

*45 WHY THE PRIVATE SECTOR IS LIKELY TO LEAD THE NEXT STAGE IN THE GLOBAL
FIGHT AGAINST CORRUPTION

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INTRODUCTION

Corruption exists in all countries, [FN1] and its deleterious impact is clear: "[C]orruption distorts markets and competition, breeds cynicism among citizens, undermines the rule of law, damages government legitimacy, and corrodes the integrity of the private sector. It is also a major barrier to international development--systemic misappropriation by kleptocratic governments harms the poor." [FN2] The World Bank estimates the global cost of corruption at \$1,000,000,000,000 per year. [FN3] Corruption *46 includes the misuse of public office for personal gain, bribery, extortion, and other misappropriations of public and private assets. [FN4]

Despite anticorruption norms and global attention, however, corruption thrives; and globalization has created vast new opportunities for it. While global norms have set valuable benchmarks to prohibit bribery, there has been relatively little prosecution for bribery of foreign officials in any country. Prosecution under the U.S. Foreign Corrupt Practices Act ("FCPA"), the oldest and one of the strictest anticorruption statutes, has been minimal, though the number of cases examined by U.S. law enforcement and regulatory authorities has increased in recent years. Contemporary empirical work suggests that the FCPA contains significant loopholes in practice. [FN5] In its most recent review of the enforcement of the Organization for Economic Cooperation and Development's ("OECD") Convention on Combating Bribery of Foreign Officials in International Business Transactions ("OECD Convention"), Transparency International notes that "there is as yet little or no enforcement in almost 2/3 of the countries covered." [FN6] It concludes that, "[a]t present limited levels of enforcement, much of the international community is not yet convinced that foreign bribery laws must be obeyed." [FN7]

There is a huge "impunity gap" with respect to international corrupt practices. The potential financial rewards for bribes are great, while the likelihood of detection, investigation, and prosecution *47 remains remote. There are indications that the size of the impunity gap may be undergoing some change, but without knowing the number of transgressions, an increase of official investigations does not guarantee that a higher percentage of wrongful acts is being detected and punished. Furthermore, even if the payment of a bribe is punished, the severity of the punishment may be insufficient to have a deterrent effect.

Government law enforcement will always have competing priorities, whether combating terrorism, the drug trade, organized crime, or other domestic objectives; and governments are not unitary actors. They are typically divided into ministries or agencies that sometimes have inconsistent priorities. In addition, there can be divergences among national, regional,

and local governments. Therefore, it should not be surprising that governments have inherently mixed motives in combating bribes to their own government officials. Many government officials in developed countries seemingly take an attitude of "benign neglect" towards major national corporations and campaign donors that pay foreign bribes. Raymond Baker and Moises Naim make a strong case that mass corruption could not exist without the collusion of legitimate accountants, banks, lawyers, and government officials. [FN8] They believe that many governments lack the political will to effectively fight corruption, in part since the governments, their corporations, and citizens benefit from the present system. It is thus quite understandable that governments would have achieved enormously more progress on paper than in actual enforcement.

This Article focuses on the role of the private sector in fighting corruption. It is unrealistic to expect that national criminal prosecutions alone will ever deter corrupt actors sufficiently to reduce the rewards of corrupt behavior while increasing the risks of detection. [FN9] Thus, it is necessary for the private sector to take a more active role in creating meaningful deterrents to international *48 bribery. Some for-profit legal entities stand to gain from better enforcement of anticorruption laws. Thus, they may be willing to commit resources where they have suffered damages.

Part I offers background on the concept and extent of corruption in general, and bribery in particular. Part II examines the existing U.S. and international legal framework for combating the payment of bribes abroad. It provides background on the history and operation of the FCPA, which was an impetus for certain international anticorruption instruments, the OECD Convention, and more recent anticorruption norms. It discusses prosecution under this legislation and the view that these norms are ineffective. Part III looks at non-State actors who may lead implementation efforts in the future. It examines private corporations, multilateral development banks ("MDBs"), and non-governmental organizations ("NGOs"), and describes several successful private claims in the United States against corrupt competitors, and the legal basis for such claims in Germany.

I. DEFINING CORRUPTION AND BRIBERY

Addressing corruption is complex and culturally nuanced. [FN10] Member States negotiating the United Nations Convention Against Corruption ("U.N. Convention") could not reach agreement on how to define "corruption," although they defined other terms. [FN11] There are significant differences among States in both their official and day-to-day attitudes concerning what constitutes corruption or unlawful conduct. For example, in some countries, civil servants are permitted to accept gifts from the public, treating such "gifts" as a component of their legal income. [FN12] These differences, however, have not impeded the development *49 of multiple, overlapping anticorruption legal norms. [FN13]

Corruption is globally prohibited, at least at the level of rhetoric and legal norms. The United Nations ("U.N.") and the OECD have adopted conventions requiring members to enact laws prohibiting bribery and extortion. [FN14] International organizations, including the Council of Europe ("COE") [FN15], the Organization of American States ("OAS"), [FN16] and the World Trade Organization ("WTO") [FN17] have enacted additional conventions and have sought to increase public awareness of corruption and its consequences. *50 Almost all nations have laws against corruption. [FN18] Development banks and corporations have adopted internal codes of conduct and ethical guidelines.

[FN19] Non-governmental watchdog groups, such as Transparency International, monitor and report on corruption worldwide. [FN20]

Combating corruption is not a simple task; it cannot be resolved by adopting legislation alone. Corruption will never be entirely eradicated; its extent can be reduced, however, by multi-layered policies. Generally, commentators focus on four main approaches to limiting corruption: (1) prevention; (2) enforcement; (3) State building; and (4) instilling cultural values that will reinforce prevention, enforcement, and State building. [FN21]

This Article examines the role of bribery in the award of international contracts for tenders. While international bribes are a subset of "corruption," they represent a transnational issue that Nations, international organizations, and corporate entities must address together beyond the borders of their home countries. This Article analyzes the environment in which bribes are paid in connection with international business involving natural resources, [FN22] infrastructure contracts (e.g., power plants or highways), and other major purchases of services or equipment, such as weapon systems or bulk medical equipment. Since many developing countries do not have well-established laws or legal cultures for transparency and accountability, it is often difficult to determine if the State receives a fair share of the revenues or if governmental officials or private intermediaries are skimming funds.

The trend in anticorruption conventions to enlarge the role for private parties to bring civil damage claims against corrupt actors is encouraging. Both the COE's Civil Law Convention *51 against Corruption, which entered into force in 2003, and the U.N. Convention, which entered into force in 2005, create private rights of action for victims of corrupt practices. This Article contends that the shift towards non-governmental civil enforcement mechanisms will improve deterrence against international bribery.

