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## A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland

Nora M. Rubin

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# A CONVERGENCE OF 1996 AND 1997 GLOBAL EFFORTS TO CURB CORRUPTION AND BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS: THE LEGAL IMPLICATIONS OF THE OECD RECOMMENDATIONS AND CONVENTION FOR THE UNITED STATES, GERMANY, AND SWITZERLAND

NORA M. RUBIN<sup>\*</sup>

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<sup>\*</sup> J.D. Candidate, 1999, American University, Washington College of Law; B.A., 1993, Trinity College, Washington, D.C. This Comment is dedicated to my husband, Cary, and my children, Paul and Cara, for their constant love, tireless patience, and unqualified support. Special thanks to my mother, Eileen Sloyan, and my sister, Eileen Sloyan-Bhanderi, for always being there. Thanks also to Professors Padideh Ala'i and Nicholas Kittrie, for their ideas and encouragement, to Leslie McKay for her invaluable critique, and to my very able colleagues at the *American University International Law Review* for their assistance.

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## INTRODUCTION

The paying of a bribe to somebody is not a crime, sometimes the representative might say, I don't need anything unless the sales (or project) goes ahead; but if it does, then include 5% in your price for me. Only that 5% may be 10%, 15%, or even 20%. On an order of \$100,000 worth of goods, \$10,000 may not ring any alarm bells; but what if the order is for \$100 million? These "success fees" lie at the heart of a grand corruption.<sup>1</sup>

In his statement, George Moody-Stuart captured some of the realities of doing business in the global marketplace during the last decade of the twentieth century. Transnational corruption has become too "grand"<sup>2</sup> to ignore; bribes are still corruption's main

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1. *The TI Source Book Part B: Applying the Framework* (visited Sept. 20, 1997) <[http://www.transparency.de/sourcebook/Part\\_B/Chapter\\_13/index.html](http://www.transparency.de/sourcebook/Part_B/Chapter_13/index.html)> (statement of George Moody-Stuart, Transparency International ("TI") at a 1994 conference on corruption). TI is a not-for-profit, non-governmental organization (NGO) launched in 1993 to mobilize anti-corruption actions by international organizations. See *Helping Countries Combat Corruption: The Role of the World Bank*, at 62, The World Bank (September, 1997) [hereinafter *World Bank Role*] (describing methods through which TI aims to curb corruption); see also Beverly Earle, *The United States Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 232-33 (1996) (examining the enforcement of the Foreign Corrupt Practices Act (FCPA), the United States legislation prohibiting foreign bribery, and describing TI's mission to curb corruption and bribery in international business transactions). TI aims to curb corruption by developing national and international coalitions that will pressure governments to change laws and policies that directly or indirectly foster the continuation of corrupt business practices. See *World Bank Role*, *supra* at 62. A one-issue NGO, TI is based in Berlin, Germany, and has more than seventy chapters worldwide, including one in Washington, D.C. See *id.* TI has been surprisingly successful at focusing the attention of countries and international organizations on the need to address corruption. See Andrew Adonis, *Politics, Money, and Crime: A World on the Take - 1994 has seen Corruption Making Headlines Across the Globe*, FIN. TIMES, Dec. 30, 1994, at 4 (describing TI's evolutionary approach to fighting global corruption as combining publicity with, among other things, the promotion of tougher laws and technical assistance).

2. See *World Bank Role*, *supra* note 1, at 9-10 (describing the differences between "grand" and "petty" corruption). "Grand" or "wholesale" corruption occurs when the benefits realized, or amounts given, are enormous; and it is often associated with international business transactions involving politicians as well as bureaucrats. See *id.* at 9. In contrast, the sums involved in "petty" corruption are small, and this type of corruption is usually practiced by lower-level officials with

tools,<sup>3</sup> and bribery across borders is not necessarily criminal.<sup>4</sup> In fact, transnational bribery is actually tax-deductible in Germany, France, and several other Member countries of the Organization of Economic Co-operation and Development ("OECD").<sup>5</sup> Moreover, in the past,

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poor salaries. See *id.* at 9-10 (describing petty theft of state assets). Petty corruption may, however, be so pervasive throughout a country's public sector that its aggregate costs can exceed those of grand corruption. See *id.* at 10. The exact scale and impact of bribery is hard to measure empirically. See generally, Graham Bowley et al., *Goodbye Mr 10%*, FIN. TIMES, July 22, 1997, at 15 (noting that the exact scale and impact is unknown). According to the World Bank, if bribes equal five percent of foreign direct investment ("FDI") and imports into developing countries—where corruption is most damaging—the total would be almost \$80 billion annually. See *id.* Demands of thirty percent are increasingly replacing the old ten percent rate, and Western businesses "are balking at paying such inflated kickbacks." *Id.*

3. See *World Bank Role*, *supra* note 1, at 9.

4. See *OECD Actions to Fight Corruption*, at 3, OECD Doc. C/MIN(97)17 (May 25, 1997) (Note by the Secretary-General to the Council at Ministerial Level, May 26-27, 1999) (describing OECD Member countries actions to fight corruption and noting the Council's recommendation that OECD Member countries should enact laws criminalizing the bribery of foreign officials by the end of 1998). The United States is one of the few countries to criminalize transnational bribery through the FCPA. See *id.* at 2. Anti-bribery legislation in several other Member countries—Canada, Greece, Hungary, Mexico, South Korea, Sweden, Turkey, the United Kingdom—is broadly drawn and facilitates the prosecution of bribery of foreign public officials in certain situations. See *id.* In other OECD Member countries, bribery of foreign public officials is not criminal. See *id.* But see Rolf Saligmann, *Implementation of the OECD Recommendations on Bribery in International Business Transactions of May 27, 1994, in Germany*, 1, 4 <<http://www.transparency.de/organization/chapters/germany/tid-rep2.htm>> (visited October 26, 1998) (noting recent German ratification and implementation of the 1997 OECD Convention). In response to the OECD recommendations, some government attitudes are changing. See Bowley et al., *supra* note 2. For instance, Japan now supports the OECD's efforts to address the supply side of corruption—i.e., the noncriminal status and tax-deductibility of bribes in the majority of states in the developed world. See *id.*

5. See *Implementing the 1996 OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials*, OECD (May 26, 1997) (Report by the Committee on Fiscal Affairs ("CFA") to the OECD Council at Ministerial Level) [hereinafter *Implementation of Tax Deductibility Recommendation*] (describing current member state practices regarding the tax treatment of overseas bribes). Attitudes of OECD Member countries concerning the deductibility of bribes to foreign officials vary greatly. See *id.* at 7. The laws vary accordingly but in most countries, bribes across borders are deductible as business expenses. See *id.* at 7-8; M. Javade Chaudri, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Conference on

the bank secrecy laws of Switzerland, another member of the OECD, enabled dictators to effectively launder and safeguard the proceeds of corrupt business transactions.<sup>6</sup>

In the nineties, the soaring volume of trade and international business transactions contributes to the increased awareness of, and agitation about, corrupt transnational business practices.<sup>7</sup> There is no proof that corruption is more prevalent now than ever before in

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Corruption, American University, Washington College of Law, April 6, 1998), in 2 COMBATING CORRUPTION—RECENT MULTILATERAL INITIATIVES 252 (1998) [hereinafter 2 COMBATING CORRUPTION ] (on file with author) (summarizing and analyzing the OECD Convention, listing the signatories to its provisions, and noting that foreign bribery and related tax-deductibility is an accepted German business practice). The OECD Member countries are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, South Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States. See *id.* at 261.

6. See Simon Holberton, *Marcos Money Claimants Meet*, FIN. TIMES, Jan. 16, 1996, at 6 (reporting the existence of \$475 million held in Swiss bank accounts in the name of the former president of the Philippines, Ferdinand Marcos - now claimed by his widow; and noting the corrupt governance and abuse of power that made the accounts possible); see also Michela Wrong, *The Dinosaur at Bay*, FIN. TIMES, Nov. 2-3, 1996, at 7 (discussing Mobutu Sese Seko's corrupt theft of millions of dollars from—the then named Zaire's—state coffers). Swiss banks accepted stolen Zairean monetary assets used by Mobutu to finance a lavish lifestyle in Europe and in his own impoverished country. See *id.*; see also Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 45 (1995) (characterizing as indigenous spoliation the systematic theft of monetary assets by corrupt leaders like Mobutu and Marcos).

7. See Martin Wolf, *Corruption in the Spotlight*, FIN. TIMES, Sept. 16, 1997, at 23 (detailing the increased international consciousness of corruption and its damaging effects). Explanations abound for the attention being paid to the issue. See *id.* The end of the Cold War and the command economies of the former Soviet Union and Central and Eastern Europe exposed the extent of the informal "corrupt" sector that had been necessary to make their economies work. See *id.* The current privatization process in those same economies yields ample opportunities for increased corruption, at least in the short-term. See *id.*; see also Daniel Kaufman and Paul Siegelbaum, *Privatization and Corruption in Transition Economies*, 50 J. INT'L AFF. 419 (1996) (discussing the unprecedented scale of privatization now underway in the former Soviet Union and Eastern Europe and the perception that endemic corruption threatens the transition from command to market economies and democracy). Globalization and a resulting increase in business transactions are further explanations for the increased awareness of corrupt practices, as is focused attention on the role of the state brought on by a consensus on the superiority of the market. Wolf, *supra* at 23.

history.<sup>8</sup> There are, however, continuing international efforts to decrease corruption's pervasiveness in international business transactions.<sup>9</sup> These efforts reflect a major change in the attitudes of countries about corruption,<sup>10</sup> dispelling the myth that corruption, as a matter of "culture," is acceptable.<sup>11</sup> The ideas set forth by the apologists for corruption<sup>12</sup> have lost their appeal and validity in the brave new world of economic competitiveness and interdependence.

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8. See Wolf, *supra* note 7. See generally Daniel Kaufmann, *Corruption: The Facts*, 107 FOREIGN POL'Y, 114 (1997) (noting the ancient nature of corruption, its links with trade, and the differing viewpoints about its positive and negative aspects).

9. See Wolf, *supra* note 7 (noting the increased international attention being given to the phenomenon of corruption); see also OFFICE OF THE CHIEF COUNSEL FOR INTERNATIONAL COMMERCE, U.S. DEPARTMENT OF COMMERCE, ANTI-CORRUPTION REVIEW (1997), reprinted in COMBATING CORRUPTION SUPPLEMENT-RECENT MULTILATERAL INITIATIVES (1998) (Conference on Corruption, American University, Washington College of Law, April 6, 1998) [hereinafter COMBATING CORRUPTION SUPPLEMENT] (on file with author) (detailing the current multinational efforts by the United States, foreign governments, international and non-governmental organizations like the OECD, and international financial institutions, to combat corruption in international business transactions).

10. See generally COMBATING CORRUPTION SUPPLEMENT, *supra* note 9 (detailing the rationale and commitment to serious reform behind the multiplicity of efforts to combat corruption); discussion *infra* Part III (noting the global awareness about the pervasiveness and economically detrimental effects of corruption).

11. See *The TI Source Book: Executive Summary* (visited Sept. 20, 1997) <<http://www.transparency.de/sourcebook/summary.html>> (writing provocatively on the pervasiveness of corruption, its causes, and how best to combat it). TI is openly skeptical about the idea that corruption can be understood in a "cultural" context. See *id.* This anti-corruption NGO implies that developed nations conveniently use this illusion as a pretext for continuing the non-criminal, tax-deductible status of transnational bribery within their legal systems. See *id.* TI notes that the Swiss numbered bank accounts do not generally characterize any country's traditional culture. See *id.* In fact, most people living in societies where corruption is endemic bitterly resent its practice. See *id.* Moreover, domestic bribes are typically illegal and criminal (although laws are not enforced) in most so-called corrupt cultures. See *id.*

12. See SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 68, 69 (1969) (defending a limited amount of corruption in societies that are generally not corrupt on the theory that corruption helps broaden the political system, stimulates economic development—by reducing obstacles to economic growth—and hastens modernization of the developing country); Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417 (1967) (arguing that corruption is the best substitute for the lack of an

Private sector corruption, while of concern because of the difficulty of monitoring or controlling the practice, is beyond the scope of this comment. The area of public procurement, a concern of the World Bank,<sup>13</sup> the International Monetary Fund ("IMF"),<sup>14</sup> and governments,<sup>15</sup> is more appropriately addressed as a separate topic, and this comment does not attempt to do so. Instead, this comment examines the 1997 multilateral efforts to curb bribery and corruption in international business transactions, as well as the implications of the 1997 OECD Convention for the United States' Foreign Corrupt Practices Act ("FCPA").<sup>16</sup> Furthermore, this comment specifically examines the Convention's significance for Germany and Switzerland. These countries exemplify two different aspects of the supply side of bribery. Before the recent ratification and implementation of the 1997 OECD Convention in Germany, domestic law permitted overseas bribery by German businesses and individuals, and tax laws still treat bribes as tax-deductible business expenses.<sup>17</sup> Switzerland's stringent bank secrecy laws facilitate the safeguarding of financial assets for all prospective account holders regardless of the assets' criminal or corrupt origin.<sup>18</sup>

Part I of this comment briefly defines corruption and explores the possible reasons for current international consensus and actions on

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essential infrastructure in countries in the early stages of development); Kaufmann, *supra* note 8, at 114-18 (introducing and arguing against pro-corruption ideas).

13. See *World Bank Role*, *supra* note 1, at 29-32.

14. See generally INTERNATIONAL MONETARY FUND, GOOD GOVERNANCE: THE IMF'S ROLE (Aug. 1997) (addressing the IMF's role in promoting good governance through the encouragement of transparent accounting, regulatory, and procurement procedures).

15. See *id.* at 1-10 (discussing the IMF's role in helping governments create transparent procurement systems).

16. 15 U.S.C. §§ 78a, 78m(b), 78dd-1, 78dd-2, 78ff (1994).

17. See Robert S. Leiken, *An End to Corruption*, WASH. POST, Apr. 16, 1996, at A15; see also discussion *infra* Part IV (analyzing Germany's criminal and tax codes).

18. See Holberton, *supra* note 6 (discussing Ferdinand Marcos' use of Swiss bank secrecy laws to safeguard looted Philippine assets deposited in his name); Wrong, *supra* note 6 (describing Mobutu Sese Seko's plundered fortune in Swiss bank accounts); see also discussion *infra* Part V (analyzing Swiss banking and criminal laws that treat the right of financial privacy and confidentiality as inviolate).



the issue. Part II analyzes the FCPA and considers its relevance to current international anti-bribery efforts. Part III reviews recent multilateral initiatives to curb bribery. Part IV analyzes applicable provisions of the German Criminal and Tax Codes, and Part V notes possible ramifications for Swiss bank secrecy laws. Finally, this comment recommends that individual OECD Member countries ratify, implement, and enforce the 1997 OECD Convention criminalizing transnational bribery. This comment also recommends that OECD Member countries eventually reform tax codes that presently allow tax deductions for amounts paid in bribes.

## I. CORRUPTION PERVADES INTERNATIONAL BUSINESS

### A. DEFINITION

Corruption may be simply defined as "the abuse of public office for private gain."<sup>19</sup> A broad range of human actions and many different forms of corruption are consistent with that definition.<sup>20</sup> The solicitation, acceptance, or extortion of a bribe by a public official for private enrichment constitutes abuse of public office,<sup>21</sup> or the offense of passive corruption.<sup>22</sup> A private agent who offers a bribe to a government official for competitive advantage and profit also

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19. *World Bank Role*, *supra* note 1, at 8 (emphasis omitted); *see id.* at 19-20 n.1 (providing a detailed definition of corruption, including a statement by World Bank General Counsel, Ibrahim Shihata). Mr. Shihata describes the level, extent, impact, and types of corruption in societies and all branches of government—whether democratic or authoritarian—in private and public sectors. *See id.*

20. *See id.* at 19 n.1.

21. *See id.*

22. *See* A Union Policy Against Corruption: Communication from the Commission of the European Communities to the Council and the European Parliament, COM(97)192 final, at 2 n.1 [hereinafter EU Commission]. The Commission defines passive corruption as:

The deliberate action of an official who requests or receives, directly or through a third party, advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions, in breach of his official duties . . . .

*Id.*

abuses public office,<sup>23</sup> and commits the legal offense of active corruption.<sup>24</sup>

Abuse of public office for personal gain can occur in the absence of bribery through patronage or nepotism,<sup>25</sup> the systematic theft of state assets,<sup>26</sup> or the diversion of state revenues.<sup>27</sup> Political and bureaucratic corruption may be independent of each other, or there may be collusion.<sup>28</sup> In recent years, media coverage of election laws, campaign finance contributions, and conflict of interest problems has uncovered inherent weaknesses in the United States' political system that render it susceptible to corrupting influences.<sup>29</sup> Although corruption in societies can be systemic or isolated,<sup>30</sup> it is found in

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23. See *World Bank Role*, *supra* note 1, at 8.

24. See EU Commission, *supra* note 22, at 2 n.1. The Commission defines active corruption as:

The deliberate action of whosoever promises or gives, directly or through a third party, an advantage of any kind whatsoever, to an official for himself or for a third party, for him to act or refrain from acting in accordance with his duty or in the exercise of his functions, in breach of his official duties . . . .

*Id.*

25. See *World Bank Role*, *supra* note 1, at 8.

26. See Kofele-Kale, *supra* note 6, at 56 (including in the definition of indigenous spoliation, the systematic theft of monetary assets by corrupt leaders who use state treasuries as their private bank accounts); David Hoffman, *Who Will Control Market Economy?* WASH. POST, Sept. 26, 1997, at A17. For example, western investors wonder whether Russia's leaders will be able to clean up rampant corruption in a post-Soviet economy torn between "bandit capitalism" and "people's capitalism." See *id.* The transition to market capitalism in Russia is fraught with setbacks, as "bribery and protection rackets sap every Russian business." *Id.*

27. See Commission Annual Report (1996) on the Fight Against Fraud - Protecting the Community's Financial Interests, COM(97), at 7 (detailing the fraud and irregularities affecting the European Union budget in 1996); Commission, Explanatory Report on the Convention on the Protection of the European Communities' Financial Interests, 1997 O.J. (C191) 2, 3 (noting amounts totaling ECU 1.33 billion, or 1.5% of the Community budget, siphoned into private hands in 1994).

28. See *World Bank Role*, *supra* note 1, at 10.

29. See Edward Walsh, *Tamraz Defends Political Donations*, WASH. POST, Sept. 19, 1997, at A1 (reporting international businessman Roger Tamraz's unapologetic stance regarding his "gift" of \$300,000 to the Democratic Campaign Committee during the 1996 elections, and his regrets for not giving \$600,000).

