government abuse of power, bribe taking can well result in less job creation, dirty environments, and degradation of workplace safety. Their raison d'etre is that government representatives should be the last ones to abuse policies and regulations they have been empowered to enforce.

To the extent the actions by NGOs affect consumer receptivity, they can engender bottom line effects for businesses—positively or negatively.

In the end, it may not matter much whether U.S. businesses are the ones succumbing to foreign government officials' extortionist demands for bribes or they themselves are offering payoffs that these officials accept. Under the FCPA, it is unquestionably illegal for U.S. businesses to be parties to such transactions, and they should have no choice but to understand that.

Yes, the goal of trying to hold *all parties* to such transactions accountable is certainly laudable. In this respect, marrying the institution of sanctions on the "supply" side with those on the "demand" side is certainly a worthy objective. Nevertheless, given the challenge domestic authorities worldwide can face enforcing penalties outside their territories, one would be wise to keep expectations in check on the additional punch that demand-side anti-bribery laws can deliver.

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