II. THE NORMATIVE FRAMEWORK

A. The U.S. Foreign Corrupt Practices Act

In 1977, the United States adopted the FCPA to combat, inter alia, the bribery of non-U.S. government officials by U.S. legal entities, nationals, and their agents. The FCPA responded to bribery scandals that had occurred abroad, some of which had serious foreign policy consequences. [FN23] The FCPA has two components: (1) U.S. persons and agents are subject to criminal sanctions for paying a commercial bribe to a defined group of foreign persons, even though the relevant actions occurred abroad, and (2) public corporations are required to disclose illegal payments in their filings with the U.S. Securities and Exchange Commission ("SEC") in accordance with the FCPA's so-called "books and records" provisions. [FN24] The latter violation is often easier to prove since there is no need to prove criminal intent on the part of the corporation's employees or agents. [FN25]

Since the United States was the only country with such legislation as of 1977, U.S. business and government officials argued that U.S. business was competing at a disadvantage with non-U.S. competitors in the international marketplace. Working with NGOs, they were able to promote the adoption of the OECD Convention to ensure that corporations, employees, and agents of other OECD nations operated pursuant to rules similar to *52 those facing U.S. actors. [FN26]

From the FCPA's unanimous enactment by Congress in 1977 until 2005, there have been a paltry number of reported investigations and prosecutions. From 1995 to 2000, the government averaged 0.8 prosecutions per year, and from 2001 to 2005, it has averaged 3.8 per year. [FN27] As the Corporate Crime Reporter recently noted, "[t]he prosecution of foreign bribery has been anemic." [FN28]

Since 2001, the U.S. Department of Justice ("DOJ") and the SEC have brought significantly more enforcement actions. [FN29] Similarly, there are forty ongoing investigations in OECD countries. These numbers in the overall scheme of things are doubtlessly low, but may be the first signs of the trend that began with the OECD Convention's entry into force in 1999. [FN30] Perhaps as governments become aware that other governments are taking their treaty commitments seriously, and that there has been an increase in capacity in these areas, they will be willing to investigate and prosecute. [FN31]

The low number of formal proceedings in the United States is not an entirely accurate indicator of the practical impact of the FCPA. [FN32] Both the DOJ and the SEC have limited resources *53 and thus are selective in their investigations and prosecutions. [FN33] Furthermore, if wrongdoing is discovered, the U.S. government may enter into negotiated settlements with the guilty party if the violation was a rogue act that did not reflect the corporation's culture. Where management has a strong compliance program, the government may prefer not to prosecute and may negotiate ways to strengthen internal corporate controls.

U.S. courts have ruled that the FCPA does not provide a private cause of action. [FN34] The statute does not explicitly include a right of action for parties to sue a violating company for civil damages. And courts have held that the legislative history does not indicate Congress's intent to create one. [FN35] The House of Representatives' version of the FCPA included a private right of action, [FN36] and the SEC General Counsel opined shortly after its enactment that the FCPA did imply a private right of action. [FN37] Nonetheless, courts do not recognize a direct private right of action today. Several scholars contend, however, that the statute would be much more effective if Congress were to amend the statute to include a direct private right of action. [FN38]

*54 There is little doubt that there would be greater enforcement, and concomitant deterrent effect, if Congress amended the FCPA to include a direct private right of action. Such congressional action is desirable, although it is not likely to occur in the near term. Despite the lack of an explicit right of action, however, some corporations, with the assistance of resourceful plaintiff's counsel, have utilized FCPA violations as bases for civil damage suits. [FN39]

B. The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Although OECD Member States adopted the OECD Convention in 1977, it did not enter into force until February 15, 1999. [FN40] This twenty-two year exercise in delay provides some window into governments' incentives to investigate and criminally prosecute their own Nations' bribes to foreign government officials. The Convention has only seventeen articles. [FN41] Under its terms, OECD Member States oblige themselves to adopt domestic

legislation prohibiting the payment of bribes to foreign officials to obtain or maintain business. [FN42]

The OECD Member States have not adopted identical implementing legislation. One frequent criticism of the Convention is that its Article 3 merely requires Member States to treat the bribery of foreign officials in the same manner as it deals *55 with bribery of domestic officials, but does not impose a uniform standard. [FN43] Thus, widely varying sanctions exist among OECD countries. This has led some to conclude that national sanctions for illegal bribes do not have a strong deterrent effect. [FN44] From a "black letter" law standpoint, however, the OECD Convention leveled the playing field for U.S. multinational corporations and citizens.

The Convention's effectiveness relies in large part on the OECD Working Groups' activities. The Working Groups monitor the Convention's implementation. Their members include experts from each of the Member States. The monitoring system is divided into two phases. Phase One consists of an analysis of whether the relevant country's implementation is in conformity with the obligations established by the Convention. Phase Two requires a series of meetings with representatives of "government, law enforcement, businesses, trade unions and civil society" in the course of a week-long site visit. [FN45] The Working Groups issue reports of the results of their fact-finding and recommendations. [FN46] The Working Groups are largely dependent on information provided by the Member States. They lack the power to compel OECD Member States to provide documents, and they can only encourage cooperation, which depends on the good faith of foreign government officials. These Working Groups lack any real enforcement power under the Convention. Rather, OECD Member State compliance relies largely on public disapprobation and fear of retaliation by other countries. [FN47]

Transparency International sees progress through the OECD process. It notes that there is now significant foreign *56 bribery enforcement in over one-third of the thirty-one countries covered by the OECD Convention in 2006. This is an increase over 2005; [FN48] but in a progress report, Transparency International notes that "it is essential to build additional momentum for enforcement. This requires a strong monitoring programme. Unless this is done, there is serious danger that the Convention could fail." [FN49]

Daniel K. Tarullo, one of the lead negotiators for the United States on the OECD Convention, contends that the Convention has failed to establish the uniform, mandatory, and enforceable requirements needed to combat bribery in international transactions. [FN50] Noting that there have been extremely few prosecutions by OECD Member States, Professor Tarullo contends that "[t]he obvious explanation for the lack of prosecutions is that OECD members lack either the will or the capacity to meet their obligations. There are other, more benign explanations, though none is particularly convincing." [FN51] Professor Tarullo rejects the idea that the Convention [FN52] is having a significant deterrent effect based on information from Transparency International's Bribe Payers Index. [FN53]

*57 While acknowledging that it is more difficult to identify OECD violations than those of other international agreements, given the nature of corruption by government officials, Professor Tarullo observes:

[A] potential "violation" of the OECD Convention is not easy to discern. Bribery takes place in the shadows. It may never be visible to anyone but the immediate actors. Where there are hints of bribery, investigations backed

with some form of compulsory process may be necessary to establish the case that a signatory is obliged to take action. Finally, even if there is information available about a specific, possibly illicit payment, a prosecutor may have good reasons for declining to prosecute the case: insufficient evidence to meet a criminal conviction standard of proof, potential cost of the prosecution relative to other enforcement priorities, etc. It may not be an easy matter to distinguish instances of good faith non-prosecution from instances where prosecutors have ignored overseas bribery in order to boost the competitive position of their country's firms. In short, while the United States and other advocates of the Convention are well aware that the Convention is not being rigorously implemented, they have difficulty identifying specific instances of non-implementation (i.e., non-prosecution) in a convincing manner. [FN54]

In sum, the OECD Convention puts peer pressure on governments to enforce national anticorruption laws and to make needed changes in their national regimes. Based on OECD Working Group Reports, however, Transparency International points out that "[t]here are significant deficiencies in the enforcement systems of 2/3 of the countries covered." [FN55]

*58 C. Council of Europe Criminal Law and Civil Law Conventions on Corruption

On January 27, 1999, the COE adopted the Criminal Law Convention on Corruption. [FN56] Parties to this Convention agreed to criminalize various acts of corruption. Among the items the signatories agreed to criminalize were the promise, offer, or giving of bribes to, and the solicitation or receipt of bribes from domestic public officials, members of domestic public assemblies, foreign public officials, members of foreign public assemblies, international organization officials, members of international parliamentary assemblies, international judges, and persons engaged in business in the private sector.