30. See *World Bank Role*, *supra* note 1, at 10.

every society. Formal and informal rules clash when systemic corruption exists.<sup>31</sup> When surrounded by widespread societal corruption, individuals, businesses, and government officials tend to submit to rather than resist the prevailing systemic corruption "trap."<sup>32</sup>

## B. CAUSES

Rooted in the history, political and economic development, and bureaucratic traditions of nation states, corruption's causes are always diverse.<sup>33</sup> Corruption is more prevalent where legal institutions are weak, and power is exercised in an authoritarian fashion.<sup>34</sup> Many have voiced concerns about rampant corruption in Eastern Europe, Russia, and the other countries of the former Soviet Union ("FSU").<sup>35</sup> While there is no doubt of the positive correlation between privatization and corruption, one Ukrainian official stated: "If you think privatization is corrupt, try without it."<sup>36</sup> Western analysts assert that the extent of corruption in the FSU and Eastern Europe is not surprising given the inadequacy of their legal systems to address private property ownership, individual autonomy, or limitations on the authority and discretion of government officials.<sup>37</sup>

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31. *See id.* at 11.

32. *See id.*

33. *See id.* at 12 (examining factors that can encourage corruption). *See generally* Michael Johnston, *What Can Be Done About Entrenched Corruption?* in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1997, at 69 (Boris Pleskovic & Joseph E. Stiglitz eds., 1997) (discussing corrupt processes, their social settings, and corruption equilibria).

34. *See* Keith Henderson & Michael Shea, GOOD GOVERNANCE AND CORRUPTION: THE NEW INDEPENDENT STATES (NIS) OF THE FORMER SOVIET UNION, March, 1998 (discussing the link between corruption and the generally low credibility of government in the NIS).

35. *See* Hoffman, *supra* note 26 (discussing the Russian government's efforts to create a more transparent and rule-governed society); *see also* Kaufman & Siegelbaum, *supra* note 7, at 421 (describing the privatization process and attendant corruption in the FSU and Eastern Europe).

36. Kaufman & Siegelbaum, *supra* note 7, at 419 (quoting an anonymous official's response to the Ukrainian Parliament's decision to halt the privatization program on the grounds of possible corrupt methods).

37. *See id.* at 423-24 (noting shortcomings in the legal systems of FSU countries). *See generally* Robert Klitgaard, *Cleaning Up and Invigorating the Civil*

Western political commentators hope that the emergence of democratic institutions will solve the problem in the future, and they believe that a corrupt transition period is preferable to the absence of privatization.<sup>38</sup> Russia's 1998 financial collapse, however, illuminates corruption's role as the lubricant of the post-Soviet economy, and reinforces a belief that the nature of Russian corruption is more enduring than transitional.<sup>39</sup> Moreover, a highly-organized Russian mafia controls the emerging business environment, and spreads a brutal strain of corruption in commercial dealings with Western countries.<sup>40</sup>

### C. ECONOMICS

While corruption may show some positive economic effects in some political economies, this is true only for a static short-run impact.<sup>41</sup> Studies on the negative effects of corruption on economic

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*Service*, 17 PUB. ADMIN. & DEV. 487, 500 (1997) (using the equation  $C(\text{corruption}) = M(\text{monopoly}) + D(\text{discretion}) - A(\text{accountability})$  to explain the dynamics of corruption in transition and systemically corrupt economies).

38. See Kaufman & Siegelbaum, *supra* note 7, at 456, 458 (citing expert opinion suggesting corruption is more prevalent in non-privatized sectors).

39. See Carol J. Williams, The Germ of Post-Soviet Russia is Corruption: Bribe-Taking and Cronyism in Government Lead to Corner-Cutting and Scofflaws in Private Enterprise, L.A. TIMES, Sept. 20, 1998, at A1 (describing the tenacity and extent of corruption that played a key role in Russia's recent economic collapse). Businessmen blame powerful ex-Communist bureaucrats, robber barons, a "resilient Soviet-era mentality," and the absence of the rule of law or enforcement mechanisms for the continuation of flourishing and destabilizing corruption). See *id.* All agree that Western expectations of a simple solution are naïve. See *id.*

40. See *id.* (commenting on the globalization and violence of the Russian mafia in international business); see also Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 999 (1996) (linking bribery, corruption, and organized crime in Russia and abroad, and examining the resulting threat to Russia's emerging social structure).

41. See *World Bank Role*, *supra* note 1, at 15 (reviewing arguments for the benefits of corruption before pointing out its more pernicious long-term effects). See generally Susan Rose-Ackerman, *When Is Corruption Harmful?*, Background Paper for the World Bank's 1997 WORLD BANK DEVELOPMENT REPORT (1996) at 9-33 (analyzing some positive short-term effects of corruption in different economies); Susan Rose-Ackerman, *Corruption and Development*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1997 35, 36-42 (Boris

development are accumulating, and the World Bank is coordinating a great deal of literature on the subject.<sup>42</sup> According to a study by Paolo Mauro, an economist for the IMF, corruption significantly lowers the level of foreign direct investment ("FDI") in developing countries.<sup>43</sup> Three central findings emerge from another recent study concerning corruption and FDI in East Asia.<sup>44</sup> First, a "rise in either the tax rate on multinational firms or the corruption levels in a host country reduces inward [FDI]."<sup>45</sup> For example, an increase in the corruption level of Singapore—a low corruption level country—to that of Mexico—a high corruption level country—is the equivalent of raising the tax rate by over twenty percentage points.<sup>46</sup> Second, "there is no support for the hypothesis that corruption has a smaller effect on FDI into East Asian host countries."<sup>47</sup> Third, "American investors are averse to corruption in host countries, but not necessarily more so than average OECD investors, in spite of the [FCPA]."<sup>48</sup> This finding implies that United States companies indulge in bribery practices to compete, and risk prosecution under United States law.<sup>49</sup>

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Pleskovic & Joseph E. Stiglitz eds., 1997) (detailing numerous reasons for bribes, such as clearing markets for scarce goods, motivating poorly paid officials, reducing costs, gaining influence, and generally making a distorted market work better).

42. See *World Bank Role*, *supra* note 1, at 14-15 (summarizing two major lines of research); see also Susan Rose-Ackerman, *When Is Corruption Harmful?*, *supra* note 41, at 59-66 (enumerating a comprehensive list of scholarly sources on the economics of corruption and bribery).

43. See Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 683 (1995) (analyzing data consisting of subjective indices of corruption, the amount of red tape, the efficiency of the judicial system, and political stability for a cross section of countries).

44. See Shang Jin-Wei, *How Taxing is Corruption on International Investors*, National Bureau of Economic Research Working Paper 6030 (1997) at 1.

45. *Id.* at 1, 22-23.

46. See *id.* at 22-23.

47. *Id.* The study finds that although the annual FDI inflow into China has been large in the past ten years, over 60% of the total investment comes from overseas Chinese—especially those in Hong Kong. See *id.* at 24. China is in fact an underachiever as a host for FDI from the major source countries. See *id.* This implies that overseas Chinese are less sensitive to corruption, possibly because they can use personal connections to substitute for the rule of law. See *id.*

48. *Id.* at 1.

49. See *id.* at 1.

## D. LINKS TO THE DRUG TRADE, MONEY LAUNDERING, AND ORGANIZED CRIME

Federal Officials estimate ten to twenty-five percent of the drugs smuggled into the United States each year from Mexico are transported across the U.S.-Mexican border with the help of corrupt United States Customs and law-enforcement officials who pocket huge bribes and look the other way.<sup>50</sup> A Justice Department agent describes the price demanded as between \$30,000 and \$60,000 per transaction.<sup>51</sup> On the Mexican side, corruption is systemic, reaching into the highest levels of Mexican state and municipal governments.<sup>52</sup> Given the impoverishment of the border area,<sup>53</sup> the extent of bribery raises concerns about the drug trade's corrupt influence on democratic institutions on both sides of the border.

Drug traffickers successfully launder as much as \$100 billion of the \$500 billion earned each year on illegal drug sales.<sup>54</sup> Profits from

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50. See William Branigin & John W. Anderson, *Drug Corruption Heading North; Some U.S. Agents Succumb to Lure of Traffickers' Cash*, WASH. POST, Nov. 3, 1997, at A1.

51. See *id.* Indictments for drug distribution, money laundering, and official corruption were recently brought against police officers who used their police cruisers to escort drug shipments to delivery points. See *id.* In southern Texas, a county judge, a county clerk, the sheriffs of three counties, a local district attorney, and a jail administrator were all convicted of drug crimes. See *id.* See generally, William J. Olson, *International Organized Crime: The Silent Threat to Sovereignty*, 21 FLETCHER F. WORLD AFF. 65 (1997) (explaining the links between the drug trade and organized crime, and observing that the huge sums of money involved make corruption pervasive and difficult to solve). The author notes that the United States decertified Colombia in 1996 because of the degree to which the drug trafficking cartels had subverted the political process. See *id.* at 65. Decertification mandates certain sanctions, like suspending most forms of United States' assistance. See *id.*

52. See Branigin & Anderson, *supra* note 50, at A1; see also John Anderson, *A Mexican's Mystery Millions: Riches of Ex-President's Brother May Soon Be Explained*, WASH. POST, Oct. 12, 1998, at A14 (reporting that millions of dollars were accumulated and laundered in foreign banks by Raul Salinas, brother of former Mexican president Carlos Salinas). Swiss investigators found that Raul Salinas controlled most of the drugs transshipped through Mexico throughout his brother's presidency from 1988-94. See *id.*

53. See Branigin & Anderson, *supra* note 50 (discussing the extent of poverty along the United States-Mexico border).

54. See Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 TUL. J. INT'L & COMP. L. 161, 168 (1995) (discussing the money laundering

the drug trade and from organized crime are potent corruption tools.<sup>55</sup> Factors such as the trend towards open economies and the instantaneous nature of financial transactions simplify corrupt transactions.<sup>56</sup> Criminals are able to exploit the advanced technology that expedites international transactions.<sup>57</sup> Drugs, profits, corruption, money laundering, and organized crime are interconnected issues in the public consciousness because of the media attention given to the war on drugs, and the astronomical sums of money involved.<sup>58</sup> These links give added impetus to the anti-corruption momentum at both the international and national levels.<sup>59</sup>

## II. THE FOREIGN CORRUPT PRACTICES ACT: ANTI-BRIBERY PROVISIONS

### A. ELEMENTS, LIABILITY, AND PENALTIES

The United States enacted the FCPA<sup>60</sup> in 1977 as a response to a number of overseas bribery scandals involving United States

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process and international initiatives to combat it); *see also* Paulina L. Jerez, *Proposed Brazilian Money Laundering Legislation: Analysis and Recommendations*, 12 AM. U.J. INT'L L. & POL'Y 329, 330-34 (1997) (describing the money laundering process, its link to the international economy, and its challenge to societies and governments in the preservation of law, order, and stability).

55. *See* Barbot, *supra* note 54, at 164, 169; *see also* Olson, *supra* note 51, at 75-78 (discussing the vast amounts of money available to criminal organizations from the drug trade, and its inherent power as a tool for bribery and corruption); Boylan, *supra* note 40 (linking drug profits to bribery, corruption, and organized crime in Russia).

56. *See* Bruce Zagaris & Scott B. MacDonald, *Money Laundering, Financial Fraud, and Technology: The Perils of an Instantaneous Economy*, 26 GEO. WASH. J. INT'L L. & ECON. 61, 63 (1992) (examining the potential for abuse of financial technology, and proposing legal measures to combat it).

57. *See id.*

58. *See supra* notes 50-58 and accompanying text (describing the vast amounts of money made in the drug trade, and its corruptive influence).

59. *See id.*

60. 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (1994).

corporations.<sup>61</sup> Under the FCPA, bribery of foreign government officials, political parties, or political office candidates with offers of money, gifts, promises, or anything of value for the purpose of obtaining or retaining business is illegal.<sup>62</sup> Additionally, the FCPA forbids making payments to third parties "knowing" that the payments will be used for bribery purposes.<sup>63</sup> This standard is intended to discourage a "conscious disregard" or "willful blindness" approach.<sup>64</sup>

The FCPA applies to both issuers<sup>65</sup> of securities under United States law and to domestic concerns.<sup>66</sup> Required elements of the offense are: (1) the use of an instrumentality of interstate

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61. See DONALD R. CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 1-9* (1994) (describing transnational bribery schemes involving prominent American corporations like Gulf Oil, Exxon, and Lockheed). See generally GEORGE C. GREANIAS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE 12-13* (1982) (discussing previous attempts to proscribe overseas bribery).

62. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a); see also Mark Shaffer & Anna Welch, *Foreign Corrupt Practices Act*, 34 AM. CRIM. L. REV. 697, 702 (1997) (describing the broad scope of the FCPA); Lucinda A. Low & Michael L. Burton, *Anti-Bribery Pact: Corruption Is Target of Multilateral Efforts*, NAT'L L. REV., May 4, 1998, at C5 (describing the FCPA's criminalization of money payments or anything of value to a foreign official).

63. See 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2 (a)(3); see also Low & Burton, *supra* note 62 (stating that in addition to actual knowledge of an illicit payment, awareness that such a payment is probable or likely is also covered by this provision of the FCPA). But see Bowley et al., *supra* note 2, at 15 (stating that the FCPA's provisions are often evaded by setting up joint ventures, with the non-U.S. partner paying the bribe).

64. See 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3); see also Low & Burton, *supra* note 62 (noting that "conscious disregard of 'red flags' may give rise to vicarious liability").

65. See 15 U.S.C. § 78dd-1(a) (incorporating the definition of "issuers" from the Securities and Exchange Act, 15 U.S.C. §§ 78a-78ll (1994)); Low & Burton, *supra* note 62; see also Shaffer & Welch, *supra* note 62, at 698-99 (defining issuers as companies which have to register with the Securities and Exchange Commission (SEC), and whose stock is publicly traded in the United States).

66. See 15 U.S.C. § 78dd-2(a) (1994). "Domestic concerns" are defined exhaustively as "any individual who is a citizen, national, or resident of the United States, and any corporation, partnership, association, . . . or sole proprietorship which has its principal place of business in the United States . . ." 15 U.S.C. § 78dd-2(h)(1). Thus, United States citizens, legal residents, and all business entities organized under United States' law are covered. See Low & Burton, *supra* note 62.



commerce,<sup>67</sup> in furtherance of, (2) a payment or offer to pay something of value,<sup>68</sup> (3) to a foreign official, political party, or political candidate,<sup>69</sup> (4) for the corrupt<sup>70</sup> purpose of inducing the official to act or refrain from acting,<sup>71</sup> (5) to assist the company in obtaining, retaining, or directing business.<sup>72</sup>

The FCPA provides for civil and criminal penalties.<sup>73</sup> A corporation may be liable for fines of up to two million dollars,<sup>74</sup> and company owners, directors, stockholders, agents, and employees also may be liable individually regardless of the corporation's criminal culpability.<sup>75</sup> If convicted, an individual may be sentenced to fines, a prison term, or both.<sup>76</sup> Moreover, the company cannot indemnify convicted individuals.<sup>77</sup> United States courts have determined that foreign recipients of bribes from American companies are beyond the reach of the FCPA, and cannot be prosecuted like their American counterparts.<sup>78</sup> In a number of federal jurisdictions, courts have also held that the Act does not provide for a private right of action.<sup>79</sup>

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67. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

68. See 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3).

69. See 15 U.S.C. §§ 78dd-1(a)(1)-(2), 78dd-2(a)(1)-(2).

70. See Shaffer & Welch, *supra* note 62, at 703 n.55 (noting that "corruptly" is used in the text of the Act to make clear that a payment, gift, or offer, must be made with the intent of inducing the recipient to wrongfully misuse his official position to give preferential treatment to the briber).

71. See 15 U.S.C. §§ 78dd-1(a)(1)(2)(3), 78dd-2(a)(1)(2)(3).

72. See 15 U.S.C. §§ 78dd-1(a)(1)-(2), 78dd-2(a)(1)-(2).

73. See 15 U.S.C. § 78ff.

74. See *\$24.8 Million Paid by Lockheed*, N.Y. TIMES, Jan. 28, 1995, § 1, at 35 (describing a 1995 fine paid by Lockheed for violations of the FCPA when the company acknowledged bribing an Egyptian legislator and her husband in order to receive a sales contract for three C-130 transport planes).

75. See 15 U.S.C. § 78ff(c).

76. See 15 U.S.C. § 78ff(c)(1)-(2).

77. See 15 U.S.C. § 78ff(c)(3).

78. See *United States v. Blondek*, 741 F. Supp. 116, 120 (N.D. Tex. 1990), *aff'd sub nom. United States v. Castle*, 925 F.2d 831 (5<sup>th</sup> Cir. 1991).

79. See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027-30 (6<sup>th</sup> Cir. 1990) *cert. denied*, 498 U.S. 1086 (1991) (holding that the FCPA creates no implied private right of action in favor of domestic tobacco producers). The United States producers claimed that tobacco importers made contributions to foreign charities to

## B. EXCEPTIONS OR "GREASE" PAYMENTS

Following complaints from United States businesses that the FCPA put them at a competitive disadvantage overseas, Congress amended the act in 1988.<sup>80</sup> As amended, the FCPA allows certain exceptions, and expressly permits "grease" or "facilitating" payments that expedite or secure the performance of a routine government action.<sup>81</sup> A low-level official in the scope of that official's non-discretionary, clerical, or processing duties ordinarily performs this type of action.<sup>82</sup> The FCPA distinguishes these routine activities from

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obtain a foreign government's imposition of price controls on foreign tobacco. See *id.* at 1027-30; see also *Citicorp Int'l Trading Corp. v. Western Oil & Refining Co.*, 771 F. Supp. 600, 606-07 (S.D.N.Y. 1991) (holding that no private right of action is available under the FCPA for shareholders allegedly injured by their corporation's attempt to bribe foreign officials). Courts in *Lamb* and *Citicorp* relied on a four-factor test set out by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975). For a finding of a private right of action: 1) The plaintiff must be a member of the class for whose special benefit the statute was enacted; 2) The legislative history creates an intent to create or deny such a remedy; 3) Creation of a private right of action is consistent with the underlying purposes of the act; 4) The cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law. See *id.* at 78.

80. See Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1107, 1415-25 (amending the FCPA); Earle, *supra* note 1, at 207 (noting the criticism of the 1977 FCPA that led to the 1988 amendments); see also RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 311-38 (1995) (surveying the FCPA and the 1988 amendments).