The COE adopted the Civil Law Convention on Corruption in 2003. The Explanatory Report of this Convention states that combating corruption cannot rely exclusively on criminal law. The COE Criminal Law Convention on Corruption covers criminal activity in both the public and private sectors (principally bribery, "trading in influence," and money laundering) and envisioned signatory State prosecution of violators under domestic criminal law adopted to implement the Convention. Significantly, the subsequently adopted COE Civil Law Convention obliged signatories to adopt measures that would give persons who had suffered damages the right to obtain compensation--that is, it obliged signatories to create a private cause of action against the person who committed the corrupt acts. [FN57] The Civil Law Convention addresses:

- *59 - accessibility and effectiveness of civil law remedies;
- main potential victims of corrupt behaviors;
- evidence and proof of the causal link between acts and damage;
- illicit payments and their relation to competition;
- validity of contracts;
- the role of auditors;

- "whistleblower" protection of employees;
- procedures, including litigation costs, and international cooperation. [FN58]

The COE established the Group of States Against Corruption ("GRECO") [FN59] to function as a monitoring group similar to the Working Groups under the OECD Convention. Its personnel rely on the use of questionnaires and site visits to monitor compliance with the Convention. [FN60] While there is not a significant track record of civil actions on which to assess its importance in practice, it does afford victims of corruption new remedies. [FN61]

Transparency International produced an evaluative report of GRECO's activities pursuant to the COE conventions on corruption *60 and other instruments ("TI Report"). [FN62] The TI Report gave a generally favorable assessment. [FN63]

D. United Nations Convention Against Corruption

In 2005, the first truly global anticorruption convention entered into force after thirty countries ratified it. Over 140 countries have now signed it, including the United States. [FN64] The U.N. *61 Convention contains four parts: (1) preventive measures; (2) criminalization and law enforcement; (3) asset recovery; and (4) international cooperation and monitoring. The framework on asset recovery, meant in large part to help developing countries to retrieve bribes and other illegally procured assets deposited in developed countries' banks by corrupt officials, is considered "groundbreaking." [FN65] The first meeting of the Conference of State Parties ("Conference") will be in December 2006; it is critical that the Conference create a monitoring system.

The U.N. Convention contains seventy-one articles and may come to play a significant role in international anticorruption efforts. Article 34, Consequences of Acts of Corruption, requires States to annul or rescind contracts awarded as a result of corruption. Article 35 requires the parties to adopt measures to compensate victims of corruption. In order to reach agreement, Member States failed to define corruption, in part because conduct considered illegal in one country might be legal in another. [FN66]

Thus, the U.N. Convention, the COE Civil Law Convention on Corruption, and the OECD Convention support private remedies for the effects of bribery. Because the OECD Convention is specific to international bribery and because it has a well-established monitoring mechanism, it currently is seen as the most significant of the three Conventions in practice.

III. THE ROLE OF NON-STATE ACTORS

Existing anti-bribery statutes and norms provide the basis for civil lawsuits for damages. Private corporations that do not engage in bribery have the greatest incentives to see that their bids succeed on the merits. MDBs have incentives to ensure that their donor nations' funds are not misappropriated. And NGOs exist to monitor and advocate in the anticorruption effort. These non-State actors are likely to be increasingly important in enforcement.

*62 A. Private Legal Entities

Corporations that have strict policies against paying bribes or engaging in

other forms of corruption have the greatest stake that large-scale international tenders be conducted without bribes. Such corporations are the principal beneficiaries of a system where winners are determined on the merits. It is these corporations that must seek civil damages when corrupt competitors harm their corporate interests. [FN67]

As countries more fully implement their obligations under the Conventions, private companies are likely to be able to defend their interests more aggressively through civil lawsuits. This is particularly the case where there has been a change in the ruling government in which the corrupt activity occurred. Where the stakes are high enough, a private multinational corporation may make a decision to pursue legal action where a State prosecutor would not. Furthermore, although the legislation in some jurisdictions may preclude certain claims under the Convention, such as unfair competition, antitrust, or anti-monopoly legislation, other corruption-related claims may be viable.

Professor Tarullo is skeptical that companies that lost business as a result of a competitor's bribe would sue. [FN68] He argues that such companies may have paid bribes themselves, they may be reluctant to take actions that might affect their future business opportunities in the country, and they may face even greater difficulty than a government in gathering evidence. [FN69] While these concerns are significant, companies have incentives to sue and in fact are doing so. Over time, some government *63 officials and employees of the tender winner leave their positions. These individuals may provide evidence or testimony, and their risks of doing so are less once they are no longer employed by the government or bribe-paying company. Furthermore, some corporations may be willing to "write-off" doing business in one country if they have sufficient business opportunities in other countries. In other words, they do not fear "closing the door" on a particular country by revealing corrupt officials in that country through a lawsuit. This is particularly true of small and medium size companies that are incapable of accomplishing numerous projects simultaneously. They may bid on numerous tenders with the expectation of winning only a small percentage of them. For some such companies, seeking damages through a legal process arising from bribery might be quite profitable.

In the past, the only remedy against corrupt competitors would have to be in the country where the corruption took place and where the domestic government and courts are unlikely to overturn a tender outcome. The winning bidder's country is not likely to prosecute the case for both legitimate and illegitimate reasons. [FN70] But today there are litigation options outside the country where the bribe took place.

1. Civil Law Claims Brought in the U.S. Involving Bribery Abroad

The right of civil action provides a useful complement to criminal proceedings as a deterrent. U.S. courts have recognized the legitimacy of these claims. These cases show that corporate victims of international corruption can and will sue to remedy their damages. Outlined below are several lawsuits in U.S. courts for civil damages as a result of international bribes. U.S. and non-U.S. claimants have brought cases against U.S. competitors in tenders abroad, against foreign nationals in the U.S. who allegedly arranged bribes in foreign transactions, and against foreign corporation with ties to the United States. It is striking that even without direct statutory support, such as a private right of action under the FCPA,

plaintiffs have brought viable claims. Surely not all have been able to prove causation: that "but for" the corrupt act, they would have won the international contract at issue. These cases, however, demonstrate the *64 kinds of cases that are likely to become more common, resulting from changing anticorruption norms and practices.

a. *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*

Environmental Tectonics Corporation, International ("ETC"), a Pennsylvania corporation, was a competitor against Kirkpatrick, a New Jersey corporation, for a major construction contract on a Nigerian air force base. [FN71] ETC, the plaintiff, lost the bid but learned that a New Jersey corporation had paid bribes to Nigerian government officials and won the tender. Plaintiff brought defendant's corrupt acts to the attention of the U.S. and Nigerian governments. [FN72] The DOJ prosecuted Kirkpatrick and its Chief Executive Officer under the FCPA; both pleaded guilty. [FN73] Based on that judgment, the plaintiff sought damages under a variety of federal and state laws and the defendants moved to dismiss, claiming the Act of State doctrine in defense. [FN74]

The Court of Appeals for the Third Circuit wrote:

The nature of the acts alleged and the number of victims are . . . important considerations in this analysis. ETC claims to have suffered direct economic injury from the appellees' scheme. By illegally influencing the decisions of appellees' public officials, however, appellees have also created an even larger class of victims, the citizens of Nigeria. Moreover, because bribery of foreign officials by American businessmen diminishes this nation's stature and influence abroad, conduct of the kind here alleged victimizes the citizens of this nation as well. [FN75]

The Supreme Court granted certiorari and unanimously affirmed the Third Circuit's decision that the defendants' Act of State defense had no merit as no foreign sovereign act was at issue. [FN76] ETC had stated viable claims for damages against a corrupt competitor that had paid bribes abroad.

*65 b. *Dooley v. United Technologies Corp.*

An employee of Sikorsky Aircraft, a subsidiary of United Technologies Corp. ("UTC"), filed an action against his employer alleging that UTC was engaged in a bribery scheme in which UTC bribed Saudi Arabian officials to win contracts for the sale of its helicopters to the Saudi Arabian government. [FN77] The employee alleged that the conspiracy developed through tacit agreements between high-level UTC executives and the Saudi Arabian Ambassador to the United States, Prince Bandar bin Sultan. [FN78] The district court found no lack of jurisdiction over any of the corporate or individual defendants, although several were foreign entities or individuals. [FN79] The plaintiff alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [FN80] and supplemental state law claims. [FN81]

c. *Rotec Industries, Inc. v. Mitsubishi Corp.*

Here, Rotec Industries, an Illinois corporation that manufactures concrete equipment, sued Mitsubishi and C.S. Johnson, a U.S. corporation, for damages that resulted from alleged corrupt actions in an international competition in China to build the Three Gorges Dam on the Yangtze River. [FN82] Rotec alleged that defendants had bribed certain members of the Bid Evaluation

Committee and that for that reason alone, Rotec had lost the construction competition. [FN83] Rotec alleged violations of federal antitrust and racketeering laws and of the Oregon tort law prohibiting intentional interference with economic relations. [FN84] The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's analysis that the tort claim was a valid cause of action but that the plaintiff had failed to allege facts that could prove that defendants' acts had caused it economic harm. [FN85] The Ninth Circuit, in evaluating defendants' summary judgment motion, *66 assumed that bribes were given, but concluded that "too many inferences need to be drawn to establish a connection between that improper conduct and Rotec's ultimate failure to secure the two contracts won by the defendants." [FN86] Although Rotec did not prevail, its claims as a victim of international corruption were recognized as valid under state tort law.

d. Korea Supply Co. v. Lockheed Martin Corp.

In Korea Supply Company v. Lockheed Martin, the Republic of Korea solicited bids for certain military equipment. [FN87] Korea Supply Company ("KSC") represented the Canadian company MacDonald Detwiler and Associates Ltd. ("MacDonald"). [FN88] KSC acted as MacDonald's agent in the bidding and negotiation process, and Loral, a California-based subsidiary of Lockheed Martin Corp., was the other party submitting a bid. Under its contract, if MacDonald had the winning bid, KSC would receive a \$30,000,000 commission. [FN89] The Korean Government declared Loral to be the winning bidder, even though MacDonald's bid was \$50,000,000 lower and its equipment was superior. [FN90] The Korean Ministry of Defense justified its decision to choose Loral by asserting that the U.S. government was less likely to share intelligence information with Korea if the contract was awarded to a Canadian company. [FN91] Whether true or not, the Korean Defense Intelligence Command's project management office conceded that the MacDonald equipment was less expensive than that offered by Loral and was also technologically superior. [FN92]

KSC filed suit in California, alleging that Loral had violated California's unfair competition law and the tort of interference with prospective economic advantage. [FN93] KSC alleged that Loral paid \$10,000,000 to an intermediary, Ms. Kim, to arrange that persons working for the Korean Ministry of Defense receive *67 bribes and sexual favors. [FN94] Not surprisingly, the situation grew into a major public scandal. KSC alleged in its complaint that "[i]n securing the contract by wrongful means, Loral acted with full knowledge of the commission relationship between [KSC] and [MacDonald] and knowing that its interference with the award of the contract would cause [KSC] severe loss." [FN95] Furthermore, KSC contended that Lockheed Martin was the beneficiary of the illegal Loral-Kim conduct and to that extent had been unjustly enriched. [FN96]

The California Supreme Court's decision ultimately turned on the particular language of the California unfair competition statute that precluded KSC from obtaining damages when it did not have an ownership interest. It also rejected a request for restitution because KSC's expectancy of payment was not justiciable; the money it would have received would originate from the Korean Government, not Loral. [FN97]

But the California Supreme Court did find that KSC was entitled to damages based on the common law claim of intentional interference with prospective economic advantage. [FN98] After examining the facts and the Restatement (Second) of Torts <section> 766B, [FN99] the Court noted the importance of the

FCPA to the present case:

*68 Here, KSC has clearly satisfied the independent wrongfulness requirement. In its complaint, KSC alleged that defendant Kim, as an agent for Loral, engaged in bribery and offered sexual favors to key Korean officials in order to obtain the contract from the Republic of Korea. Under the Foreign Corrupt Practices Act, it is unlawful to pay or offer money or anything of value to a foreign official for the purposes of influencing any act or decision of the foreign official, or to induce the foreign official to use his or her influence with a foreign government to affect or influence any act or decision of the government. In addition, the complaint alleges that the commissions paid by Loral to Kim exceeded the maximum allowable amounts established by the Foreign Corrupt Practices Act. The complaint thus clearly alleges that defendants engaged in unlawful behavior in order to secure the . contract. KSC has, therefore, sufficiently alleged that defendants' acts, in addition to interfering with KSC's business expectancy, were wrongful in and of themselves. [FN100]

KSC was able to assemble the necessary evidence, perhaps through private investigators, reporters, or tips from Korean Government officials or Loral employees.

KSC had an incentive to find out why its client did not get the contract, and it then proceeded to seek a legal remedy. The KSC case was possible because it could prove that its client had made the superior bid and there was no issue of standing. There was no doubt that but for the illegal conduct, MacDonald would have won the tender. [FN101]

*69 2. The German Civil Right of Action

German law provides a private right of action for parties injured by bribe-paying corporations. In its formal submission to the OECD, Germany stated that:

At present, German law does not provide for specific "civil sanctions" against persons who are subject to criminal sanctions in respect of the bribery of a foreign public official. However, Germany draws attention to section 826 of the German Civil Code, which provides for damages where a person intentionally injures another in such a way as to breach public morals, and states that section 826 should apply to intentional bribery of a foreign public official. [FN102]

Germany's interpretation of the OECD Convention goes beyond the U.S. FCPA and finds that plaintiffs may obtain damages when they have been injured by another party's intentional bribe of an official. Further, Germany's submission to the OECD clarifies that the investigation and prosecution of bribery of a foreign public official "shall not be influenced by consideration of national economic interests, the potential effect upon relations with another state or the identity of the natural or legal person involved." [FN103] In other words, the government undertakes to treat such bribery in a criminal context, not a diplomatic one.