81. See 15 U.S.C. §§ 78dd-1(b), 78dd-2(b) (1994); Low & Burton, *supra* note 62, at C5.

82. See ARTHUR ARONOFF, ANTI-BRIBERY PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT (1994), reprinted in 1 COMBATING CORRUPTION—RECENT MULTILATERAL INITIATIVES 63, 65 (1998) (Conference on Corruption, American University, Washington College of Law, April 6, 1998) [hereinafter 1 COMBATING CORRUPTION] (on file with author) (discussing the 1988 amendments to the FCPA, and the permitted exceptions). Acceptable actions in response to payments include: procuring licenses, permits, or other official documents authorizing a person to do business within a country; the processing of paperwork, visa, or work orders; the provision of police protection, the picking up and delivering of mail, providing phone service and utilities; scheduling inspections, loading and unloading cargo, and protecting perishable goods. See *id.* at 65; see also 15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A) (1994).

larger official decisions to award contracts, new business, or continue business with a particular party.<sup>83</sup>

### C. DEFENSES

The FCPA provides for two affirmative defenses.<sup>84</sup> Although the scope of the defenses is not clear, a "payment, gift, offer, or promise of anything of value" to a foreign official, is allowed as long as it is legal in the host country,<sup>85</sup> or if the payment is a "reasonable and bona fide" business expenditure.<sup>86</sup> The expenditures must be "directly related" to either the promotion of products or services or the performance of a contract.<sup>87</sup>

### D. UNITED STATES PRESSURES OTHER COUNTRIES TO FOLLOW SUIT

The United States in 1977 enacted the FCPA in keeping with a post-Watergate morality.<sup>88</sup> No country rushed to emulate its example because the moral costs of bribery were of no consequence.<sup>89</sup> In 1997, the United States succeeded in pressuring its trade partners to follow suit with persuasive arguments that evoked the deleterious economic costs associated with bribery.<sup>90</sup> Emerging empirical

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83. See 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B) (1994).

84. See 15 U.S.C. §§ 78dd-1(c), 78dd-2(c) (1994); ARONOFF, *supra* note 82, at 66 (finding that the defendant, not the prosecutor, has the burden of showing that the payments meet the requirements for this type of expenditure).

85. See 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1) (1994); Low & Burton, *supra* note 62 (noting that the FCPA requires that local law permit these types of payments).

86. See 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2) (1994). Travel and lodging expenses incurred by or on behalf of a foreign official are considered reasonable and bone fide. See ARONOFF, *supra* note 82, at 66. These payments are normally made when associated with product demonstrations, facility tours, or contract performance. See Low & Burton, *supra* note 62.

87. See 15 U.S.C. §§ 78dd-1(c)(2)(A)-(B), 78dd-2(c)(2)(A)-(B) (1994).

88. See Earle, *supra* note 1, at 224 (describing the moral and ethical indignation in the United States incited by Watergate revelations of international slush funds).

89. See *id.* at 224.

90. See *id.* at 208, 226 (asserting that economic indicators, not moral or altruistic precepts, drive current OECD efforts to criminalize bribery and

evidence links poor economic performance with a global business environment that tolerates, fosters, or ignores bribery.<sup>91</sup> In addition, the global anti-corruption momentum is rooted in a generalized feeling of unease regarding the widening scope of bribery, its links to the drug trade, money laundering, and organized crime.<sup>92</sup> In the international regulatory marketplace, and particularly at the OECD, the United States is using bribery's detrimental economic indicators to influence international law and policy.<sup>93</sup>

### III. A GLOBAL ISSUE: INTERNATIONAL DIMENSIONS OF EFFORTS TO CURB CORRUPTION

#### A. FOREIGN GOVERNMENTS, INTERNATIONAL FINANCIAL INSTITUTIONS, AND NON-GOVERNMENTAL ORGANIZATIONS

##### *1. Foreign Governments: The European Union*

Self-interest motivates European Union ("EU") efforts, as set out in the May 1997 Communication to the Council and The European Parliament on a Union Policy Against Corruption ("EU Communication").<sup>94</sup> It is also clear that the EU is watching OECD

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corruption). The author contends that European companies and governments recognize that corrupt market practices have negative effects on business in rapidly changing global economic markets. *See id.* at 226.

91. *See supra* notes 41-48 and accompanying text (evaluating the recent studies equating poor economic performance with high corruption levels in a nation's economy).

92. *See supra* notes 50-58 and accompanying text (describing the economic temptations that result in a link between drug trafficking, money laundering, organized crime, and profits from corruption).

93. *See* discussion *infra* Part III (detailing the scope of international efforts to ban business bribery and corruption).

94. *See* EU Commission, *supra* note 22, at 1. The EU is concerned about the prevalence of intra-community fraud in connection with general EU funds dispensed to member states for EU-approved expenditures. *See id.* There is also concern about corruption's links with organized crime, drug trafficking, and money laundering. *See id.* at 2. The tone of the Communication indicates that the EU does not want the OECD making policy for member states of the EU. *See id.* at 1-4; *see also* Simone White, *Proposed Measures Against Corruption of Officials in the European Union*, 21 E.L. REV. DEC. 465 (1996) (detailing corruption problems

developments closely and recognizes the need for coordinated Community action to safeguard its interests.<sup>95</sup> The Communication stresses the advisability of criminalizing overseas bribery; ending the tax deductibility of bribes in EU states; reforming public procurement, accounting, and auditing systems; and even blacklisting companies that infringe on the competitive rights of other firms by using bribes.<sup>96</sup> The EU Communication notes, however, the fear of some member states about being at a competitive disadvantage if they end tax deductibility and others continue the practice.<sup>97</sup> Therefore, a more politically feasible approach might be to increase such legislation in response to an EU directive or instrument.<sup>98</sup> On a broader geographical level, the Council of Europe<sup>99</sup> supplements EU regional anti-corruption efforts.<sup>100</sup>

## *2. International Financial Institutions: The World Bank and IMF*

Current efforts of the World Bank and the IMF focus on controlling fraud and corruption in the projects financed by these international lending institutions.<sup>101</sup> In the past, employees of the two

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in the context of European Commission ("EC") officials, funds, expenditures, percentage of the EC budget, and rules for determining jurisdiction, extradition, prosecution, and cooperation).

95. See EU Commission, *supra* note 22, at 1-4.

96. See *id.* at 4-11.

97. See *id.* at 7.

98. See *id.*

99. See Michelle Moser, *Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime*, 27 CASE W. RES. J. INT'L L. 321, 337 (1995) (describing the Council of Europe as a European international organization dedicated to the protection of human rights and freedoms, and increased cooperation between European countries).

100. See *World Bank Role*, *supra* note 1, at 61. The Council of Europe Programme of Action Against Corruption which was prepared by the Multidisciplinary Group on Corruption ("MGC"), was adopted by the Committee of Ministers in 1996. See *id.* The criminalization of corrupt behavior would be legislated by way of a convention on corruption, prepared by the Council of Europe. See *id.* A discussion of draft instruments in the civil, penal, and administrative law aspects of corruption is ongoing. See *id.*

101. See *World Bank Role*, *supra* note 1, at 1-2; see also Wolf, *supra* note 7 (noting the 1997 publication of the IMF paper, GOOD GOVERNANCE: THE IMF'S

Bretton Woods organizations were criticized as "growth-befuddled bureaucrats"<sup>102</sup> for ill-advised loans to countries whose corrupt elites and rulers siphoned off the aid intended for their nations' development.<sup>103</sup> World Bank and IMF rules governing financial borrowing conditioned loans on exclusively economic, not political, considerations.<sup>104</sup> Indonesian opposition groups recently accused the World Bank of deliberately ignoring the corrupt use of past loans to the Indonesian government.<sup>105</sup> In reversing such policies, the World Bank and IMF will, in the future, consider corruption levels in

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ROLE, *see* INTERNATIONAL MONETARY FUND, *supra* note 14); Robert Chote, *IMF: Member Countries Warned Over Corruption*, FIN. TIMES, Aug. 7, 1997, at 4 (reporting the IMF's warning that financial assistance may be withheld or suspended if governments take inadequate steps to prevent corruption).

102. William Safire, *Asia's 'Crony Capitalism': The Truth that the West Ignored: Autocratic Rule Prevents a Sound Market Economy*, PITTSBURG POST-GAZ., Jan. 20, 1998, at A7.

103. *See* Ralph I. Sato, *Uphill Struggle on Corruption After Decades of Neglect*, FIN. TIMES, Sept. 24, 1997, at 18 (describing huge loans made by the World Bank and the IMF to legendarily corrupt regimes in Indonesia, Mexico, the Philippines, Russia, and Zaire).

104. *See* Jerome I. Levinson, *Repressive Regimes Shouldn't Get a Loan*, WASH. POST, June 15, 1998, at A23 (describing the Articles of Agreement of the World Bank and IMF that mandate non-interference by officers "in the political affairs of any member . . ."). Levinson asserts that the drafters of the Articles of Agreement never meant for this expanded interpretation to provide legal justification for financing corrupt, non-democratic regimes. *See id.*

105. *See* Keith B. Richburg, *World Bank Draws Fire in Indonesia*, WASH. POST., Feb. 5, 1998, at A19 (describing how Indonesian community leaders and activists chastised World Bank President James Wolfensohn for the Bank's huge loans to the Indonesian government despite the institution's awareness of rife corruption and use of the money to further get-rich schemes by President Suharto's large family and friends). While on an Asian tour to assess the social impact of the Asian economic crisis in various countries, Wolfensohn acknowledged that "[the World Bank] didn't get everything right in the past." *Id.*; *see also* Alistair Hammond, *Asia Meltdown: World Bank Admits It Made Errors in Indonesia*, THE NEWS, Feb. 5, 1998, *available in* LEXIS, News Library, Curnews file (discussing the criticism of the World Bank for its part in ignoring a corrupt Suharto regime, and the factors that helped destroy the value of Indonesia's currency); Colin Woodard, *Do-Good Bank Can't Please All*, CHR. SCI. MON., Feb. 11, 1998, at 1 (discussing Indonesia's economic meltdown and the corruption tacitly supported by the Bank's prior lending policies); Seth Mydans, *Suharto Agrees to End Monopolies: IMF Deal Would Dismantle Cartels of Family and Friends*, N.Y. TIMES, Jan. 16, 1998, at 1 (noting the Suharto family's hold on lucrative monopolies and cartels supported by World Bank funds).

countries when designing development assistance strategies,<sup>106</sup> and choosing to implement aid projects.<sup>107</sup> Furthermore, the World Bank must also monitor the ethical behavior of its own agents, given recent findings of internal fraud, kickbacks, and embezzlement.<sup>108</sup>

Current international anti-corruption efforts were well underway before the Asian currency crisis became apparent in the latter half of 1997.<sup>109</sup> The "tiger" economies of Indonesia, Malaysia, South Korea, and Thailand experienced severe financial turmoil as their currencies plummeted in value.<sup>110</sup> The extent of over-investment, over-building,

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106. See James Wolfensohn, *Asia: the Long View*, FIN. TIMES, Jan. 29, 1998, at 28 (acknowledging that the World Bank must now support institutional corrections, while also advocating the adoption of wide-range reforms in corporate and financial sectors). The World Bank will address issues of corruption and accountability in future lending decisions. See *World Bank Role*, *supra* note 1, at 23-47 (describing World Bank strategies for tackling corruption and economic reforms); see also Levinson, *supra* note 104 (advocating that the World Bank and IMF reject the "Chinese Wall" between economic and political considerations and revolutionize their traditional lending policies).

107. See *World Bank Role*, *supra* note 1, at 3. The World Bank will address issues of corruption and accountability in future lending decisions. See *id.* at 23-47 (describing World Bank strategies for tackling corruption and economic reforms); See generally *Good Governance: The IMF's Role*, *supra* note 14, at 10 (noting how transparency in decision-making and budgetary processes could improve private sector confidence with regard to government policies).

108. See Stephen Fidler, *World Bank in Internal Corruption Probe*, FIN. TIMES, July 17, 1998, at 10 (discussing the World Bank's response to allegations of bribery by a former official); Lorraine Adams, *World Bank Hires Auditors to Probe its Own Spending*, WASH. POST, July 16, 1998, at A1 (citing "alarming information" about kickbacks amounting to "tens of thousands" of dollars pocketed by corrupt World Bank officials).

109. See Peter Montagnon, *Chronology of a Crisis*, FIN. TIMES, Dec. 23, 1997, at 13; *Asia in Crisis*, WASH. POST, Jan. 4, 1998, at A20.

110. See Keith B. Richburg & Steven Mufson, *In Hindsight, Signs of Asian Crisis Appear Clear*, WASH. POST, Jan. 4, 1998, at A1. (discussing 1996 bank scandals, unregulated banking systems, and corrupt or non-existent accounting practices that contributed to the larger economic meltdown causing recession and crisis in Indonesia, Malaysia, the Philippines, South Korea, and Thailand); see also Steven Mufson, *Rebuilding South Korea's House of Cards: Conglomerates Totter under Costs, Corruption*, WASH. POST, Dec. 22, 1997, at A1 (detailing the loose lending practices of South Korea's banks, and the lack of objective regulatory oversight of the banking and corporate sectors); Kevin Sullivan, *South Koreans Called to Account: Need for Truth-Telling Spurs Training of U.S.-Style CPAs*, WASH. POST, Jan. 2, 1998, at A1 (noting that reform of murky Korean economic practices means that the lack of transparency inherent in government-business

and short-term foreign debt necessitated an IMF bailout for each country.<sup>111</sup> Commentaries, analyses, and reports indicate that corrupt financial, corporate, and business practices are common factors precipitating the currency crisis in the "tiger" economies and in Japan.<sup>112</sup> As a result, the affected countries must implement difficult institutional reforms.<sup>113</sup>

Asia's economic crisis caused widespread unemployment and massive social unrest in Indonesia and South Korea.<sup>114</sup> In May 1998, President Suharto was forced to resign in Indonesia in the face of widespread rioting, civil unrest, and protests.<sup>115</sup> Despite the intervention of the IMF in South Korea, resistance to change of an institutionalized corrupt status quo is evident, as unemployment rises

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dealings requires standard, non-corrupt accounting practices).

111. See Steven Pearlstein, *Understanding the Asian Economic Crisis*, WASH. POST, Jan. 18, 1998, at A32 (discussing the over-borrowing, over-lending, over-building, and eventual currency devaluation that led to the crisis).

112. See *Why Did Asia Crash?*, ECONOMIST, Jan. 10, 1998, at 66 (suggesting possible explanations for Asian currency dives); see also E. Gerald Corrigan, *A Crisis Manager takes a Look at Asia*, WASH. POST, Dec. 21, 1997, at H2 (evaluating the causes of the crisis, and asserting that macroeconomic policies were "not all that bad"). Corrigan concluded that substantial weaknesses in domestic banking and financial systems resulted in institutionally unsound close links between banks and companies or between banks and governments. See *id.* Because of similar government and business links in Japan, the world's second-largest economy continues on a no-growth path. See Sandra Sugawara, *Japanese Construction Trade Built on Cronyism*, WASH. POST, Jan. 31, 1998, at A1 (discussing the pervasive level of bribery, kickbacks, and other corrupt practices plaguing Japan, and the iron triangle of bureaucrats, politicians, and executives accused of seamless links in the banking sector).

113. See Peter Montagnon, *Needed: Another Miracle*, FIN. TIMES, Dec. 23, 1997, at 13 (questioning the ability of Asia's tigers to undertake the institutional and banking reforms necessary to promote transparency); Paul Blustein, *IMF Credibility is on the Line in Asia Bailout*, WASH. POST, Dec. 22, 1997, at A1, (discussing the tough challenge faced by the IMF as it negotiates reform); Jerome Levinson, *One-Dimensional Bailout*, WASH. POST, Dec. 31, 1997, at A21 (criticizing the inherent inequities in the IMF reform plan).

114. See Conor O'Cleary, *Tension Rises in Indonesia as People Left Hungry*, IRISH TIMES, Feb. 6, 1998, at 56, (noting that rapidly growing unemployment and poverty are causing riots in Indonesia, and that opposition to layoffs dictated by IMF reforms is building in South Korea).

115. See William Branigin, *Nepotism, Cronyism Undercut President*, WASH. POST, May 21, 1998, at A1 (describing the rampant corruption during President Suharto's rule).



and trade unions fight job losses.<sup>116</sup> Instead of promoting smug Western economic chauvinism,<sup>117</sup> the Asian crisis offers a unique opportunity for anti-corruption reform and cooperation between countries, using the international fora currently engaged in global efforts.<sup>118</sup>

### 3. Non-governmental Organizations: Transparency International

Transparency International ("TI"),<sup>119</sup> which calls itself "the coalition against corruption in international business,"<sup>120</sup> has no illusions about the realities and difficulties of tackling entrenched corruption,<sup>121</sup> nor does TI believe that quick fixes will result from the current worldwide efforts against corruption.<sup>122</sup> TI pioneers a carrot rather than a stick approach, relying on a combination of publicity,<sup>123</sup> tighter monitoring, technical assistance, and tougher national laws to fight corruption internationally.<sup>124</sup> TI's efforts are also supported by

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116. See John Burton, *A Last Chance for Korea*, FIN. TIMES, May 27, 1998, at 19.

117. Richard Lambert, *Uncle Sam Sees Off Asia's Paper Tigers*, FIN. TIMES, Dec. 23, 1997, at 13 (stating that Americans may be excused for gloating in the wake of the Asian crisis brought on by un-American industrial policy, crony capitalism, and corrupt corporate governance).

118. See COMBATING CORRUPTION SUPPLEMENT, *supra* note 9, at 188-90 (detailing the international global actors leading anti-corruption efforts).

119. See discussion *supra* note 1 (discussing TI and its role in fighting against corruption); see also Adonis, *supra* note 1, at 4 (describing TI's leaders, and its long term efforts to fight global business corruption); Jean-Luc Testault, *Transparency International Combats Corruption*, AGENCE FR.-PRESSE, Aug. 23, 1995, available in 1995 WL 7847347 (describing TI, its goals and its anti-corruption strategies).

120. Adonis, *supra* note 1, at 4.

121. See *id.* (emphasizing TI's recognition that corruption will be eradicated slowly).

122. See *id.*; see also Michael Holman, *Risk is Up Against Reward—Corruption is Acknowledged to be a Growing Global Phenomenon*, FIN. TIMES, July 12, 1995, at III (discussing TI's realistic assessment of the difficulties in decreasing the pervasiveness of corruption).

123. See Adonis, *supra* note 1, at 4 (describing various corruption scandals worldwide in 1994, and TI's decision to fight those scandals with publicity).

124. See Adonis, *supra* note 1 (describing TI's leaders, and its methods for fighting global business corruption); see, e.g., Haig Simonian & John Griffiths, *VW Suspends Executives After Bribery Allegations*, FIN. TIMES, Feb. 19, 1997, at 24

other non-governmental organizations ("NGOs"), notably the American Bar Association ("ABA").<sup>125</sup>

The results from TI's annual Corruption Index trigger a reaction that helps to promote public opposition to corruption in some developing countries.<sup>126</sup> The Corruption Index rates Bolivia, Colombia, and Nigeria as the most corrupt countries, with Denmark, Finland and Sweden as the least corrupt countries.<sup>127</sup> The rankings, which reflect the perceptions of the working community in fifty-two countries and not the actual level of corruption,<sup>128</sup> sparked angry discourse and controversy within the countries rated most corrupt.<sup>129</sup>

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(revealing that members of VW's purchasing staff systematically attempted to extract bribes from suppliers for many years); Quentin Peel, *Survey - Slaying the Monster—Corruption*, FIN. TIMES, Nov. 19, 1996, at 2 (characterizing corruption in India as obsessive since bribes are used to accomplish everything from installing the telephone to gaining access to drinking water); *Corrupt France: A Suitable Case for Modest Reform, Not for Panic*, ECONOMIST, Sept. 17, 1994, at 16 (reporting on the criminal investigation of at least one hundred prominent French businessmen for business corruption).