Germany's private right of action against corrupt practices is important in itself and as a model for other National civil law legislation within the OECD and in Europe. Germany's private right of action against bribery of foreign officials is likely to lead to such a right of action in other OECD and COE nations, as required under the COE Civil Law Convention on Corruption and the OECD Convention. Whether all the civil law countries take the same approach

as Germany remains to be seen.

B. Multilateral Development Banks

MDBs are in a position to play a key role in the fight against certain forms of corruption. They provide funds and technical assistance to the public sector and civil society to increase monitoring systems for public contracts and allocate funding through *70 tenders held pursuant to formal procedures. Such procedures are usually better structured than domestic legislation and are more likely to achieve higher transparency and to facilitate fair evaluation of competitive bids.

MDBs finance some of the largest global development projects. These banks include the Asian Development Bank, [FN104] the European Bank for Reconstruction and Development, [FN105] the Inter-American Development Bank, [FN106] and the World Bank (and its component parts). [FN107] Increasingly, MDBs have focused on the problem of corruption, rule of law, and their impact on development. MDBs are concerned about compliance by third parties in projects they finance and anticorruption efforts within the banks themselves. According to the World Bank's website:

The Bank has identified corruption as among the greatest obstacles to economic and social development. It undermines development by distorting the rule of law and weakening the institutional foundation on which economic growth depends. The harmful effects of corruption are especially severe on the *71 poor, who are hardest hit by economic decline, are most reliant on the provision of public services, and are least capable of paying the extra costs associated with bribery, fraud, and the misappropriation of economic privileges. Corruption sabotages policies and programs that aim to reduce poverty, so attacking corruption is critical to the achievement of the Bank's overarching mission of poverty reduction.

[The Bank] believe[s] that an effective anticorruption strategy builds on five key elements:

1. Increasing Political Accountability
2. Strengthening Civil Society Participation
3. Creating a Competitive Private Sector
4. Institutional Restraints on Power
5. Improving Public Sector Management

. . . . Since 1996, the World Bank has supported more than 600 anticorruption programs and governance initiatives developed by its member countries. [FN108]

But despite these programs and declaratory policy, corruption problems persist at the World Bank. [FN109]

MDBs do not necessarily have the same interests as the governments to which they make loans. MDBs and donor countries to MDBs have incentives to see that projects are awarded solely on the merits. Also, since large project financing deals are completed over many years, the institutional personnel will not remain the same throughout the relevant time frame. This turnover of

personnel creates opportunities for whistleblowers. Similarly, *72 the fact that MDB staffs are multinational provides a margin of protection against corruption. Given the staff's multiple loyalties to home countries, national companies, and to the MDB, collusion among staff with particular donee government officials or with particular contractors for corrupt purposes is less likely than in more homogeneous environments. [FN110]

C. Non-Governmental Organizations

NGOs are the principal entities that critique the government monitoring process under the OECD Convention. [FN111] NGO monitoring work provides extremely valuable background information for potential civil damage claims. NGOs provide information on country conditions and anonymous assessments of the level of corruption in particular environments. They are also able to assist whistleblowers and private corporations in the fight against corruption.

Transparency International, probably the leading anticorruption NGO, not only provides neutral information on perceptions of corruption in individual countries, it also monitors compliance with the OECD Convention. It is stating clearly that government enforcement practices are insufficient. Its work, and that of other NGOs, is invaluable in creating greater awareness of the depth and breadth of corruption.

D. The Development of a Plaintiff's Bar

We are not aware that a plaintiff's bar yet exists for bringing civil claims for bribery, but its development seems desirable and likely. Private actions against corrupt competitors in international commerce are likely to increase as the world's economy *73 becomes ever more integrated and as anticorruption norms become more accepted. A specialized plaintiff's bar would have expertise in the domestic law claims that have been most effective in winning damages and in whistleblower protection laws. Lawyers in the anticorruption area would likely have close working relationships with investigatory firms, given the extremely difficult nature of establishing causation in these cases. These lawyers would probably work on a contingency basis and be outside the major law firms that represent large corporate clients that would be potential defendants.

In situations where there are a number of losing bidders, it might be possible for all the losing bidders that made a tender offer to assert that they all have standing until such point that it is proven that a particular plaintiff had no possibility of being declared the winner. This strategy would permit plaintiffs to share the costs of bringing such cases. Aggregating plaintiffs in this way is not implausible. According to the Financial Times, last year British Petroleum fired over 200 employees for wrongdoing, including bribery. [FN112] One can only guess whether, but for the actions of such employees, other companies would have won certain international tender offers.

An aggressive plaintiff's bar could help deter international bribery by raising the costs of corrupt acts. If corporate actors contemplating bribery faced a credible threat of civil litigation, with its concomitant costs of bad publicity, management distraction, legal fees, and possible adverse judgment, they might think twice.

CONCLUSION

Private actors, rather than governmental ones, are in a position to lead the next stage of the global fight against corruption. International conventions recognize private claims for damages from corrupt acts and plaintiffs are bringing civil suits. MDBs and corporations should start to bring more civil actions when they have suffered from the corrupt acts of others. Monitoring bodies should start to devote more attention to civil law enforcement. Attorneys in private practice should start to consider this *74 as a promising field. There is an opportunity for corporations to begin to police their own in the next stage in the global fight against corruption.

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[FN1]. While corruption is universal, the forms it takes and the attitudes towards it vary. Nonetheless, there is not a single country in the world that explicitly permits the payment of large-scale bribes. For a discussion of cultural differences in tolerance of corruption, see John Hooker, Working Across Cultures 88, 204, 317 (2003).

[FN2]. Ben W. Heineman, Jr. & Fritz Heimann, The Long War Against Corruption, 85 Foreign Aff., May/June 2006, at 75, 76.

[FN3]. See World Bank, Global Monitoring Report 2006, 171 (2006), <http://web.worldbank.org/external/default/main?theSitePK=2186432&pagePK=64218950&contentMDK=20810084&menuPK=2199415&piPK=64218883> (last visited Nov. 9, 2006). It is difficult, if not impossible, to get any precise figure. When examining such assertions, one should keep in mind that corrupt individuals do not report their actions, nor is there universal agreement on what constitutes corruption. In theory, corruption bribery may be measured by the amount of the bribe paid or favor rendered. It also may be analyzed within the context of its costs, not all of which can be quantified. In some circumstances, corruption operates as a tax, increasing the cost of goods and government services. Corruption in the extreme may deprive a government of the financial resources to render necessary services to the individuals living in the territories it purports to rule. Furthermore, corruption has a corrosive and multiplicative effect--why comply with relevant laws and regulations if others are not and are benefiting from their conduct? If corruption exists at the highest levels in government and the private sector, it is almost certain to be present at lower levels. See generally Ethan S. Burger, Thinking About Corruption (2005), <http://www.american.edu/tracc/resources/publications/burger07.pdf> (last visited Sept. 30, 2006) (unpublished paper); World Bank Governance and Anti-Corruption Website, <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/0,,menuPK:1740542~pagePK:64168427~piPK:64168435~theSitePK:1740530,00.html> (last visited Sept. 6, 2006) (providing research on the topics of governance and anti-corruption).