125. See Jay M. Vogel, *Corrupt Practices in the Conduct of International Business*, 30 INT'L LAW. 193 (1996) (describing the ABA's support for the OECD, the OAS, the United Nations, and other entities fighting corruption in international business transactions). The ABA sounds a cautionary note, saying the OECD Recommendations will not be effective unless they are accompanied by binding national and international legislation. See *id.* at 198.

126. See *Transparency International Publishes 1997 Corruption Perception Index*, TI Press Release (visited Sept. 20, 1997) <<http://www.transparency.de/press/1997.31.7.cpi.html>> [hereinafter *Corruption Index*] (discussing an international business poll survey of the subjective evaluations of business people, political analysts, and the general public, on levels of corruption in different countries).

127. See Guy de Jonquieres, *Nigeria: Country Seen as Most Corrupt Nation*, FIN. TIMES, Aug. 1, 1997, at 4 (discussing TI's Corruption Index, and the rankings of countries in the Index); see also *Corruption Index*, *supra* note 126 (describing various country's corruption rankings). The United States ranks as the sixteenth least corrupt nation in the survey. See *id.*

128. See de Jonquieres, *supra* note 127.

129. See *Corruption Index*, *supra* note 126, at 3-5 (discussing the political impact of TI's Index in Argentina, Malaysia, and Pakistan). In Argentina, the Index's results made headlines for weeks, and a public dispute and debate ensued between the government and TI. See *id.* at 5. Prime Minister Mahatir of Malaysia denounced the Index as an example of Western "cultural imperialism." See *id.* at 4. Pakistan's Prime Minister Bhutto was dismissed from office by Pakistan's President and later lost national elections in a landslide. See *id.* at 4.

## B. INTERNATIONAL ORGANIZATIONS

### 1. *The United Nations*

At the United Nations, United States negotiators successfully persuaded the General Assembly to adopt a Recommendation from the Economic and Social Council against Corruption and Bribery in International Commercial Business Transactions in 1996.<sup>130</sup> Although not legally binding, the Resolution specifically focuses on the need to criminalize overseas bribery and to eliminate the tax deductibility of bribes.<sup>131</sup>

### 2. *The Organization of American States*

The Organization of American States ("OAS") was the first multilateral entity to sign a convention.<sup>132</sup> The OAS Inter-American Convention Against Corruption ("OAS Convention")<sup>133</sup> was signed by twenty-three of the thirty-five OAS members.<sup>134</sup> The state governments of Bolivia, Costa Rica, Ecuador, Mexico, Paraguay, Peru, and Venezuela,<sup>135</sup> have ratified the OAS Convention. Although there is no enforcement mechanism beyond the compliance efforts of the individual countries, the OAS Convention provides articles that

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130. General Assembly Endorses Outcome of UNCTAD IX, Adopts Anti-Corruption Declaration, Stresses Challenges of Global Financial Integration, GA/9206 Press Release, at 21, Dec. 16, 1996 (visited Sept. 18, 1997) <<http://www.un.org/plweb-cgi/idoc.p>> (noting the remarks of United States Representative, Prezell Robinson, that the Declaration was the result of United States' efforts); see also G.A. Res. 51/191, U.N. GAOR 2d Comm., 51<sup>st</sup> Sess., Annex, Agenda Item 12, U.N. Doc. A/51/601 (1996).

131. See G.A. Res. 51/191, U.N. GAOR 2d Comm., 51<sup>st</sup> Sess., Annex, Agenda Item 12, at 1, 3, 4, U.N. Doc. A/51/601 (1996).

132. See Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the U.S. Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 243 (1998) (noting that the OAS Convention established the first international legal framework for banning corruption and bribery of government officials).

133. Organization of American States: Inter-American Convention Against Corruption, Caracas, March 29, 1996, [hereinafter OAS Convention].

134. See *World Bank Role*, *supra* note 1, at 59.

135. See *id.*

can serve as model laws on jurisdiction,<sup>136</sup> the criminalization and tax deductibility of transnational bribes,<sup>137</sup> extradition,<sup>138</sup> legal assistance and cooperation,<sup>139</sup> and bank secrecy.<sup>140</sup> The articles also outline the commitments assumed by the signatory states.<sup>141</sup> At a subsequent June 1997 meeting in Lima, Peru,<sup>142</sup> the OAS General Assembly adopted a Program for Inter-American Cooperation in the Fight Against Corruption to include the Inter-American Development Bank ("IADB"), the World Bank, and the OECD.<sup>143</sup>

### 3. OECD Recommendations and 1997 Convention

The OECD process began in 1994 at the urging of the United States<sup>144</sup> and culminated in 1997 with both the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("1997 OECD Convention")<sup>145</sup> and the

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136. See OAS Convention, *supra* note 133, art. V (outlining jurisdictional rights if conflict arises).

137. See *id.* art. VIII (stating each party should punish and prohibit bribery).

138. See *id.* art. XIII (declaring certain offenses should lead to extradition).

139. See *id.* art. XIV (stressing need for prompt judicial cooperation).

140. See *id.* art. XVI (prohibiting the invocation of bank secrecy to avoid aiding in a bribery investigation).

141. See OAS Convention, *supra* note 133; see also *World Bank Role*, *supra* note 1, at 59 (stating that the OAS Convention is open to ratification by all OAS member states).

142. See *World Bank Role*, *supra* note 1, at 60 (noting OAS efforts to keep anti-corruption momentum alive by intensifying cooperative efforts between OAS member states).

143. See *Program for Inter-American Cooperation in the Fight Against Corruption*, OEA/Ser. P, AG/DOC. 3571/97 (June 5, 1997) (suggesting the implementation of consultations among international organizations to share information); see also *World Bank Role*, *supra* note 1, at 60 (reporting an anti-corruption plan of action by the IADB).

144. See COMBATING CORRUPTION SUPPLEMENT, *supra* note 9, at 212 (describing the beginning of OECD efforts).

145. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference, Paris, Nov. 21, 1997 [hereinafter 1997 OECD Convention] (containing articles 1-17 that codify definitions of bribery and foreign public officials, jurisdictional principles, and provisions on sanctions, enforcement, auditing, accounting, and disclosure); see also Low & Burton, *supra* note 62 (analyzing the Convention's provisions).

adoption of the Recommendation on Bribery in International Business Transactions ("Recommendation")<sup>146</sup> by the OECD Council. The Recommendation isolated the non-criminality of foreign bribery and the tax deductibility of bribes as issues requiring further examination by OECD member states.<sup>147</sup> Subsequent actions by the Committee on International Investment and Multinational Enterprises ("CIME"), the Working Group on Bribery, and the Committee on Fiscal Affairs ("CFA") included consultation with and among member governments.<sup>148</sup> Representatives from the private sector, NGOs, and other international organizations also met to discuss the issue of bribery.<sup>149</sup> In 1996, the OECD Council adopted a specific Recommendation on the Tax Deductibility of Bribes;<sup>150</sup> however, the eventual 1997 OECD Convention failed to eliminate such deductibility,<sup>151</sup> as did the 1997 Revised Recommendation on Combating Bribery in International Business Transactions.<sup>152</sup>

The revised version of the Recommendation is more specific than the 1994 Recommendation.<sup>153</sup> The 1997 Revised Recommendation reflects a careful analysis by the Working Group on Bribery, special

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146. OECD Council Revised Recommendation on Combating Bribery in International Business Transactions, May 23, 1997 [hereinafter 1997 Revised Recommendation] (calling on Member countries to take broader measures to deter, prevent, and combat the bribery of foreign public officials in business transactions).

147. See *id.* art. IV (urging elimination of tax deductibility for bribes).

148. See *OECD Actions to Fight Corruption*, *supra* note 4, at 2 (describing the work of the CIME, the CFA, and the Working Group on Bribery).

149. See *id.* (describing the participation of the International Chamber of Commerce (ICC), TI, Council of Europe, OAS, IMF, and World Bank either as observers or as part of an informal network).

150. See *1996 Recommendation of the Council of the OECD on the Tax deductibility of Bribery to Foreign Public Officials (incorporated in Implementation of Tax-Deductibility Recommendation*, *supra* note 5, at 11).

151. See Low & Burton, *supra* note 62 (describing the 1997 OECD Convention's provisions, and noting the Convention's failure to curtail tax-deductibility of overseas bribes); *OECD Actions to Fight Corruption*, *supra* note 4, at 3 (describing the Norwegian Parliament as the lone governing body to pass a law disallowing the tax-deductibility of bribes to foreign public officials in 1996).

152. See 1997 Revised Recommendation, *supra* note 146 (urging but not eliminating tax deductibility).

153. See *id.* art. V-X.

prosecutors, and private sector experts of the appropriate modalities and international instruments to facilitate criminalization legislation.<sup>154</sup> The Revised Recommendation also indicates an awareness that the criminalization of bribery is a priority.<sup>155</sup> As a result of OECD efforts, legislation to criminalize foreign bribery is now pending in Belgium and Norway.<sup>156</sup>

The negative responses by OECD Member countries to the 1996 recommendation on tax-deductibility<sup>157</sup> reflects the difficulties and the challenges that resulted from a total lack of consistency among the tax laws of the Member countries.<sup>158</sup> Since the adoption of the

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154. See *id.*; see also *OECD Actions to Fight Corruption*, *supra* note 4, at 2-3 (describing methodologies for implementation of the Recommendations used by the CFA, CIME, and Working Group on Bribery, which culminated in the 1997 Revised Recommendation).

155. See *OECD Actions to Fight Corruption*, *supra* note 4, at 2-3.

156. See *id.* at 2. The OECD also evaluated the progress, or lack of progress, of each Member country, in the criminalization and tax-deductibility process. See *id.* at 2-3.

157. See *Implementation of Tax Deductibility Recommendation*, *supra* note 5 (summarizing the results of 1996 OECD recommendations on eliminating tax-deductibility of foreign bribes, and noting the implementation difficulties faced by OECD members). The CFA also notes that few OECD members have made serious efforts to tackle the tax-deductibility issue. See *id.* at 8-10.

158. See *id.* at 7-10 (describing general tax practices in the OECD Member countries); Annex II: Tax Treatment of Bribes in OECD Member Countries, in *Implementation of Tax-Deductibility Recommendation*, *supra* note 5 (discussing the different tax treatment of bribes in specific OECD Member countries) [hereinafter *Annex II*]. In Canada, the Czech Republic, Norway, and the United States, bribes are not tax deductible, not even foreign bribes incurred as a customary cost of business. See *id.* (noting that bribes also may not qualify as a business expense in Greece, Poland, Italy, South Korea, and Spain). In Australia, Austria, Belgium, France, Germany, Ireland, and New Zealand, bribes are deductible; however, some deductions may be disallowed on examination because the briber did not retain sufficient documentation or because the briber refuses to identify the recipient. See *id.* at 12-14; *Implementation of Tax-Deductibility Recommendation*, *supra* note 5, at 8. Countries are all at different stages of consideration and implementation. See *id.* at 8-9 (comparing Belgium and Denmark's pending legislation against tax deductions to other countries' restrictions governing deductions). In France and Germany, the tax deductibility issue is being studied in a broader context than taxation, i.e. whether transnational bribery should be criminalized. See *id.* at 9 (describing a general study initiated in France in 1995); see also *infra* notes 234-252 and accompanying text (discussing the German legislative response to the OECD Recommendations on criminalization); *Implementation of Tax-Deductibility Recommendation*, *supra*

1996 Tax Recommendations, only Norway has passed a law disallowing the deductibility of foreign bribes.<sup>159</sup> In the judgment of the CFA and the CIME, this one action represents insufficient progress on the tax issue.<sup>160</sup> The CIME recommended accelerating the pace of implementation by member states,<sup>161</sup> while monitoring and reviewing the progress of each member state.<sup>162</sup>

The 1997 OECD Convention, signed by twenty-nine OECD Member countries and five non-members,<sup>163</sup> criminalizes the payment of bribes to foreign public officials, but fails to eliminate

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note 5, at 8 (describing the process in the Netherlands to change their laws concerning deductibility); see also *infra* note 216 and accompanying text (describing the amendment to German tax code that changed their laws concerning deductibility). The CFA is proceeding on the idea that criminalization is a prerequisite for denying tax deductibility. See *OECD Actions to Fight Corruption*, *supra* note 4, at 3 (recommending prompt action by Member countries to criminalize foreign bribery).

159. See *Implementation of Tax-Deductibility Recommendation*, *supra* note 5, at 8.

160. See *OECD Actions to Fight Corruption*, *supra* note 4, at 3 (expressing the dissatisfaction of the CIME with the laggard response of OECD Member countries on the tax-deductibility issue). To monitor the tax-deductibility implementation process, the CFA suggested categorizing member states, depending on their stage of progress on the legislation aspect of the Recommendations. See *Implementation of Tax-Deductibility Recommendation*, *supra* note 5, at 6-7. The categories should address: 1) Member countries that had not yet begun to examine the tax treatment of bribes; 2) Member countries that were actually re-examining the issue; 3) Member countries that had already conducted the tax treatment of bribes examination. 4) Member countries whose review was over or that had adopted new legislation denying the tax deductibility of bribes. See *id.* States in the third category would be asked to report on how they had organized and conducted the review, and whether they had involved the business community in the process. See *id.* at 7. States in the fourth category would be asked to report on the experience and methodology of implementation. See *id.* States already denying the tax deductibility of bribes were in a separate category, and essentially would be asked to present their legislation. See *id.*

161. See *OECD Actions to Fight Corruption*, *supra* note 4, at 3.

162. See 1997 Revised Recommendation, *supra* note 146, at 5. In addition, the 1997 Revised Recommendation made clear that the CIME Group on Bribery would examine existing criminal statutes and their enforcement within member states. See *id.* at 6.

163. See Chaudri, *supra* note 5, at 261 (listing the 1997 OECD Convention's five participating non-members: Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic).

the tax deductibility of bribes.<sup>164</sup> To bind OECD Member countries, the Convention must be ratified by each Member country's legislature.<sup>165</sup> The 1997 OECD Convention will enter into force sixty days after five of the ten OECD Member countries with the largest shares of exports, accounting for sixty percent of the combined exports of those ten countries, ratify it.<sup>166</sup> If such ratification has not occurred by December 31, 1998, a country may simply declare its intention to be bound, and the 1997 OECD Convention will become effective between any two such states.<sup>167</sup> The parties pledged April 1, 1998, as the informal deadline for submission of the 1997 OECD Convention to the parties' respective legislatures.<sup>168</sup>

The agreement may be the result of twenty years of United States pressure.<sup>169</sup> It is not, however, a mini-version of the FCPA.<sup>170</sup> Critics complain that (1) it does not fully ban bribes to officials of political parties or holders of public office;<sup>171</sup> (2) it does not force countries to revoke the tax deductibility of bribes;<sup>172</sup> and (3) it does not criminally penalize bribe takers.<sup>173</sup> While United States negotiators believe it will level the competitive playing field when United States

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164. See *id.* at 252 (noting the absence of tax-deductibility provisions in the 1997 OECD Convention).

165. See *id.* at 256.

166. See *id.* See generally Low & Burton, *supra* note 62 (describing the ratification process required by Article 15.1 of the 1997 OECD Convention).

167. See Chaudri, *supra* note 5, at 256; Low & Burton, *supra* note 62.

168. See Low & Burton, *supra* note 62.

169. See Anne Swardson, *34 Nations Promise to Curb Bribery*, WASH. POST, Nov. 22, 1997, at A16 (reporting the sustained United States' pressure that led to the Convention).

170. See *id.* (discussing criticism of the Convention in preserving an uneven competitive international playing field); Chaudri, *supra* note 5, at 256-58 (describing potential loopholes in the Convention's provisions, and the lack of a model law or detailed blueprint, thus resulting in functional equivalency and too-flexible standards). But see, Editorial, *Banning Bribes, Finally*, WASH. POST, Nov. 28, 1997, at A26 (defining the Convention as each country's adoption of the FCPA).

171. See Swardson, *supra* note 169, at A16.

172. See *id.*

173. See *id.*



companies compete for contracts with foreign countries,<sup>174</sup> some analysts contend that the field is still unacceptably uneven.<sup>175</sup> OECD Member countries like Germany, a major exporter and international economic competitor of the United States,<sup>176</sup> although currently revising its laws to criminalize foreign bribery, still permits the tax-deductibility of such bribes.<sup>177</sup> In addition, the 1997 OECD Convention forbids the use of bank secrecy laws as a shield to prosecution of these crimes or other corrupt financial transactions.<sup>178</sup> Yet, Switzerland, an OECD Member country, has stringent bank secrecy laws that have frequently frustrated U.S. law-enforcement officials prosecuting and investigating money-laundering and other international economic crimes.<sup>179</sup>

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174. See *Banning Bribes, Finally*, *supra* note 170.

175. See Stanley J. Marcuss & Seth Goldschlager, *An Uneven International Playing Field*, WASH. POST, Dec. 17, 1997, at A25 (contending that the anti-bribery treaty has many weaknesses, and that the playing field is far from even). *But see* Stuart E. Eizenstat, Editorial, *The Anti-Bribery Treaty*, WASH. POST, Jan. 16, 1998, at A20 (lauding the 1997 OECD Convention as a significant and progressive accomplishment).

176. See ECONOMIST INTELLIGENCE UNIT, GERMANY: EIU COUNTRY PROFILE 17-18, 37-41 (1997) [hereinafter GERMANY: EIU COUNTRY PROFILE] (describing Germany's economy as the third largest in the world, and its status as the world's second largest exporter after the United States); *see also* Leiken, *supra* note 17 (reporting United States Department of Commerce calculations of the loss of 100 foreign contracts worth \$45 billion to foreign competitors through graft from 1994 through 1995, with German companies among the particularly egregious bribers).

177. See *OECD Actions to Fight Corruption*, *supra* note 4, at 2 (identifying the OECD countries that criminalize foreign bribery); Saligmann, *supra* note 4, at 4 (describing the 1998 ratification and subsequent implementation of the 1997 OECD Convention criminalizing foreign bribery in Germany); *Annex II*, *supra* note 158, at 9 (describing foreign bribes as tax-deductible business expenses in Germany).

178. See 1997 OECD Convention, *supra* note 145, art. 9.3.

179. See Moser, *supra* note 99, at 333-34 (discussing international and United States' pressure on Switzerland to relax bank secrecy laws).

## IV. GERMANY: IMPLICATIONS FOR CRIMINAL AND TAX LAWS

### A. BRIBERY: CRIMINAL LAW IN FLUX<sup>180</sup>

"If a German bribes a German, he gets thrown in jail; if he bribes a foreign official, he gets a tax deduction."<sup>181</sup> Before Germany's prompt ratification and implementation of the 1997 OECD Convention in 1998, the preceding quotation accurately depicted the types of criminal and tax regimes that inspired OECD anti-bribery initiatives.<sup>182</sup> If the 1997 OECD Convention enters into force as expected on 1 January 1999, the German Penal Code will then reflect presently on-going legislative changes.<sup>183</sup> With that caveat, an examination of the traditional criminal laws germane to overseas bribery permits a meaningful evaluation of Germany's response to the OECD Recommendations and the 1997 OECD Convention.<sup>184</sup>

The application of the German Penal Code is limited to criminal acts committed on German territory,<sup>185</sup> or against German citizens or vital interests.<sup>186</sup> The Penal Code punishes acts committed in foreign countries against non-German citizens only in extraordinary circumstances like genocide, drug-trafficking, or counterfeiting.<sup>187</sup>

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180. See generally Telephone Interview with Rolf Saligmann, Attorney, Max-Franz-Str. 25, 53177 BONN (Oct. 28, 1997); Saligmann, *supra* note 4 (providing an unofficial English translation of the relevant sections of the German Penal, Civil, Commercial, and Administrative Codes, and an update on recent German legislative initiatives to implement the OECD Recommendations).

181. Leiken, *supra* note 17.

182. See Saligmann, *supra* note 4, at 1-4 (describing sections of the German criminal, civil, commercial, and administrative codes that relate to domestic and foreign bribery, the ratification of the 1997 OECD Convention by the German Parliament on 20 April 1998, and the implementing legislation passed on 24 June 1998); see also Telephone Interview with Carel Mohn, Programme Officer, Transparency International, Berlin Chapter (Oct. 12, 1998) (on file with author) (noting that Germany was one of the first OECD Member countries to ratify and implement the 1997 OECD Convention).

183. See Telephone Interview with Carel Mohn, *supra* note 182.

184. See Saligmann, *supra* note 4, at 1-3 (analyzing German criminal laws).

185. See § 3 Strafgesetzbuch [StGB] (German Penal Code) (F.R.G.).

186. See *id.* § 5, 6.

187. See *id.* § 6. Joachim Grunewald, a former German State Secretary of

Only bribery of domestic public officials merits criminal penalties like imprisonment or stiff monetary fines.<sup>188</sup> German civil servants may not accept bribes or benefits,<sup>189</sup> but the "passive" acceptance of bribes by German Members of Parliament is not criminal unless a parliamentary vote is explicitly sold.<sup>190</sup>

Anyone seeking a competitive business advantage through the bribery of employees of a commercial enterprise can be imprisoned for three years.<sup>191</sup> The affected competitors must request prosecution unless a special public interest is indicated.<sup>192</sup> This threshold provision limits the law's application to business transactions within German borders.<sup>193</sup>

## B. BRIBERY IN FOREIGN COUNTRIES

If German firms resort to bribery to compete against each other in a foreign country,<sup>194</sup> a penal provision of the Code can apply.<sup>195</sup> It is only applicable, however, when: (1) exclusively German companies are competing with each other;<sup>196</sup> and (2) the particular transaction is also punishable by the criminal law of the respective foreign

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Finance, believed that banning the payment of transnational bribes "would damage German firms in the international market and threaten jobs." Earle, *supra* note 1, at 234. The Federation of German Industry, the BDI, argues that overseas bribery should not be considered corrupt. *See id.*

188. *See* §§ 333, 334 StGB. A new provision of the German Penal Code includes an exception to protect Members of the European Parliament from bribery attempts. *See id.* § 108(e).

189. *See id.* §§ 331, 332.

190. *See id.* §§ 331, 332. Like German Members of Parliament, presumably European Members of Parliament can also "passively" accept bribes. *See id.* § 108(e).

191. *See id.* § 299.

192. *See id.* § 301. An employer or other specifically-affected interest group may also request prosecution. *See id.*

193. *See generally* Saligmann, *supra* note 4, at 1.

194. *See* §§ 298-301 StGB. These practices are defined as "crimes against fair competition." Saligmann, *supra* note 4, at 1.

195. *See* § 7 para.2 alt.1 StGB (applying to corrupt business practices of German nationals in foreign countries).

196. *See id.* §§ 298-301.

country.<sup>197</sup> Moreover, the criminal division of the German Federal Court of Justice has ruled that the bribery provisions cannot be applied if a German bribes a foreign official,<sup>198</sup> since these provisions guard and regulate only domestic interests.<sup>199</sup>

### C. CIVIL LAWS AND REGULATIONS

A general clause in the German Civil Code nullifies any act<sup>200</sup> against the standards of public morality.<sup>201</sup> These standards are not defined in the Code.<sup>202</sup> As interpreted by the Supreme Court, the clause applies to transactions resulting from the bribery of a foreign public official.<sup>203</sup> Illegal bribery transactions obligate the offender to pay damages.<sup>204</sup> This does not automatically invalidate agreements or transactions following the illegal, and therefore void, bribery agreements.<sup>205</sup>

### D. TAX LEGISLATION AND DEDUCTIBILITY

Germany's Income Tax Act<sup>206</sup> defines deductible expenses as all expenses incurred by the taxpayer in the conduct of business.<sup>207</sup> Bribes or commissions paid abroad fall into this category as "useful expenditures,"<sup>208</sup> and tax authorities usually accept the business

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197. See Saligmann, *supra* note 4, at 1.

198. See §§ 333, 334 StGB.

199. Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] (Federal Court of Justice) 8,355 (F.R.G.).

200. See § 138 Bürgerliches Gesetzbuch [BGB] (German Civil Code) (F.R.G.).

201. See Saligmann, *supra* note 4, at 2 (stating that any act against the standards of public morality is not legally binding).

202. See *id.*

203. See Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 94,268 (F.R.G.).

204. See § 826 BGB.

205. See Saligmann, *supra* note 4, at 2.

206. Einkommensteuergesetz [EStG] (Income Tax Act); see JUERGEN KILLIUS, HOST COUNTRY GERMANY 2-4 (1997) (providing an unofficial English translation and analysis of the German Tax Code) (on file with author). Dr. Killius is a partner in the law firm of Oppenhoff & Rädler, Munich. See *id.*

207. See § 4 (4) EStG.

208. See *id.* § 4(4); see also Saligmann, *supra* note 4, at 2.

judgment of the taxpayer.<sup>209</sup> The associated income, however, must be taxable in Germany.<sup>210</sup>

Section 160 of the General Tax Code<sup>211</sup> requires the taxpayer to identify the recipient of a bribe payment.<sup>212</sup> In practice, tax authorities can waive this requirement if the briber can show that compliance with the law would cause him unreasonable business damage, an assessment dependent on the subjective evaluation of the briber himself.<sup>213</sup> Tax authorities are mainly concerned with confirming that the payment was actually made to a recipient who cannot be taxed in Germany.<sup>214</sup> A Ministry of Finance regulation forbids the competent tax authorities to request the name of the bribe recipient in these circumstances.<sup>215</sup> Since 1996, a new provision of the Income Tax Act forbids the deductibility of domestic bribes "if the briber or the recipient has been convicted for paying this bribe, in a court of law."<sup>216</sup> Given that few corruption cases ever make it to court or result in a conviction, the change has been called a "paper tiger."<sup>217</sup> The prospect of the new tax provision being applied to foreign bribes is even more remote.<sup>218</sup>

Information in German tax files about bribe payments may not be made available to other countries for any non-tax-related matters.<sup>219</sup> Germany is not alone in forcing requesting countries to comply with

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209. See KILLIUS, *supra* note 206, at 1. According to a spokesman for the Federation of German Industry, foreign bribes are more aptly characterized as "marketing costs," not bribes. See Earle, *supra* note 1, at 235.

210. See KILLIUS, *supra* note 206, at 1.

211. Abgabenordnung [AO] (German Tax Code) (F.R.G.).

212. See § 160 AO.

213. See Saligmann, *supra* note 4, at 2.

214. See KILLIUS, *supra* note 206, at 2.

215. See Anwendungserlaß des BMF zu § 160 AO Rdn. 4; see also Saligmann, *supra* note 4, at 2.

216. § 4(5)(10) EStG.

217. Saligmann, *supra* note 4, at 2.

218. See KILLIUS, *supra* note 206, at 3.

219. See Saligmann, *supra* note 4, at 3 (discussing how requesting countries obtain information).

stringent rules on information exchange.<sup>220</sup> The tax and bank secrecy restrictions in Germany, Switzerland, and other OECD Member countries are an obstacle to international cooperation in the fight against corruption.<sup>221</sup>

#### E. LEGISLATIVE AND POLITICAL DEVELOPMENTS SINCE 1994

Germany has a bicameral parliament, with a legislative body, or lower house, called the Bundestag, and an upper house called the Bundesrat, which represents the sixteen German states.<sup>222</sup> In September 1998, voters in the German general election dramatically changed the political composition of the country's parliamentary bodies, ending the sixteen-year era of Chancellor Helmut Kohl and the conservative Christian Democratic Union ("CDU")/Christian Social Union ("CSU") coalition.<sup>223</sup> The Sozialdemokratische Partei Deutschlands ("SPD"), led by Gerhard Schroeder, soundly defeated the incumbent government, winning the election with 41% of the vote to 35% for the CDU/CSU.<sup>224</sup> The incoming government will consist of a governing coalition between the SPD and the Greens, and this leftist-alliance will command a twenty-one seat majority in the new Bundestag.<sup>225</sup>

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220. See *id.*; see also JOHANNES BOHNEL, BLANCHIMENT D'ARGENT ET SECRET BANCAIRE [MONEY LAUNDERING AND BANKING SECRECY] 153-54 (Paolo Bernasconi ed. 1996) (discussing the confidentiality of fiscal and tax matters in various countries in the context of non tax-related proceedings).

221. See Saligmann, *supra* note 4, at 3 (discussing international agreement constraints).

222. See GERMANY: EIU COUNTRY PROFILE, *supra* note 176, at 9 (describing the function of the Bundesrat, which approves the budget and laws affecting the Länder).

223. See William Drozdiak, *Schroeder Defeats Kohl in Historic German Vote; Election Restores Left to Power After 16 Years*, WASH. POST, Sept. 28, 1998, at A1 (discussing the results and implications of the German elections); Greg Steinmetz & Camille Rohwedder, *Germany's Schroeder Deals Kohl Firm Defeat*, WALL ST. J., Sept. 28, 1998, at A20 (asserting that continued high unemployment was the most important political issue for German voters).

224. See Steinmetz & Rohwedder, *supra* note 224 (citing the voting percentages guaranteeing the SPD's victory); see also Drozdiak, *supra* note 224 (noting the high voter turnout of 81.5% in the German election).

225. See William Drozdiak, *Socialists Seek Coalition with German Greens*, WASH. POST, Sept. 29, 1998, at A1 (announcing Chancellor-elect Schroeder's

In its opposition role, the SPD adopted a generally tougher stance than the CDU/CSU on bribery and corruption issues.<sup>226</sup> In March, 1995, the SPD proposed tax regulations to combat corruption.<sup>227</sup> The party advocated the non-deductibility of bribery money, separate enlistment of bribe expenditures, and regulations enabling German financial authorities to inform public prosecutors of suspected bribery cases.<sup>228</sup> In May 1995, the SPD opposition party proposed a parliamentary resolution asking the coalition to implement the OECD Recommendations.<sup>229</sup> Later in the year, the SPD presented draft legislation for an anti-corruption law that would essentially revolutionize German law enforcement instruments and procedures in domestic bribery cases.<sup>230</sup> The proposed legislation included longer statutes of limitation, stiffer penalties, seizures of property, and reporting inducements.<sup>231</sup>

In response to this initiative, a government agency, the Conference of State Ministers of the Interior, advanced a number of distinct steps to prevent domestic corrupt practices.<sup>232</sup> Presumably the administrative proposals apply to economic sectors like the construction industry, where corruption and kickbacks are

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intention to form a coalition government with the environmentalist Greens party, ensuring a comfortable majority in the new 669-member Bundestag); Michael Adler, *German Chancellor-to-be Schroeder Headed for Leftist Coalition*, AGENCE FR.-PRESSE, Sept. 28, 1998, available in 1998 WL 16607986 (describing the SPD-Greens meeting following the election results); Kevin McElderry, *A Week on, Schroeder Looking Like Chancellor*, AGENCE FR.-PRESSE, Oct. 4, 1998, available in 1998 WL 16612278 (noting the beginning of formal coalition talks between the SPD and the Greens).

226. See Saligmann, *supra* note 4, at 3 (describing the 1995 anti-corruption legislative initiatives introduced by the SPD).

227. See *id.*

228. See *id.*

229. See *id.*

230. See *id.*

231. See *id.* (noting that in limited cases, the Bundesrat also wanted to strengthen surveillance measures against suspected offenders by means of wire tapping and bugging.)

232. See Saligmann, *supra* note 4, at 3-4 (recounting bribery scandals involving two hundred employees of Opel car manufacturing, and hundreds of doctors bribed by artificial heart valve producers).

pervasive.<sup>233</sup> The proposals included job rotation in corruption-prone units; separation of planning, surveying, and implementation duties, especially in the areas of tendering and contract awards; improved transparency of the administrative decision-making process; and the establishment of Codes of Conduct.<sup>234</sup>

These tentative initiatives led to 1996 revisions of the German Income Tax Code, supposedly abolishing the tax deductibility of illegally paid bribes<sup>235</sup> punishable by the Penal Code.<sup>236</sup> Germany's finance authorities are now required to apprise public prosecutors about suspected bribery cases.<sup>237</sup> Some observers view the change as a positive step by the German political establishment.<sup>238</sup> They note that a cardinal tenet of the tax system, the "principle of moral neutrality," is supplanted by the change in the tax law.<sup>239</sup>

In June 1996, the ruling CDU/CSU coalition presented a draft bill embracing public prosecution of inter-business bribery and tougher criminal sentences,<sup>240</sup> with measures confined to domestic

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233. See Peter Norman, *A Hidden Hand of Corruption*, FIN. TIMES, June 5, 1996, at 27 (describing the extent of recently-publicized domestic corruption within Germany, as scandals involving engineering, shipbuilding, and construction industries make headlines). Reports detail bribery on a "Sicilian scale" by building companies to government officials to secure lucrative public works contracts, which are estimated to generate DM10 billion annually in bribes. See *id.* Bribes are big business between building contractors, sub-contractors, and municipal officials. See *id.* A DM108 million equipment contract for a city's sewer works was obtained with payments in DM3.24 million in bribes. See *id.*

234. See Saligmann, *supra* note 4, at 4.

235. See § 4(5) EStG (describing illegally paid bribes as those paid to German domestic public officials). These bribes are not tax deductible if there is a criminal conviction for either the briber or the recipient. See *supra* note 216 and accompanying text (noting the non-deductibility of the bribe if either the briber or the recipient is criminally convicted).

236. See §§ 333, 334 StGB.

237. See Saligmann, *supra* note 4, at 4 (describing the turnaround of the income tax system with the abolition of the tax deductibility of illegally paid bribes). But see Telephone Interview with Carel Mohn, *supra* note 182 (noting that the tax authorities are not utilizing this possibility for cooperation with public prosecutors).

238. See *id.*

239. *Id.*

240. See *id.*



corruption.<sup>241</sup> The SPD opposition party introduced a similar bill.<sup>242</sup> The German Parliament extensively debated the two opposing draft bills and sent them to the appropriate parliamentary committee for further consideration.<sup>243</sup> The government enacted the so-called Law to Combat Corruption in June 1997.<sup>244</sup> After signing the 1997 OECD Convention, the German federal government introduced ratification legislation on 20 April 1998,<sup>245</sup> together with a draft law that would penalize the bribery of foreign public officials by German citizens, but not by companies or organizations.<sup>246</sup> On 24 June 1998, the German Parliament passed the OECD ratification law by a large majority, with corresponding changes in domestic law.<sup>247</sup>

As a result of large-scale, domestic corruption scandals and financial accounting irregularities by private firms,<sup>248</sup> the number of corruption cases brought to trial increased significantly in recent years.<sup>249</sup> Corruption crimes and activities related to German

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241. *See id.* The government declared, however, that it would extend the provisions to include public officials of the other EU-Member States, insofar as corruption is damaging to Community financial interests. *See id.*

242. *See* Saligmann, *supra* note 4, at 4.

243. *See id.* An expert hearing on the issue was organized by the Judiciary Committees of the Federal Parliament. *See id.*

244. *Id.* Members of Parliament ("MPs") of the coalition and the SPD voted for the new law, MPs of the Opposition Green Party abstained, and Socialist MPs, representing former East Germany, voted against the law. *See id.*

245. *See* Saligmann, *supra* note 4, at 4 (describing the introduction of ratification legislation by the German Parliament).

246. *See id.* (noting that the requirements of the ratification legislation do not apply to German business entities).

247. *See id.* (reporting that the implementing legislation will enter into force according to the provisions of Article 15 of the 1997 OECD Convention); *see also supra* note 166 and accompanying text (describing the relevant Article 15 provision).

248. *See* Norman, *supra* note 233, at 27. With the German economy in the doldrums, corrupt business practices were of great concern to the Kohl administration. *See id.* There is no consensus on why corruption has grown so fast in Germany during this decade. *See id.* Five managers of Siemens, the electrical and electronics company, were convicted in 1992 for giving bribes worth DM3.24 million. *See id.*

249. *See* Norman, *supra* note 233, at 27 (noting that prosecutorial resources to deal with corruption cases are woefully inadequate). More prosecutors would result in a huge increase in the number of cases tried. *See id.*

unification involved massive fraud mostly by West German companies.<sup>250</sup> Spectacular corruption practices involving leading industrial companies are also receiving prominent media attention.<sup>251</sup> To deal with the apparent explosion in domestic bribery cases, German states have formed specialized public prosecutor offices in Berlin, Frankfurt, Munich, and Wuppertal.<sup>252</sup> There are ongoing investigations involving hundreds of persons and corrupt enterprises spanning ten years.<sup>253</sup> The extent of institutionalized corruption within Germany itself surprises even normally well-informed Germans.<sup>254</sup> In addition, legal, untaxed, bribes related to foreign trade amount to seven billion deutsch marks a year.<sup>255</sup>

The current severe unemployment problems in Germany<sup>256</sup> may dampen societal enthusiasm and willingness to enforce laws

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250. See Telephone Interview with Carel Mohn, *supra* note 182 (discussing bribery and economic crime generated by the enormous subsidies spent on reconstructing the East German economy). West German "advisors" sold overpriced and vastly oversized sewage treatment plants to East German municipalities. See *id.*; see also Wolf, *supra* note 7 and accompanying text (describing privatization and corruption in the FSU and Eastern Europe).

251. See Saligmann, *supra* note 4, at 4-5.

252. See *id.* at 4; see also Telephone Interview with Carel Mohn, *supra* note 182 (specifying that the respective state authorities, not the federal government, took the initiative in forming corruption prosecution offices).