[FN4]. See U.S. Agency for International Development Website, http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/anti-corruption (last visited May 4, 2006) (describing programmatic and research work in the anticorruption area); United Nations ("UN") Office on Drugs and Crime Website, <http://www.unodc.org/unodc/en/corruption.html> (last visited May 4, 2006) (discussing anticorruption initiatives).

[FN5]. See Theodore H. Moran, How Multinational Investors Evade Developed Country Laws 8-9 (Ctr. for Global Dev., Working Paper No. 79), available at http://www.cgdev.org/files/6113_file_WP_79.pdf (explaining how law firms give opinion letters exposing Foreign Corrupt Practices Act ("FCPA") and Convention on Combating Bribery of Foreign Officials in International Business Transactions ("OECD Convention") loopholes to stimulate evasion).

[FN6]. Fritz Heimann & Gillian Dell, 2006 Transparency International Progress Report: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials 3 (June 26, 2006), available at <http://www.transparency-usa.org/documents/TISecondOECDProgressReportFinal.pdf>.

[FN7]. Id.

[FN8]. See generally Raymond W. Baker, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free Market System* (2005); Moises Naim, *Illicit: How Smugglers, Traffickers and Copycats are Hijacking the Global Economy* (2005); see also Ethan S. Burger et al., *Tax Avoidance vs. Tax Evasion--Ethical Implications for Lawyers and Accountants: The Strange Case of KPMG*, 31 J. Legal Prof. (forthcoming 2006) (discussing KPMG's role in facilitating the use of abuse tax shelters and the U.S. government's legislative and regulatory response).

[FN9]. See generally Baker, *supra* note 8.

[FN10]. See Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Int'l & Comp. Law 793 (1981) (discussing how previously legal U.S. campaign finance practices may be viewed as corrupt by others).

[FN11]. See UN Convention Against Corruption, Dec. 9, 2003, S. Treaty Doc. No. 109-6 [hereinafter U.N. Convention]; see also Ethan S. Burger, *The U.N. Convention Against Corruption: Decisive Action or Mere Symbolism?*, <http://www.american.edu/traccc/resources/publications/glasshouses.pdf> (last visited Aug. 6, 2006) (unpublished paper) (discussing the U.N. Convention).

[FN12]. Under the Russian Federation Civil Code, the giving of a 'gift' to a state or municipal official having a value of less than five times the minimum monthly wage (the equivalent of about \$150) is not considered a crime. See *Grazhdanskiy Kodeks [GK] [Civil Code]* art. 575. Nonetheless, the Russian Criminal Code provides that the payment and receipt of a bribe in an amount in excess of a "gift" is a crime. See *Ugolovnyi Kodeks [UK] [Criminal Code]* arts. 290-91.

[FN13]. See U.N. Office on Drugs and Crime, U.N. Convention Against Corruption, http://www.unodc.org/unodc/crime_convention_corruption.html (last visited May 4, 2006) (providing the text of the convention, its negotiation history, and related materials).

[FN14]. Although the Organization for Economic Cooperation and Development ("OECD") recognizes the broad scope of corruption and its impact on investment and development, the OECD chose to concentrate its efforts on the adoption of an anti-bribery convention. See OECD Corruption Website, http://www.oecd.org/topic/0,2686,en_2649_37447_1_1_1_1_37447,00.html (last visited May 4, 2006) (discussing corruption in general); see also Barbara Crutchfield

George, Kathleen A. Lacey & Jutta Birmele, The 1998 OECD Convention: An Impetus for Worldwide Change in Attitudes Toward Corruption in Business Transactions, 37 Am. Bus. L.J. 485 (2000) (discussing the factors leading to the preparation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") and noting the Creation of the OECD Working Groups to Monitor the Convention's Implementation); Nikolay A. Ouzounov, Facing the Challenge: Corruption, State Capture and the Role of Multinational Business, 37 J. Marshall L. Rev. 1181 (2004) (noting the growing awareness of the role of international business in facilitating corruption within weak states and examining how the OECD may be able to reduce this problem).

[FN15]. See Civil Law Convention on Corruption, Nov. 4, 1999, Europ. T.S. No. 174, available at <http://conventions.coe.int/treaty/en/Treaties/Html/174.htm>; Criminal Law Convention on Corruption, Jan. 27, 1999, Europ. T.S. No. 173, available at <http://conventions.coe.int/treaty/en/Treaties/Html/173.htm>.

[FN16]. The Council of Europe ("COE") and the Organization of American States ("OAS") both have agreements that address corruption in the transnational context and within the Member States as well. The COE's website contains the Criminal Law Convention on Corruption and other materials. See COE's Economic Crime Website, http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Combating_economic_crime (last visited May 4, 2006). The OAS website focuses on the Inter-American Convention Against Corruption, but also contains some information about anti-money laundering programs and domestic legislation in the OAS's Member States. See OAS Anti-Corruption Website, <http://www.oas.org/main/main.asp?sLang=&sLink=http://www.oas.org/juridico/english/fightcur.html> (last visited May 4, 2006).

[FN17]. The World Trade Organization's ("WTO") website does not discuss corruption per se, but includes documents relating to good governance and information on how to organize a tender. See WTO Website, http://www.wto.org/english/info_e/site2_e.htm (last visited May 4, 2006).

[FN18]. See Henning, *supra* note 10, at 793 n.2.

[FN19]. See Heineman & Heimann, *supra* note 2, at 115; Sean Murphy, Taking Multinational Corporate Codes of Conduct to the Next Level, 43 Colum. J. Transnat'l L. 389, 400 (2005).

[FN20]. See Transparency International Website, <http://www.transparency.org> (last visited May 4, 2006).

[FN21]. See Heineman & Heimann, *supra* note 2, at 115.

[FN22]. See Matthew Nick, Rethinking Multinational Corporate Governance in Extractive Industries: The Caspian Development Project and the Promise of Cooperative Governance, 38 Vand. J. Transnat'l L. 577 (2005) (discussing that the Caspian Development Project in many respects failed to protect the interests of the countries where the exploration and extraction was occurring).

[FN23]. See generally Daniel Patrick Ashe, The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act, 73 Fordham L. Rev. 2897, 2940-45 (2005). For a

thorough discussion of FCPA developments in recent years, see Oren Gleich & Ryan Woodward, Foreign Corrupt Practices Act, 42 Am. Crim. L. Rev. 545 (2005).

[FN24]. See generally Oren Gleich & Ryan Woodward, Foreign Corrupt Practices Act, 42 Am. Crim. L. Rev. 545 (2005) (summarizing the key features of the FCPA and analyzing its implementation); U.S. Department of Justice FCPA Website, <http://www.usdoj.gov/criminal/fraud/fcpa.html> (last visited May 4, 2006).