253. See Norman, *supra* note 233. Wolfgang Schaubenstein is a German prosecutor who believes that there is greater tolerance of corruption in Germany than in other European societies. See *id.* He speaks of the infamous Otto Lambsdorff, a politician fined in connection with bribes made by industrial groups to his party. See *id.* Lambsdorff's trial and conviction did not seem to matter to voters or the party, as he was subsequently re-elected as party leader. See *id.* Schaubenstein says that companies are still claiming bribes as tax deductions, and are being allowed to do so despite the OECD Recommendations and the so-called change in German tax law forbidding deductibility in the event of a criminal conviction. See *id.*

254. See Saligmann, *supra* note 4, at 4.

255. See Norman, *supra* note 233 (quoting estimates by Werner Rügemar, an author of a 1996 book on corruption in Germany).

256. See William Drozdiak, *Germany's Lost Luster*, WASH. POST, Oct. 11, 1997, at A1. Germany has over 12% unemployment, or 5.6 million people. See *id.* This type of economic problem is new for Germany, an industrialized nation envied by other Western nations since the nineteen-sixties. See *id.*

pertaining to foreign business deals.<sup>257</sup> It is likely that the newly-elected government will foster a less tolerant corruption environment in the political economy.<sup>258</sup> Without a change in Germany's permissive criminal and tax laws, their application to overseas bribery will continue the inherent double standard in international bribery's supply side.<sup>259</sup> The extent of German domestic corruption also indicates that corruption is not just a developing country dilemma.<sup>260</sup>

## V. SWITZERLAND: IMPLICATIONS FOR BANK SECRECY LAWS

### A. HISTORY, CORRUPT DICTATORS, AND ABUSES

Switzerland and Germany share a common border, and significant historical, cultural, and trade ties also bind these two democratic OECD Member countries.<sup>261</sup> There are, however, important differences in their respective international perspectives, with twentieth-century Germany initiating two world wars and

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257. See Saligmann, *supra* note 4, at 4.

258. See Telephone Interview with Carel Mohn, *supra* note 182 (noting that in Germany, the initial general assessment of the SPD by anti-corruption organizations like TI is positive); see also Drozdak, *supra* note 225 (reporting Schroeder's stated desire to push for global financial reform).

259. See Oscar Arias Sanchez, The TI Source Book: Foreword, at 4 (visited Sept. 20, 1997) <<http://www.transparency.de./sourcebook/foreword.html>> (analyzing the double standard applied to corruption in the developed and developing world). Condoning bribery overseas while condemning the practice domestically poses danger to both sides, as rich nations that reserve ethics for the domestic stage cannot expect to be taken seriously abroad. See *id.* Sanchez also notes that while democracies are not immune to corruption, the existence of democratic institutions like freedom of expression and the press can best expose and attack its practice. See *id.* at 1.

260. See Bowley et al., *supra* note 2; *supra* notes 233, 248 and accompanying text (describing the extent of corruption in various sectors of the German economy).

261. See ECONOMIST INTELLIGENCE UNIT, SWITZERLAND: EIU COUNTRY PROFILE 10, 30 (1998) [hereinafter SWITZERLAND: EIU COUNTRY PROFILE] (describing wartime and economic ties between the two western democracies, and asserting that Germany is Switzerland's single largest trade partner).

Switzerland remaining resolutely neutral.<sup>262</sup> In addition, while manufacturing is important in the Swiss economy, the country's prosperity and high standard of living are based on earnings from banking and tourism services.<sup>263</sup>

To preserve Switzerland's historical tradition of neutrality, the individual right of financial privacy has been a hallowed principle of the Swiss banking system for centuries.<sup>264</sup> Created to protect Huguenots fleeing religious persecution in seventeenth-century France,<sup>265</sup> bank secrecy laws in Switzerland evolved in the 1930s and 1940s to accommodate the needs of European Jews and others to safeguard financial assets threatened by the Nazi regime.<sup>266</sup> In the process, Switzerland has built one of the most efficient and competitive banking industries in the world.<sup>267</sup> Nevertheless, misconceptions persist about the nature of its bank secrecy laws.<sup>268</sup>

In recent decades, critics have questioned the truth of Switzerland's noble bank secrecy rationale.<sup>269</sup> Ferdinand Marcos of

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262. See *id.* at 8-10 (noting Switzerland's pride in the traditional neutrality that, unlike Germany, kept it out of both World War I and II, and in recent decades, out of the EU).

263. See *id.* at 12.

264. See DENNIS CAMPBELL, INTERNATIONAL BANK SECRECY 663 (1992).

265. See *id.* at 663; see also Moser, *supra* note 99, at 321.

266. See CAMPBELL, *supra* note 264, at 664.

267. See Paolo Grassi & Daniele Calvarese, *The Duty of Confidentiality of Banks in Switzerland: Where it Stands and Where it Goes. Recent Developments and Experience. The Swiss Assistance to, and Cooperation with the Italian Authorities in the Investigation of Corruption among Civil Servants in Italy (The "Clean Hands" Investigation): How Much is Too Much?* 7 PACE INT'L L. REV. 329, 331, 336 (1995) (insisting that abuses of the Swiss bank secrecy system are only an insignificant component of total banking activities).

268. See CAMPBELL, *supra* note 264, at 673 (explaining that one popular and erroneous belief relates to the anonymity of Swiss bank accounts). Anonymous numbered accounts do not exist. See *id.* The name of the account holder is always known to at least one bank official. See *id.*

269. See Grassi & Calvarese, *supra* note 267, at 336. See generally, Richard T. Preiss, *Privacy of Financial Information and Civil Rights Issues: The Implications for Investigating and Prosecuting International Economic Crime*, 14 DICK. J. INT'L L. 525 (1996) (discussing the tensions between the legitimate needs of law enforcement and the desire for confidentiality of an individual's financial affairs). Preiss concludes that bank secrecy rules grounded in privacy and confidentiality rights are more concerned with economic, political, and sovereignty rights of

the Philippines<sup>270</sup> and Mobutu Sese Seko of Zaire,<sup>271</sup> two of the world's notoriously corrupt dictators,<sup>272</sup> funneled millions of dollars looted from national treasuries of capital-poor developing countries into Swiss bank accounts.<sup>273</sup> Members of the family of Benazir Bhutto, former prime minister of Pakistan, recently had their Swiss accounts frozen in connection with corruption inquiries.<sup>274</sup> Switzerland has also been fiercely criticized as the money laundering center of the world,<sup>275</sup> mainly because of its long resistance to United States and European efforts to enlist its cooperation in fighting international economic crime.<sup>276</sup>

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nations than with civil rights. *See id.*

270. *See* Holberton, *supra* note 6, at 6 (discussing Marcos' corrupt theft of millions subsequently held in Swiss bank accounts).

271. *See* Wrong, *supra* note 6, at 7 (describing Mobutu Sese Seko of Zaire as "a walking bank balance with a leopard skin cap," and attributing the description to Bernard Kouchner, a former French humanitarian aid minister). The article discusses Mobutu's corrupt theft of millions of dollars from Zaire's state coffers, making the country one of the first to be described as a kleptocracy. *See id.* Switzerland is trying to repair the damage to its banking industry's reputation for integrity by acknowledging past acceptance of assets "of dubious origin from heads of state [like Mobutu]." William Hall, *Cotti Reassures Swiss Bankers*, FIN. TIMES, Sept. 6, 1997, at 2. Flavio Cotti, the Swiss foreign minister, stated that it was "in the deepest interests of the financial centre to keep such monies at a distance." *Id.* Nevertheless, Switzerland is apparently the banker of choice for African heads of state, whose account assets in Swiss banks total twenty billion dollars. *See* Earle, *supra* note 1, at 227 (describing how this element of the supply side of bribery and the accommodation of corruptly-obtained assets hurts the citizens and country of the assets' origin).

272. *See* Kofele-Kale, *supra* note 6, at 45, 53.

273. *See id.*

274. *See* Farhan Bokhari & William Hall, *Bhutto Bank Account in Switzerland Frozen*, FIN. TIMES, Sept. 16, 1997, at 24.

275. *See* JEAN ZIEGLER, LA SUISSE LAVE PLUS BLANC [THE SWISS WASH IT WHITER] 16 (1990).

276. *See* Barbot, *supra* note 54, at 201 n.101 (discussing the inherent conflict between anti-money laundering legislation and Swiss banking and criminal laws). In an effort to protect the integrity of its banking system, and in response to foreign pressure to combat international financial criminal activity and money laundering, Switzerland signed international agreements with other countries. *See* Moser, *supra* note 99, at 332. A treaty with the United States was signed in 1975. *See id.*; *see also* Treaty on Mutual Assistance in Criminal Matters, May 25, 1975, U.S.-Switz., 27 U.S.T. 2019. Disclosure of financial information was not permitted unless the crime being investigated was also a crime in Switzerland. *See* Moser,

## B. LEGAL BASIS FOR SWISS BANK SECRECY

*1. The Civil Code, Code of Obligations, and Federal Banking Act*

Bank secrecy laws are enshrined in a number of Swiss legal codes.<sup>277</sup> In the Swiss Civil Code, Article 28(1) refers to a person's right to be free from invasions of privacy, and specifies: "Whosoever suffers an illegal offense against his person is entitled to ask the judge for help against anyone joining in the offense."<sup>278</sup> The duty of secrecy also derives from the contractual relationship between the bank and its client, and the duty of loyalty to be observed by the bank as agent.<sup>279</sup> Article 47 of the Bank and Savings Bank Act of 1934<sup>280</sup> and the Penal Code<sup>281</sup> are unique to Switzerland in the area of bank secrecy.

*2. Criminal Liability*

A violation of bank secrecy in Switzerland subjects the offender to criminal penalties and is a state crime.<sup>282</sup> Article 47<sup>283</sup> stresses the almost absolute duty of banking employees to abide by strict confidentiality principles regarding the accounts of holders, and delineates severe penalties for infringement of professional secrecy.<sup>284</sup> Article 273 of the Penal Code is intended to guard Swiss

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*supra* note 99, at 333 (discussing the dual criminality requirement).

277. See CAMPBELL, *supra* note 264, at 665-70 (describing the scope of Swiss bank secrecy laws).

278. Code civil suisse [CC] art. 28(1) (Switz.); see also CAMPBELL, *supra* note 264, at 665-68 (providing an unofficial English translation of Swiss bank secrecy laws).

279. Code des Obligations [CO] art. 394, (Switz.). See Moser, *supra* note 99, at 326. Article 398 requires the agent to exercise the same care as the employee must exercise. See CO art. 398(2).

280. See Bank and Savings Bank Federal Act of June 8, 1934, art. 47 (Switz.) [hereinafter Banking Act] in CAMPBELL, *supra* note 264, at 666-67 (providing an unofficial English translation of Article 47).

281. Code pénal suisse [CP] art. 273 (Switz.).

282. See Banking Act, *supra* note 280, art. 47 (Switz.); see also CAMPBELL, *supra* note 264, at 666-67.

283. See Banking Act, *supra* note 280, art. 47 (Switz.).

284. See *id.* Article 47 provides:

public interests and economic sovereignty<sup>285</sup> by imposing the duty of bank secrecy to limit the intrusion of foreign countries.<sup>286</sup>

### 3. *Exceptions and Conflict: Article 305bis and Article 305ter*

In 1990, Switzerland adopted Article 305(bis) on Money Laundering and Article 305(ter) on Lack of Due Diligence in Financial Transactions in the Swiss Penal Code.<sup>287</sup> Article 305(bis) criminalizes the act of laundering the monetary proceeds derived from criminal activity,<sup>288</sup> subjecting guilty individuals to punishment

Every person working at a bank has a duty to keep secrets;

Third parties who lead others to infringe the secrecy duty are also to be punished, even if the offense never takes place;

Infringement due to pure negligence, as well as intentional infringement, is to be punished;

The infringement of bank secrecy may be prosecuted by a court on its own initiative;

The penalties are a prison term not to exceed six months or a fine not to exceed Sfr. 50,000; either penalty may be cumulated;

Breach of professional secrecy remains punishable even after termination of a public or private employment relationship or the practice of a profession, and

Bank secrecy is not absolute; in specific legal circumstances, Swiss authorities are to be granted the right of access to private banking records.

Banking Act, art. 47 (Switz.).

285. See CAMPBELL, *supra* note 264, at 667.

286. See *id.* at 667-68 (noting that Article 273 provides that a person who makes business information available to foreign officials is criminally liable, and punishable by imprisonment and/or a fine).

287. See Grassi & Calvarese, *supra* note 267, at 348 (explaining that Articles 305(bis) and 305(ter) were necessary to create a legal basis for fighting organized crime).

288. See *id.* at 348, n.100. The Code states:

Whosoever undertakes actions which lend themselves to defeat the ascertainment of origin, the discovery or collection of assets which, as he knows or must assume, emanate from crime, will be subject to punishment by imprisonment or a fine.

In severe cases punishment is seclusion up to five years or imprisonment. Added to this penalty of detention is a fine of up to one million francs. A severe case is if the perpetrator: a) acts as a member of a criminal organization; b) acts as a member of a criminal organization whose purpose is the continued practice of money-laundering; c) realizes a large turnover or considerable profit from professional money laundering activities.

The perpetrator will also be subject to sentencing if he commits the principal act of

by imprisonment or a fine.<sup>289</sup> Under Article 305(ter), a bank employee who fails to verify the identity of the owner of financial assets, is also criminally liable.<sup>290</sup>

Article 305(ter), when combined with Article 47 of the Banking Code, created a dilemma for Swiss financial officers.<sup>291</sup> By requiring a banker to report suspicious activity, or money of questionable origin, Article 305(ter) essentially required a violation of Article 47 of the Banking Act.<sup>292</sup> Failure to communicate a suspicion of criminal behavior to authorities led to criminal liability for money laundering, with no legal defenses.<sup>293</sup>

Swiss legislators amended Article 305(ter) in 1994,<sup>294</sup> and changed the communication obligation of a banker to a "right."<sup>295</sup> The decision is therefore left to a banker's discretion, and resolves his dilemma. The original reporting requirement is replaced with a

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violation abroad and such act is also punishable in the place of perpetration.

CP art. 305(bis) (Switz.).

289. See Grassi & Calvarese, *supra* note 267, at 348.

290. See *id.*, n.101. The code states:

Whoever professionally accepts, keeps in safe custody, assists in the investment or transfer of assets which are the property of others and fails to apply the relative due diligence required for establishing the identity of the economic beneficiary, is subject to punishment by imprisonment of up to one year or a fine.

CP art. 305(ter) (Switz.).

291. See Moser, *supra* note 99, at 340 (explaining that Article 305(bis) and 305(ter) were passed in response to United States pressure).

292. See *id.* at 340-41 (noting that Article 305(ter) can be considered a "due diligence" provision).

293. See *id.* at 340-41 (describing Swiss attempts to maintain consistency with international norms).

294. See *id.* (noting Swiss Legislator's amending of Article 305(ter) to address conflicts between national law and international agreements).

295. See *id.* The Swiss Penal Code Article 305(ter), Marginal Note and Paragraph 2, as amended, provides:

Marginal Note: want of vigilance in financial operations and the right to communicate.

Second Paragraph: the persons designated by the first paragraph (305ter) have the right to communicate observations that enable the conclusion that assets were the proceeds of crime to the interior authority of penal pursuit and to the federal authority designated by law.

CP art. 305(ter), Marginal Note & Para. 2 (Switz.).



discretionary version,<sup>296</sup> and is less than satisfactory from the standpoint of countries anxious to curb international economic crime.<sup>297</sup>

### C. NAZI GOLD AND SWISS BANK ACCOUNTS OF NAZI HOLOCAUST SURVIVORS

More recently, in 1996 and 1997, the integrity of the Swiss banking industry was further tarnished by revelations about its wartime role in handling looted Nazi gold.<sup>298</sup> Allegations of grand larceny persist because Switzerland is also accused of hoarding the money entrusted to its banks by Jews and others who perished in Nazi concentration camps.<sup>299</sup> After World War II, Swiss banks refused to give money or information to survivors of Holocaust victims, demanding account numbers and death certificates as proof of claims.<sup>300</sup> Dormant accounts came to light in 1996,<sup>301</sup> and Swiss

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296. See Moser, *supra* note 99, at 341 (creating a resolution to the conflict between Article 305(ter) and Article 47).

297. See *id.* at 351 (explaining that the amendment to 305(ter) will not satisfy the goals of other international actors, such as the U.S. or E.U., with whom Switzerland works).

298. See Anne Swardson, *Report on Nazi Gold Extends Swiss Role; Banks Reportedly Handled \$450 Million*, WASH. POST, Dec. 2, 1997, at A20 (noting that Swiss banks processed \$450 million of the Nazis' gold during World War II, which would be worth \$4.5 billion today); David B. Ottaway, *Quest for Nazis' Loot: Dispute Focuses on Role of Swiss Banks*, WASH. POST, Dec. 8, 1996, at A1 (describing the failure of Allied negotiators to get Switzerland to acknowledge that its banks had dealt in looted gold from Germany). The wartime business transactions between Swiss banks and both Jewish Holocaust victims and their Nazi persecutors are themselves seen as corrupt. See Henry I. Sobel, *Neutrality, Morality, and the Holocaust*, 14 AM. U. INT'L L. REV. 205, 206 (1998). Rabbi Sobel asserts that Swiss laundering of then-bankrupt Germany's gold bars, conducted behind the shield of Swiss bank secrecy laws, shows opportunistic and calculating indifference to the origin and makeup of the bars. See *id.*

299. See Sobel, *supra* note 298, at 205 (describing the Holocaust as not just genocide, but as a "sinister and cynical act of larceny" by Switzerland and other nations who profited from racial slaughter and the horrors of the conflict); see also John M. Goshko, *Swiss Banks Reveal Hidden War Accounts: Funds May be Assets of Holocaust Victims*, WASH. POST, July 23, 1997, at A1; Richard Cohen, *They Danced With the Devil*, WASH. POST, July 24, 1997, at A21 (describing the creation of bank accounts by desperate Jews during World War II that were "conveniently" forgotten by the Swiss banking industry until 1996).

300. See William Drozdiak, *Swiss Banks Release New List of Accounts*, WASH.

banks have since then cooperated with a team of international auditors and accountants to locate accounts and possible survivors of original owners.<sup>302</sup> In an unprecedented departure from steadfast adherence to confidentiality principles, the banks published lists of names of account holders in leading international newspapers in 1997.<sup>303</sup>

The World Jewish Congress ("WJC"),<sup>304</sup> American Jews, and politicians<sup>305</sup> vehemently criticized the Swiss reaction to the disclosures.<sup>306</sup> Furthermore, they noted the marked differences in the

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POST, Oct. 30, 1997, at A25 (discussing the inability of survivors to pierce the veil of Swiss bank secrecy and retrieve access to the second list of 14,000 dormant accounts of Holocaust victims published in 1997 by Swiss banks).

301. See William Hall, *Swiss Bankers Uncover More Dormant Accounts*, FIN. TIMES, July 24, 1997, at 2 (describing Swiss bankers' discovery of more than twice the number of dormant accounts from World War II than they believed they had one and one-half years earlier).

302. See William Hall, *Volcker to Lead Holocaust Cash Hunt*, FIN. TIMES, July 30, 1996, at 2 (discussing the agreement by the Swiss to allow an independent search for dormant accounts to be led by Paul Volcker, former United States Federal Reserve chairman); see also William Hall, *Holocaust Victims' Accounts: Auditors Step Up Search*, FIN. TIMES, June 27, 1998, at 2. Four accounting firms and a total of 375 outside auditors are searching the wartime files of 27 Swiss banks for dormant bank accounts of Holocaust victims. See *id.* The firms are Arthur Andersen, Coopers & Lybrand, KPMG, and Price Waterhouse. See *id.*

303. See Drozdiak, *supra* note 300, at A25 (reporting publication of a second list of 14,000 dormant accounts); Hall, *supra* note 301, at 2 (stating that Swiss banks planned to publish lists of dormant accounts).

304. See Drozdiak, *supra* note 300, at A25. The World Jewish Congress ("WJC") believes that \$7 billion in "unclaimed Jewish assets" were deposited into Swiss accounts during the Nazi-era, an amount much larger than estimated by Swiss banks. See *id.* As a result, the WJC characterized Switzerland's response as begrudging, belated, and woefully inadequate. See *id.*

305. See Arthur Spiegelman, *D'Amato: Switzerland Used Holocaust Victims Assets to compensate its Citizens*, WASH. POST, Oct. 17, 1996, at A6 (reporting that Senate Banking Committee Chairman Alfonse D'Amato charged the Swiss government with using "Jewish assets to compensate its citizens" for the nationalization of properties taken from them in communist East Europe in 1949).

306. See William Hall, *UBS Guard Escapes Charges*, FIN. TIMES, Oct. 2, 1997, at 2. Security guard Christoph Meili, who saved historical files from a Union Bank of Switzerland ("UBS") shredder, was fired from his post and fled to the U.S. following alleged death threats. See *id.* Swiss prosecutors finally dropped a criminal investigation of his action in bringing the documents to a local Jewish organization. See *id.*; see also Alfred Defago, *The Swiss Defense: Slowly but Surely, We are Confronting our Past*, WASH. POST, Aug. 24, 1997, at C1.

estimations of the monetary amounts involved.<sup>307</sup> State banks in New York and California stopped dealing with Swiss banks,<sup>308</sup> and Holocaust survivors filed a consolidated class action lawsuit in the United States seeking twenty billion dollars in damages.<sup>309</sup> Following acrimonious disagreements, threats of further litigation and sanctions by associated parties,<sup>310</sup> and extraordinarily contentious negotiations

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(discussing the debate about Switzerland's wartime role, the less-than-exemplary actions taken by Swiss officials against Jews during the war, and the failings of the banking industry with regard to looted gold and bank accounts of Holocaust victims). Defago is the Swiss ambassador to the United States. *See id.* Defago notes the reactive defensiveness of Swiss leaders and citizens who are angered by arguments that Swiss wartime neutrality was opportunistic. *See id.* Some Swiss citizens feel they are being unfairly blackmailed by the World Jewish Congress's threat of a banking boycott. *See The Swiss and the Holocaust*, FIN. TIMES, Jan. 27, 1997, at 19.

307. *See The Swiss and the Holocaust*, *supra* note 300 (finding that while the WJC believes that \$7 billion in unclaimed assets were deposited and never reclaimed by Nazi concentration camp victims, Swiss banks estimate the amount to be \$30 million); *see also* John Authers et al., *Suit Filed Against Swiss Central Bank*, FIN. TIMES, July 1, 1998, at 6 (discussing a lawsuit filed by United States' lawyers against Switzerland's central bank alleging the bank's wartime handling of stolen gold and other assets). The WJC estimates that the total value of Jewish assets is between \$9 billion and \$14 billion, worth \$140 billion at 1998 prices. *See id.*

308. *See U.S. States Chided on Swiss Policy*, WASH. POST, Oct. 16, 1997, at A24, (quoting the United States Ambassador to Switzerland, who criticized the decisions of New York and California to end state dealings with Swiss banks because of the banks' handling of Holocaust bank account issues).

309. *See* Charisse Jones, *Survivor Leads Fight for Lost Holocaust Money: In Lawsuit against Swiss Banks, a Hope to do Justice to a Father's Memory*, N.Y. TIMES, Nov. 12, 1996, at B1 (reporting the class action lawsuit filed in a New York federal court by Holocaust survivor Gizella Weissshaus); Wendy R. Leibowitz, *The Swiss Bank Affair; Getting the Gnomes of Zurich to Cough Up*, 19 NAT'L L.J. 12 (1997). The civil suit asked "for \$10 billion for conversion and \$10 billion for unjust enrichment, punitive damages, and attorney fees." *See id.* The evidentiary problems facing the plaintiffs were formidable, with claims over fifty years old, and plaintiffs scattered worldwide. *See id.* The difficulties of finding records and reconstructing accounts were exacerbated by the changes that have occurred in Swiss banking, and the existence of hundreds of banks and institutions that are the products of multiple mergers over the years. *See id.*

310. *See* Bill Hall & John Authers, *The Holocaust's Final Chapter*, FIN. TIMES, June 23, 1998, at 19 (explaining the bitter arguments between the Swiss banks and lawyers in the class-action suit). Multiple parties associated with the negotiations include: the New York-based World Jewish Congress; New York City Comptroller Alan Hevesi; the nine-member Volcker Commission; 40 law firms representing

between the main parties, an eventual settlement of \$1.25 billion ended the two-year feud in August 1998.<sup>311</sup>

#### D. ITALIAN CORRUPTION: SWISS COOPERATION AND JUDICIAL ASSISTANCE

In 1992, Italian law enforcement authorities requested Swiss legal assistance in an inquiry dubbed the "Clean Hands" investigation of corruption and bribery among Italian civil servants and politicians.<sup>312</sup>

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80,000 potential claimants; and the Swiss banks. *See id.* In September, 1997, Mr. Hevesi barred UBS from underwriting a New York City bond issue in retaliation for the bank's apparent destruction of dormant accounts. *See id.* The United States Department of State condemned the city comptroller's action, because the Department feared spillover and damage to United States-Swiss relations. *See id.*; John Authers, *Swiss Banks Prepare to Fight Possible 'Nazi Gold' Sanctions*, FIN. TIMES, June 29, 1998, at 20 (reporting litigation threats by Swiss banks in the event of future sanctions imposed by United States' state and city authorities). Insults and counter-insults dominated the intense verbal exchanges. *See id.* Lawyers representing the victims denounced the amount offered as "shabby," and a Credit Suisse spokesman accused the lawyers of being motivated primarily by desires to generate fees. *See id.*; *see also* Richard Wolffe & John Authers, *Officials Warn Against Sanctions on Swiss Banks*, FIN. TIMES, June 30, 1998, at 1 (warning against the imposition of sanctions on Swiss banks by New York state and city officials). *See id.* Negotiators for the Swiss banks threatened to bring legal action to challenge the constitutionality of sanctions by a state or municipal entity like New York, asserting that foreign sanctions are the province of the federal government. *See id.*; *see also* John Authers, *US Pension Funds Set to Impose Sanctions on Swiss Banks*, FIN. TIMES, July 2, 1998, at 1 (announcing the decision of officials of the three largest public pension funds in the United States to impose sanctions on Credit Suisse and UBS). Officials of California state pension funds planned to stop investing with Swiss banks. *See id.* New York state and city comptrollers threatened to block Swiss banks from underwriting municipal bonds and from the pension fund business generally. *See id.*

311. *See* James Bone, *Swiss Pay \$1.25 bn To End Feud with Holocaust Jews*, TIMES (London), Aug. 14, 1998, at 13 (recounting the settlement and the bitter dissension between lawyers for Nazi Holocaust survivors, Jewish organizations, American states and municipalities, Swiss banks, and the Swiss government, about the unacceptability of initial Swiss monetary offerings); John Authers, *Swiss Banks Agree \$1.25 bn Payment over Holocaust*, FIN. TIMES, Aug. 13, 1998, at 1 (noting that the agreement averts the prospect of drawn-out litigation in United States courts); Michael Hirsh, *After 50 Years, a Deal*, NEWSWEEK, Aug. 24, 1998, at 41 (describing the key role of United States judge Edward Korman in brokering a deal between the fractious parties).

312. *See* Grassi & Calvarese, *supra* note 267, at 358-71 (detailing the facts and process of the Italian investigation); *see also* *Corruption Continues Despite Crackdown, says Scalfaro*, AGENCE FR.-PRESSE, Nov. 10, 1995, available in 1995

Before requesting Swiss assistance, Italian investigators found evidence that the payment of bribes had occurred by way of money transfers between accounts in Swiss banks.<sup>313</sup> Swiss banks and accused account holders appealed decrees of the cooperating Instruction Judge and Swiss Prosecutor relating to the disclosure of information and seizure of assets.<sup>314</sup>

The Swiss Court of Appeals partially confirmed the judicial decree against thirteen of forty-four investigated persons,<sup>315</sup> conditioned execution against seventeen others on the supply of further information by Italian authorities,<sup>316</sup> and repealed the decree against the remaining fourteen persons.<sup>317</sup> The Swiss Supreme Court upheld the Court of Appeals decisions.<sup>318</sup>

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WL 11468958 (noting remarks of then Italian President Oscar Scalfaro about continuing corruption in Italy, despite the judicial "Clean Hands" investigations of more than 4000 people – politicians, bankers, civil servants, judges, designers, and military).

313. See Grassi & Calvarese, *supra* note 267, at 358.

314. See *id.* at 364-70 (explaining that the applicable law regarding judicial assistance between Switzerland and Italy is the European Convention, supplemented by domestic law).

315. See *id.* at 367.

316. See *id.*

317. See *id.*

318. See Grassi & Calvarese, *supra* note 267, at 371. The basis and limits of Swiss bank secrecy law were further clarified by the Swiss Supreme Court in a more recent case, which held that absolutism must yield to Swiss international obligations. See *Switzerland: Limits of Swiss Banking Secrecy*, 16 INT'L FIN. L. REV. 50 (1997), available in LEXIS, Legnws Library, Allnws File. An Italian customer in the "Clean Hands" probe opposed the order requiring several banks to disclose information about accounts of persons being investigated. See *id.* He argued that: 1) Bank secrecy is a right protected by the Swiss Constitution; and 2) Bank secrecy prevails over Italy's interest in prosecuting wrongdoers as a matter of Swiss national policy. See *id.* The Federal Supreme Court rejected both arguments. See *id.* The Court held that 1) Bank secrecy is not a constitutional right, only a right protected by statutory provisions; and 2) the right does not generally prevail over competing interests, but may have to take second place to Swiss legal obligations arising out of international treaties. See *id.* In addition, while mere disclosure of the data of an account-holder does not endanger the vital state interests of Switzerland, safeguarding criminal money accounts damages its reputation. See *id.* As long as requests for judicial assistance in criminal matters do not infringe upon human or civil rights, Swiss bank secrecy does not provide a basis for refusal. See *id.*

The importance of the banking sector to Switzerland's economy is undisputed.<sup>319</sup> While abusing the system, corrupt leaders and criminals benefited from its protections.<sup>320</sup> In the last decade, Switzerland promulgated internal controls and laws to prevent continuing abuse.<sup>321</sup> Due diligence<sup>322</sup> is now a right of bankers.<sup>323</sup> Confidentiality principles have survived intact.<sup>324</sup> To the Swiss, their abrogation is as untenable as abolishing Miranda rights in the United States even though their strict application has resulted in the release of murderers.<sup>325</sup> In the wake of the Holocaust disclosures, it is probable that the OECD bank secrecy provision<sup>326</sup> will increase existing international pressure on Switzerland to execute its bank secrecy laws in a less absolute manner.<sup>327</sup>

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319. See Hall, *supra* note 271, at 1. Flavio Cotti, Switzerland's foreign minister, stated that the Swiss government must stand by the Swiss banking sector "in the interests of the entire country." See *id.* The Swiss banking industry is a "central pillar of the Swiss economy," generating 10% of gross domestic product, 11% of tax revenues, and employing 108,000 people. See *id.* at 1-2.

320. See Grassi & Calvarese, *supra* note 267, at 332.

321. See discussion *supra* Part VII.B.3 (discussing the money laundering provisions of the Swiss Penal Code).

322. See Code pénal suisse [CP] art. 305(ter) (Switz.) (defining due diligence as establishing the identity of account holders and being alert for signs of assets' criminal origin).

323. See CP art. 305(ter), Marginal Note and Para. 2 (Switz.) (giving bankers the right to communicate suspicions of criminality, but not requiring them to do so); see also *supra* note 295 and accompanying text (describing art. 305ter, as amended by the Swiss legislature in 1994).

324. See Grassi & Calvarese, *supra* note 267, at 372 (noting that the 1994 amendments ensure the survival of confidentiality principles).

325. See *id.* at 332.

326. See 1997 OECD Convention, *supra* note 145, art. 9.3.

327. See *supra* note 284 and accompanying text (describing the stringent provisions of Article 47 of the Swiss Banking Act).

## VI. RECOMMENDATIONS

### A. THE UNITED STATES AND OECD MEMBER COUNTRIES

The ratification and implementation of the 1997 OECD Convention<sup>328</sup> will require compromise by the United States, a nation whose goal of "leveling the playing field" is the driving force behind this historic agreement. The United States should not utilize the 1997 OECD Convention's jurisdictional provisions to expand the FCPA on very broad terms. Congress should promptly approve the Clinton administration's jurisdictional "mirror-image" proposal<sup>329</sup> by amending the FCPA for the second time in its twenty-year history.<sup>330</sup> The amendment will require the adoption of nationality jurisdiction in line with the United States' OECD partners. A comparative analysis of United States' law and the 1997 OECD Convention reveals similarities and differences between the FCPA and the agreement's provisions.<sup>331</sup> The 1997 OECD Convention's broader and narrower aspects have implications for the United States and its OECD partners,<sup>332</sup> particularly in the area of jurisdiction.<sup>333</sup>

First, the OECD measures embrace a broader category of bribe payors than the FCPA,<sup>334</sup> and proscribe corrupt payments by any person acting in whole or in part within a country's borders.<sup>335</sup> The United States must therefore amend the FCPA to cover the actions of any person or entity, regardless of nationality or domicile, if the

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328. See *supra* notes 165-67 and accompanying text (describing the ratification and implementation process).

329. See Low & Burton, *supra* note 62.

330. See *supra* note 80 and accompanying text (recounting 1988 Congressional passage of the OTCA, amending the FCPA).

331. See Low & Burton, *supra* note 62; *supra* notes 170-73 and accompanying text (discussing the differences between the OECD agreement and the FCPA).

332. See *id.*; see also Lucinda A Low, *Historic OECD Anti-bribery Pact Signed by 33 Countries*, 1 TRANSLEX 6 (1998) (comparing the 1997 OECD Convention and the FCPA and discussing implementation, ratification, and implications of the Convention for the United States).

333. See Low & Burton, *supra* note 62.

334. See 15 U.S.C. §§ 78dd-1-2 (1994) (defining issuers and domestic concerns and the FCPA's applicability to both groups).

335. See 1997 OECD Convention, *supra* note 145, arts. 1.1, 4.1.

actions have a sufficient nexus to United States' territory.<sup>336</sup> In addition, the United States must determine the extraterritorial scope of the Convention according to its own jurisdictional legal principles.<sup>337</sup> Under the FCPA, jurisdiction is based primarily on the nationality principle in conjunction with the requirement of a nexus to United States commerce for domestic concerns<sup>338</sup> and issuers.<sup>339</sup> In contrast, civil law OECD Member countries assert jurisdiction on the nationality principle alone,<sup>340</sup> holding nationals accountable

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336. See *id.*; see also Low, *supra* note 332, at 7 (discussing the implications of the 1997 OECD Convention's broader provisions for the United States).

337. See 1997 OECD Convention, *supra* note 145, arts. 4.2, 4.4; see also Low & Burton, *supra* note 62 (discussing the jurisdictional implications of the OECD anti-bribery pact for the United States); JORDAN PAUST ET AL., INTERNATIONAL CRIMINAL LAW 116-40 (1996) (discussing existing bases of jurisdiction in international law, in particular the principles of nationality and territorial jurisdiction). Under the nationality principle, a state is competent to prescribe laws regulating the conduct of its nationals, wherever and whenever they commit offenses. See *id.* at 122. The territorial principle of jurisdiction recognizes 1) subjective territorial jurisdiction, where offenses occur within a state's borders; and 2) objective or "impact" territorial jurisdiction, involving extraterritorial acts (*i.e.* acts committed outside the United States) that are intended to produce and actually do produce effects within the United States. See *id.* at 123-27; see also *United States v. Fernandez*, 496 F.2d 1294, 1296 (5th Cir. 1974); *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal. 1981) (recognizing the intent and effects theories as bases for United States' jurisdiction); *United States v. Yunis*, 681 F.Supp. 896, 899-903 (D.D.C. 1988) (summarizing the five traditional bases of jurisdiction over extraterritorial crimes under international law). In addition to territoriality and nationality principles, the three other general principles of jurisdiction are 1) protective jurisdiction, which bases jurisdiction on injury to the national interest; 2) universal jurisdiction, which confers jurisdiction in any forum having physical custody of a perpetrator of particularly heinous crimes; and 3) passive personal jurisdiction, where jurisdiction is based on the crime victim's nationality. See PAUST, *supra* at 130 (excerpting *United States v. Yunis*); see also Low et al., *supra* note 132, at 277 n.121 (1998) (noting the five international principles of jurisdiction). The discussion focuses on the similarity between the OAS and OECD Conventions in the area of jurisdiction, and analyzes the jurisdictional changes and challenges that both Conventions pose for the United States. See *id.* at 274-78.

338. See 15 U.S.C. § 78dd-2 (1994); see also Low et al., *supra* note 132, at 276 n.119 (noting other countries' criticism of the United States' overly-broad assertion of jurisdiction over foreign corporations through their United States subsidiaries).

339. See 15 U.S.C. § 78dd-1 (1994); see also Low et al., *supra* note 132, at 276 n.119.

340. See Low & Burton, *supra* note 62 (discussing the jurisdictional reach of



worldwide, but not subjecting non-nationals to extraterritorial jurisdiction.<sup>341</sup>

The 1997 OECD Convention's application to all persons, coupled with existing jurisdictional principles under the FCPA's commercial link, would inordinately expand the FCPA's extraterritorial reach beyond that of civil-law countries.<sup>342</sup> Such an extension of jurisdiction would encompass foreign subsidiaries of United States companies,<sup>343</sup> as well as foreign persons and entities previously not bound by the act,<sup>344</sup> creating new asymmetries between the United States and its international business competitors.<sup>345</sup>

In the United States, implementing legislation must therefore amend the FCPA to ensure conformity with the Convention's provisions.<sup>346</sup> The Clinton administration proposes the adoption of "mirror-image" implementation in the jurisdictional sphere and the elimination of the FCPA's territorial nexus requirement.<sup>347</sup> Under this proposal, an amended FCPA would replicate the nationality jurisdiction principle,<sup>348</sup> and non-nationals would not be subject to United States jurisdiction.<sup>349</sup>

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civil-law nations); *see also* Low et al., *supra* note 132, at 276 (describing the differences between United States jurisdiction under the FCPA and nationality jurisdiction in civil-law countries).