[FN25]. See 15 U.S.C. <section> 78m(b)(2) (2000) (mandating that issuers make and keep books and records).

[FN26]. The OECD Convention is not directly related to the voluntary 2004 Principles of Corporate Governance. See OECD Principles of Corporate Governance Website, http://www.oecd.org/document/56/0,2340,en_2649_34813_31530865_1_1_1_1,00.html (last visited May 4, 2006).

[FN27]. See Danforth Newcomb, Digests of Cases and New Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977, 3 (2006), available at http://www.shearman.com/lt_022806.

[FN28]. 20 Corporate Crime Reporter, 14(1), Mar. 29, 2006.

[FN29]. See generally Worth D. McMurray, Private Sector Response to the Emerging Anticorruption Movement, Developmental Proc., Sept. 2006, <http://www1.worldbank.org/devoutreach/article.asp?id=367> (last visited Sept. 25, 2006).

[FN30]. See id.

[FN31]. Some governments have a long history of using charges of corruption (with or without merit) to discredit political opponents. See John Read, Zuma Corruption Trial to Hear Claims of Corporate Bribery, Fin. Times, Sept. 6, 2006, at 12. In this matter, African National Congress Deputy President Jacob Zuma has been accused of taking large bribes in connection with a multi-billion dollar tender for the South African Navy. See id. In the view of many, he had stood a good chance of succeeding President Thabo Mbeki in 2009. See id.

[FN32]. Throughout the world a veritable army of "anticorruption" specialists, both outside consultants as well as government officials within State bodies, has appeared over the last decade. There seems to be an industry consisting of conferences, seminars, guides, and management systems. See generally OECD, Bribery in International Business Website, http://www.oecd.org/department/0,2688,en_2649_34855_1_1_1_1_1,00.html (last visited May 4, 2006); Scientific Applications International Corporation, FCPA Training Website, <http://www.saic.com/employees/fcpa.html> (last visited May 4, 2006); U.S. Agency for International Programs Website, http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/anticorruption (last visited May 4, 2006).

[FN33]. See Larry D. Thompson, Deputy Attorney General, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003). Timothy J. Coleman, Esq., Senior Counsel to the Deputy Attorney General, made available a copy of the memorandum at the Annual Meeting of the Association of Corporate Counsel held in Chicago on October 25, 2004. According to the Thompson Memo, the

decision whether to prosecute an organization, which often occurs in conjunction with the prosecution of individuals, depends on a corporation's culture, the operation of its regulatory compliance program, and how quickly management informs the appropriate government authorities of possible violations of law. If management waits until the conclusion of an investigation, it may have waited too long.

[FN34]. See, e.g., *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990), cert. denied, 498 U.S. 1086 (1991); see also *Citicorp Int'l Trading Co. v. Western Oil & Refining Co.*, 771 F. Supp. 600 (S.D.N.Y. 1991).

[FN35]. See, e.g., *Lamb*, 915 F.2d at 1024-25.

[FN36]. See *id.* at 1025.

[FN37]. Opinion of the General Counsel on the Existence of a Private Right of Action Under the Foreign Corrupt Practices Act of 1977, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 81,071, at 80,806 (Sept. 6, 1976).

[FN38]. See Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 Cal. L. Rev. 185 (1994); see also Brett Witter, *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990): The Sixth Circuit Gets Sheepish on Foreign Corrupt Practices Act Enforcement, 5 *Transnat'l Law* 533 (1992).

[FN39]. See *infra* notes 71-101.

[FN40]. See *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 17, 1992, 337 I.L.M. 8 [hereinafter *OECD Convention*].

[FN41]. The headings of the articles are: (1) The Offence of Bribery of Foreign Public Officials, (2) Responsibility of Legal Persons, (3) Sanctions, (4) Jurisdiction, (5) Enforcement, (6) Statute of Limitations, (7) Money Laundering, (8) Accounting, (9) Mutual Legal Assistance, (10) Extradition, (11) Responsible Authorities (12) Monitoring and Follow-up, (13) Signature and Accession, (14) Ratification and Depositary, (15) Entry into Force, (16) Amendment, and (17) Withdrawal. See *id.* arts. 1-17. They provide that the penalty for bribing a foreign official may be civil or criminal, including a fine or imprisonment, so long as punishment is proportionate to the offense. The article on enforcement consists of two sentences. The first affirmed the right of each state to enact its own laws in accordance with its own system--that is, the method for implementation need not be uniform. The second sentence provides that the parties "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." *Id.* art. 5.

[FN42]. See *OECD Convention*, *supra* note 40, art. 1.

[FN43]. See *id.* art. 3.

[FN44]. See, e.g., David L. Heifetz, *Japan's Implementation of the OECD Anti-Bribery Convention: Weaker and Less Effective than the U.S. Foreign Corrupt Practices Act*, 11 *Pac. Rim L. & Pol'y* 209 (2002) (noting that the Japanese crime of bribing a foreign public official is weaker than what the

OECD Convention mandates).

[FN45]. OECD Working Group on Bribery in International Business Transactions, http://www.oecd.org/document/5/0,2340,en_2649_34859_35430021_1_1_1_1,00.html (last visited May 4, 2006) (describing the OECD Working Groups).

[FN46]. Because one week is too short a period for information collection, there may need to be a permanent Working Group presence in each OECD member state to monitor activities.

[FN47]. See Harold Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2635 (1997) (book review) (noting that "efficiency, national interest, and regime norms" are more likely to result in Nation States complying with treaties than a treaty enforcement mechanism).

[FN48]. See Heimann & Dell, *supra* note 6, at 3.

[FN49]. *Id.*

[FN50]. Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 *Va. J. Int'l L.* 665, 666-89 (2004). During the Clinton Administration, Mr. Tarullo participated in OECD Convention negotiations as Assistant Secretary of State for Economic and Business Affairs from 1993 to 1996, and then as Assistant to the President for International Economic Policy.

[FN51]. *Id.* at 683.

[FN52]. The effectiveness of internal controls and anticorruption legislation vary, as do attitudes within a corporation. In a letter written in 2002, Transparency International's founder Dr. Peter Eigen noted that corporate awareness about the need to comply with the Convention was low:

In fact, the situation is much worse because only one in five managers in emerging market countries is even aware of the [C]onvention and these are the managers at the front line where bribery takes place. Only 19 per cent of respondents in the Transparency International (TI) [B]ribe [P]ayer[s] survey, conducted for TI by Gallup International between December 2001 and March 2002, were familiar with or knew something about the [C]onvention.

Peter Eigen, *Letter to the Editors, Anti-Bribery Convention Needs Support*, *Fin. Times*, Oct. 17, 2002, at 20. While corporate awareness and knowledge of the consequences for violations have increased, it is impossible to know whether this has resulted in a reduction of overall corruption in the intervening years.