341. *See* Low et al., *supra* note 132, at 276 (differentiating between nationality jurisdiction and United States jurisdiction under the FCPA).

342. *See* Low & Burton, *supra* note 62 (noting the dilemma created for the United States because of the OECD Member countries' reliance on nationality jurisdictional principles).

343. *See* Chaudri, *supra* note 5, at 259 (discussing the respective scopes of the FCPA and the 1997 OECD Convention and noting that the United States will potentially be able to directly prosecute international subsidiaries of American companies if it ratifies the Convention).

344. *See* Low & Burton, *supra* note 62.

345. *See id.* (identifying the excessively extraterritorial reach of the combined FCPA and OECD provisions); *see also* Low, *supra* note 332, at 8 (noting the irony of an agreement originally intended to "level the playing field" inadvertently creating new competitive imbalances).

346. *See* Low & Burton, *supra* note 62 (identifying the Convention's requirement for signatories to enact and implement proper laws).

347. *See id.* (describing the legislative package that the administration submitted to Congress).

348. *See id.* (defining the national jurisdiction/principle under which nationals

Second, signatories to the 1997 OECD Convention adopted an expanded definition of bribery.<sup>350</sup> This definition applies to money payments made not just to obtain and retain business<sup>351</sup> but to secure "other improper advantages"<sup>352</sup> like tax or regulatory benefits or environmental waivers.<sup>353</sup> The Clinton administration's proposed amendments to the FCPA recommend the codification of this principle.<sup>354</sup> Congress should avail itself of the opportunity to expand the reach of anti-bribery laws.

Third, the Convention broadly defines "foreign public officials," covering officials and employees in all branches and instrumentalities of government and in state-owned enterprises.<sup>355</sup> Legal commentators believe that the more expansive standard for qualification as a state-owned entity, possibly encompassing subsidized private companies, while theoretically attractive, could be difficult to apply.<sup>356</sup> The United States should encourage countries to

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are held accountable on a world-wide basis, but where non-nationals are not subject to extraterritorial jurisdiction); see also Low et al., *supra* note 132, at 274-78 (discussing the similarities and challenges of jurisdictional provisions for the United States under the OAS and OECD Conventions, and advising the U.S. not to retain the nexus to commerce provision of the FCPA).

349. See Low & Burton, *supra* note 62.

350. See 1997 OECD Convention, *supra* note 145, art. 1.1; see also Low & Burton, *supra* note 62 (noting the similarity of the Convention's definition of bribery to the interpretation by United States' courts).

351. See 1997 OECD Convention, *supra* note 145, art. 1.1.

352. See *id.*

353. See Low & Burton, *supra* note 62 (comparing the 1997 OECD Convention and the FCPA).

354. See *id.*

355. See 1997 OECD Convention, *supra* note 145, art. 1.4(a). As in the FCPA, the degree of ownership or control necessary for an entity to qualify as a parastatal is not defined in the Convention. See Low, *supra* note 332, at 7 (noting that language in the accompanying commentaries to the 1997 OECD Convention suggests that the test is probably narrower than the one applied by the United States); see also *Commentaries on the Convention Combating Bribery of Foreign Public Officials in International Business Transactions* ¶ 14-15, adopted by the Negotiating Conference, November 21, 1997 [hereinafter *Commentaries*]. The Commentaries indicate that private companies could be treated as parastatals or semi-state entities if they receive subsidies or other competitive advantages from the government. See *id.*

356. See Low, *supra* note 332, at 7.

adopt and enforce the broader standard. In OECD Member countries where privatization or partial privatization of state entities occurs, decreasing opportunities for bribery of those entities' officials is consistent with the 1997 OECD Convention's goals.<sup>357</sup> Circumventing potential loopholes for bribery should be a key element of a vigilant international strategy.

Since the 1997 OECD Convention is not self-executing, all parties must implement its provisions by enacting domestic laws prohibiting and punishing transnational bribery.<sup>358</sup> Within the OECD, doubts and fears will emerge about the implementation and enforcement efforts of co-members. The OECD has no supranational powers to ensure compliance if one country decides another OECD Member country is not enforcing the new laws vigorously.<sup>359</sup> These understandable concerns must not delay the 1997 OECD Convention's prompt implementation and ratification by the United States and other OECD Member countries.<sup>360</sup> Effective enforcement by individual

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357. See 1997 OECD Convention, *supra* note 145, preamble (delineating the Parties' goals of effectively combating transnational bribery).

358. See RAJ BHALA, INTERNATIONAL TRADE LAW 299 (1996) (explaining that a non-self-executing agreement by the executive branch of the United States government is not operative until an additional independent act occurs). The 1997 OECD Convention, although signed by the United States, is not the law in the United States until appropriate implementing legislation by the United States Congress takes place. See *id.* at 300; see also Low & Burton, *supra* note 62 (describing the Clinton administration's proposed legislative package to the House and Senate Banking Committees, and the transmission of the Convention to the Senate Foreign Relations Committee in April, 1998).

359. See Swardson, *supra* note 169 (reporting on details of the Convention and anticipated enforcement problems).

360. See Low & Burton, *supra* note 62 (noting the importance of maintaining momentum by ratifying, implementing, and properly enforcing the Convention's provisions); see also Editorial, *A Vote Against Bribes*, WASH. POST, Oct. 7, 1998, at A20 (encouraging the United States House of Representatives to quickly implement the OECD Convention already ratified by the Senate, and noting that competing House business threatens timely implementation); Editorial, *Last Chance on Bribes*, WASH. POST, Oct. 17, 1998, at A20 (castigating the United States Congress for holding up implementing legislation, and predicting that most OECD nations will not ratify or implement the Convention if the United States fails to do so); H.R. 4353, 105th Cong. (1998) (listing the provisions of the proposed amendment to the FCPA); 144 Cong. Rec. H11672 (daily ed. Oct. 20, 1998) (statement of Rep. Dingell) (explaining Congressional delay in implementing the 1997 OECD Convention, and the controversial extraneous

legal regimes will also be crucial to the 1997 OECD Convention's ultimate success.<sup>361</sup> The OECD agreement has symbolic importance.<sup>362</sup> Receiving a tax subsidy for violating a foreign country's bribery laws sends an inappropriate message to developing countries where corruption is systemic. The 1997 OECD Convention will test the credibility and commitment of the developed world by the eventual success or failure of OECD Member countries to diminish bribery by their business emissaries abroad.

Governments and organizations can recommend, declare, and call for measures against corruption. Legislatures can find the political will to enact those measures, as the United States did in 1977.<sup>363</sup> Nonetheless, there must be effective enforcement so businesses see the advantage in obeying the laws. Many large corporations have their own codes of conduct for employees representing them in international commercial transactions.<sup>364</sup> While there is some evidence that tough private corporate standards enhance international competitiveness,<sup>365</sup> there is no substitute for binding national legislation.

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satellite provisions holding up passage in the House of Representatives).

361. See Low & Burton, *supra* note 62.

362. See *Payback Time*, FIN. TIMES, May 29, 1997, at 19 (reporting corruption's supply side, with western companies doing the bribing). In developing nations where corruption as culture is a Western accusation, serious reform of OECD criminal laws permitting bribery in those nations would send a much-needed message that the West is finally changing its own perceptions. See *id.*

363. See *supra* notes 60-87 and accompanying text (describing the enactment and implementation of the FCPA in the United States).

364. See Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L L. & COM. REG. 389, 442 (1997) (contending that present multilateral initiatives to fight corruption are motivated by the economic self-interest of countries and businesses who believe that honesty and efficiency are closely linked). Furthermore, competitive businesses are those that have established rigorous codes of corporate conduct. See *id.* at 444. An example is General Motors, which put tough anti-corruption guidelines into place recently in its Adam Opel plant in Germany. See *id.* at 445. General Electric, Euron, Colgate-Palmolive, and other large corporations have similarly adopted tough standards. See *id.* at 444-45.

365. See *id.* at 446 (discussing how this outgrowth of the Total Quality Management ("TQM") movement has led to a rising standard of business conduct).

## B. GERMANY

The 1997 OECD Convention's category of bribe recipients fails to include political parties, party officials, and candidates for elective office.<sup>366</sup> In this respect, the 1997 OECD Convention is narrower than the FCPA.<sup>367</sup> Legislators are included,<sup>368</sup> however, making German Members of Parliament now subject to criminal sanctions.<sup>369</sup> Post-implementation amendments to Germany's laws must criminalize this type of domestic bribery, but its laws may still permit bribery of political parties. Dialogue between Member countries on this issue should continue.<sup>370</sup> Some analysts view the new legislation as a significant reversal of the status quo ante.<sup>371</sup> Nevertheless, the exclusion of companies and organizations from the new law's requirements will negatively impact the effectiveness and viability of the enforcement process. The newly-elected SPD/Greens coalition<sup>372</sup> and German public reaction to recent domestic bribery scandals<sup>373</sup> may overcome the resistance of both German legislators and businesses to international anti-bribery efforts.

Notwithstanding the failure of the 1997 OECD Convention to proscribe the tax-deductibility of overseas bribes,<sup>374</sup> the United States

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366. See 1997 OECD Convention, *supra* note 145, art. 1.4(a) (including persons holding legislative, administrative, or judicial office; exercising public functions; and officials of public international organizations).

367. See Low & Burton, *supra* note 62.

368. See Low, *supra* note 332, at 7 (noting that some OECD members tried to exclude legislators exempted from their domestic bribery laws).

369. See 1997 OECD Convention, *supra* note 145, art. 4(a) (broadly defining "foreign public official" to include persons holding legislative office); see also *supra* notes 188-90 and accompanying text (describing the legality of the "passive" acceptance of bribes by German legislators).

370. See Low & Burton, *supra* note 62 (noting that this topic will be considered by the OECD in the future).

371. See Telephone Interview with Carel Mohn, *supra* note 182 (giving a positive assessment of Germany's new laws criminalizing foreign bribery).

372. See *supra* note 225 and accompanying text (discussing the composition of the new German government).

373. See Norman, *supra* note 233 (describing the proliferation and magnitude of corruption within Germany itself).

374. See Low & Burton, *supra* note 62; see also *supra* notes 206-18 and accompanying text (discussing German laws allowing tax-deductibility of overseas

should persist in pressuring co-signatories like Germany to do so. In this regard, the CFA, CIME, and Working Group on Bribery should monitor and promote German and other OECD Member countries' efforts to change current laws permitting tax-deductibility.<sup>375</sup> United States tax laws target transnational bribery under Section 162(c) of the Internal Revenue Code.<sup>376</sup> Congress added Section 162(c) to the Internal Revenue Code in 1958, denying tax deductibility for an illegal kickback or bribe payment under Section 162(a) of the Code.<sup>377</sup> Section 162(c) also prohibits the deductibility of any payment that is unlawful under the FCPA.<sup>378</sup> As the 1997 OECD Convention does not contain a similar tax deductibility provision, the United States cannot dictate this type of revolutionary change to a business rival and democratic partner. Rather, such change should occur principally as a result of pressure from voters in the German political economy.<sup>379</sup> The recommendations and mechanisms for achieving goals are based on a realization that change must be compatible with democratic institutions in OECD Member countries.

### C. SWITZERLAND

Domestic corruption in Germany and the Holocaust revelations in Switzerland show that western OECD Member countries can no

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bribes); *Implementation of Tax Deductibility Recommendation*, *supra* note 5 (describing the OECD's recommendations that states eliminate these deductions).

375. See *OECD Actions to Fight Corruption*, *supra* note 4, at 8-9 (proposing specific follow-up and monitoring procedures).

376. See I.R.C. § 162(c) (1994).

377. See I.R.C. § 162(c) (1994). Under Section 162(a) of the Code, United States taxpayers are allowed to deduct all "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business . . ." I.R.C. § 162(a) (1994); see also Low et al., *supra* note 132, at 280 (explaining the tax deductibility provision of United States law and describing the amendment to Section 162(a) of the Internal Revenue Code). These tax measures were passed to affect corporate behavior of United States companies. See *id.* They were in force for almost twenty years before Congress enacted the FCPA. See *id.*

378. See I.R.C. § 162(c) (1994). The burden of proof is on the government to prove the illegality of the tax action by clear and convincing evidence. 26 U.S.C. § 7454 (1994); see ARONOFF, *supra* note 82, at 68 (referring to tax deductibility forbidden by the FCPA).

379. See GERMANY: EIU COUNTRY PROFILE, *supra* note 176, at 3, 9 (defining Germany as a parliamentary democracy).

longer claim presumed moral superiority on the issue of business corruption.<sup>380</sup> Switzerland's bank secrecy laws could be a major constraint on international cooperation in a necessarily global fight against corruption.<sup>381</sup> Article 9(3) of the 1997 OECD Convention prohibits the use of bank secrecy laws as a basis for refusal to cooperate with countries prosecuting corruption and bribery crimes.<sup>382</sup> The concept of a banker's duty of confidentiality will be subject to harsher scrutiny by international actors, and Switzerland's co-signatories. In the wake of the Holocaust scandal and Switzerland's concern about its international image,<sup>383</sup> this bastion of neutrality should adopt the 1997 OECD Convention and comply with its bank secrecy provision. The era of blind application of bank secrecy laws must end and yield to Switzerland's obligations to assist its OECD partners in prosecuting corrupt crimes. Notwithstanding the Swiss economy's reliance on its banking and financial services industry,<sup>384</sup> Swiss bankers and employees in the financial services industry must be willing to enforce the 1997 OECD Convention bank secrecy provision after ratification by the Swiss legislature. Switzerland's current aggressive investigation into the illicit drug and money laundering activities of Raul Salinas, brother of former Mexican president Carlos Salinas, signals a positive commitment to its international obligations.<sup>385</sup> The decision by a Swiss federal court

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380. See discussion *supra* Parts IV.E, V.C (describing the extent of corruption in Germany and disclosures about wartime financial dealings by Switzerland).

381. See Moser, *supra* note 99, at 321-22 (noting Switzerland's past tendencies to guarantee absolute financial confidentiality, regardless of the assets' source).

382. See 1997 OECD Convention, *supra* note 145, art. 9(3) (describing OECD Member countries' obligations to render mutual legal assistance). This provision is similar to Article XVI of the OAS Convention, which prohibits the invocation of bank secrecy as a basis for refusing legal assistance. See OAS Convention, *supra* note 133, art. XVI.

383. See discussion *supra* Part V (describing the history and abuses of Swiss bank secrecy laws, the missing World War II assets of Holocaust victims, and recent cooperative efforts by Switzerland to repair its tarnished international image).

384. See SWITZERLAND: EIU COUNTRY PROFILE, *supra* note 261, at 23 (describing Swiss pre-eminence in global asset management).

385. See Anderson, *supra* note 52, at A14 (reporting the investigation by Swiss Attorney General Carla del Ponte, and the extent of Swiss cooperative efforts with United States and Mexican authorities); see also Anne Swardson, *Swiss Call*

to return illegally deposited Marcos funds to the Philippines is also encouraging.<sup>386</sup>

## CONCLUSION

Corruption and bribery in the world economy have pernicious effects on the conduct of international business.<sup>387</sup> Skeptics believe that their existence has mostly inspired rhetoric, grandiose reform-posturing, conferences, and writings, but not action internationally.<sup>388</sup> The number of global efforts underway refutes that belief. Discussion of the problem is no longer taboo.<sup>389</sup> Many organizations and groups are focusing the efforts to tackle the cancer of corruption in the world economy.<sup>390</sup> The 1997 OECD Convention is the most ambitious effort,<sup>391</sup> and has important legal implications for the

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*Salinas Drug Profiteer, Seize Bank Funds*, WASH. POST, Oct. 21, 1998, at A1 (describing the seizure of \$114 million in drug assets of Raul Salinas by Swiss authorities).

386. See *Switzerland: Court Clears Transfer of Marcos Millions to Philippines*, TI NEWSLETTER, RECENT REFORMS (Transparency International, Berlin, Germany), June 17, 1998, (visited Oct. 13, 1998) <<http://www.transparency.de/documents/newsletter/98.2/reforms.html>> (reporting the April 1998 decision to return \$520 million deposited by Marcos in Swiss banks).

387. See discussion *supra* Part I.C (discussing the economic effects of corruption on development); see also Bowley et al., *supra* note 2 (describing the spiraling bribery rates that are increasing the cost of doing business internationally).

388. See Kaufmann, *supra* note 8, at 130 (portraying World Bank, IMF, and OECD efforts as merely positive first steps, when a revolution is necessary).

389. See *Transparency International: Annual Report 1997*, at 3 (visited Sept. 20, 1997) <[http://www.transparency.de/ti/an\\_report97.html](http://www.transparency.de/ti/an_report97.html)>. Peter Eigen, Chairman of TI's Board of Directors, expresses satisfaction that shattering the taboo against frank and open discussion of corruption, one of TI's goals, is now accomplished. See *id.* The global efforts against corruption and bribery in international business transactions effectively achieved that goal in a relatively short space of time. See *id.*

390. See discussion *supra* Part III.B.3 (describing the scope of international efforts by the United Nations, EU, OAS, OECD, the World Bank, IMF, and TI to control corruption and bribery in international business transactions).

391. See discussion *supra* Part III.B.3 (discussing OECD efforts since 1994 to combat bribery in international business transactions, including the OECD Recommendations and Convention on criminalizing overseas bribery and eliminating the tax-deductibility of bribes).



United States, Germany, Switzerland, and other OECD nations.<sup>392</sup> Implementation of OECD directives will not be easy, and must amount to more than a change of laws and a conspicuous inability to change business behavior.<sup>393</sup> The World Bank and IMF face daunting institutional challenges in developing countries.<sup>394</sup> Corruption will never be eradicated, but it must be contained. Enforcement of the OECD Convention through binding national legislation would be an auspicious beginning.

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392. See discussion *supra* Part VI.A,B,C (analyzing the legal implications of the 1997 OECD Convention for the United States, Germany, Switzerland, and other OECD Member countries).

393. See discussion *supra* Part IV (discussing the German criminal laws permitting transnational bribery and tax-deductibility of overseas bribes, and the reluctance of Germany to change its laws); see also Norman, *supra* note 233, at 27 (implying that competitive bidding has essentially developed into competitive bribery within Germany, and that internationally, German firms rely on bribery to compete).

394. See discussion *supra* Part III.B.1 (reviewing criticism of the World Bank and IMF, and the ongoing turmoil and social unrest in Indonesia and South Korea occurring in part because of past corrupt practices).