[FN53]. Tarullo, *supra* note 50, at 684. Transparency International's Bribe Payers Index offers a useful gauge of corruption throughout the world. While other organizations and individuals have examined corruption on a comparative basis, none have been as successful as Transparency International in raising public awareness of corruption and its consequences. See Transparency International 2006 Bribe Payers Index, http://www.transparency.org/newsroom/in_focus/2006/bpi_2006 (last visited May 4, 2006) (providing overview of Transparency International's work in this area).

[FN54]. Tarullo, *supra* note 50, at 689. Professor Tarullo identifies three approaches to enhance OECD Member State governments' willingness to uphold their treaty obligations:

(1) Reduce the payoff for a government tolerating overseas bribery by credibly threatening additional costs on that government; (2) Increase the payoff for a government's prosecuting overseas bribery by credibly promising rewards to that government; and (3) Change the agents within other governments who make the assessment of their governments' payoff structure.

Id. at 690-91; see also Hugh Williamson, *Export Credit Agencies' Graft Crackdown Stalls*, *Fin. Times*, Feb. 15, 2006, at 8 (noting that Germany and Japan prevented stronger anticorruption controls for companies with official credit agency financing).

[FN55]. Heimann & Dell, *supra* note 6, at 3.

[FN56]. See Criminal Law Convention on Corruption, *supra* note 15; see also COE, *Explanatory Report to the Criminal Law Convention on Convention*, <http://conventions.coe.int/Treaty/EN/Reports/Html/173.htm> (last visited Sept. 6, 2006).

[FN57]. See Criminal Law Convention on Corruption, *supra* note 15, arts. 9, 12-13; see also Civil Law Convention on Corruption, *supra* note 15. The relevant language providing that COE Member States must create the legal basis to compensate victims of corruption is as follows:

Chapter I--Measures to be taken at national level

Article 1--Purpose

Each Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.

Article 2--Definition of corruption

For the purpose of this Convention, 'corruption' means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.

Article 3--Compensation for damage

1. Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.

2. Such compensation may cover material damage, loss of profits and non-pecuniary loss.

Article 4--Liability

1. Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated:

i. the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption;

ii. the plaintiff has suffered damage; and

iii. there is a causal link between the act of corruption and the damage.

2. Each Party shall provide in its internal law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.

Id. arts. 1-4.

[FN58]. U.S. Mission to the European Union, *Fact Sheet*, Nov. 11, 2000, <http://www.useu.be/ISSUES/conv10111.html> (last visited Sept. 6, 2006).

[FN59]. See COE, *Explanatory Report to the Civil Law Convention on Corruption*, *supra* note 56, P 92.

[FN60]. Id. PP 92-94.

[FN61]. See Bruce Zagaris, Anticorruption Conventions Provide for Remedies to Victims, Int'l L. News (ABA Sec. of Int'l L., Washington D.C.) Summer 2006, at 21.

[FN62]. See Fritz Heimann & Gillian Dell, Report of TI Study on Follow-Up Process for UN Convention Against Corruption (2006), www.transparency-usa.org/documents/UNCACReportFinal6-13-06.pdf (last visited Sept. 6, 2006).

[FN63]. See id. at 19-20. Transparency International gave the following evaluation:

Strengths

Methodology

- Adequate funding.
- Strong secretariat with high level of professionalism.
- GRECO plenary with strong chairman meets 3- 5 times annually.
- EU accession requirements for Central European countries provided an effective lever.
- Associated technical assistance.

Methodology

- Well designed questionnaires.
- Well organized country visits.
- A compliance process which follows up on the implementation of the recommendations made in the evaluation process.
- Some civil society participation.
- Scrupulous equal treatment of all countries and willingness to recommend improvements.

- Systematic audit with wide coverage.

- Review produces detailed reports with recommendations.

Transparency

- Publishes explanations of review process, schedule and questionnaires.
- Evaluation and compliance reports are always published, subject however to agreement of country reviewed.

Weaknesses

There has been criticism of GRECO on the following grounds:

- Too much focus on formal provisions, insufficient focus on some questions of real impact.

- Country visits are largely officials with evaluated countries not always providing the civil servants with the best information.

- Civil society participation could be strengthened, is not required in the rules, but has become standard part of country reviews.

- Agreement of countries required for publication of reports.

Id.

[FN64]. A list of States that have ratified the U.N. Convention is available at http://www.unodc.org/unodc/crime_signatures_corruption.html (accessed July 20, 2006). The U.S. Senate Foreign Relations Committee unanimously consented to ratify the Convention on August 1, 2006, and the full Senate ratified it on September 15, 2006. See 152 Cong. Rec. S9662-63; see also U.S. Senate, Treaties Approved by the United States Senate During the Current Congress, http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/trty_rtf.htm (last visited October 23, 2006). For a cynical view of the convention, see Burger, supra note 11.

[FN65]. World Bank, *supra* note 3, at 181.

[FN66]. See Burger, *supra* note 11.

[FN67]. Numerous scholars have noted that governments have long deputized private persons to assist in law enforcement functions in certain instances. In particular, attorneys have sometimes been assigned gatekeeper roles. See Fred Zacharias, *Lawyers as Gatekeepers*, 41 *San Diego L. Rev.* 1387, 1397- 1402 (2004) (noting that altering the role of lawyers and advocates has far-reaching implications for the attorney-client relationship).

[FN68]. Tarullo, *supra* note 50, at 670-71.

[FN69]. Bribery can take many forms, such as kickbacks for purchasing agents or special treatment by customs or other governmental officials. The latter are called "grease payments," which are payments given to government officials to get them to perform non-discretionary tasks that by law or custom they are required to do, such as register a car. See Rebecca Koch, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance*, 28 *B.C. Int'l & Comp. L. Rev.* 379 (2005) (arguing that the interpretation of grease payments is not narrowly enough drawn).

[FN70]. See Ouzounov, *supra* note 14, at 1189-94.

[FN71]. See *Env'tl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1054-56 (3d Cir. 1988).

[FN72]. See *id.* at 1056.

[FN73]. See *id.*

[FN74]. See *id.* at 1054, 1056.

[FN75]. See *id.* at 1063-64 (internal quotations omitted).

[FN76]. See *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 439 U.S. 400 (1990).

[FN77]. See *Dooley v. United Technologies Corp.*, 786 F.Supp. 65, 69 (D.D.C. 1992).

[FN78]. See *id.*

[FN79]. See *id.* at 82.

[FN80]. *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. <section><section> 1961-68 (2000).

[FN81]. See *Dooley*, 786 F.Supp. at 68.

[FN82]. See *Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1118 (9th Cir. 2003)

[FN83]. See *id.* at 1122.

[FN84]. See *id.* at 1119.

[FN85]. See *id.* at 1122-23.

[FN86]. See *id.* at 1122.

[FN87]. See *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 941- 42 (Cal. 2003).

[FN88]. See *id.* For a discussion of *Korea Supply Co. v. Lockheed Martin* in light of U.S. FCPA requirements, see Justin Serafini, *Foreign Corrupt Practices Act*, 41 *Am. Crim. L. Rev.* 721 (2004).

[FN89]. See *Korea Supply Co.*, 63 P.3d at 941-42.

[FN90]. See *id.* at 942.

[FN91]. See *id.*

[FN92]. See *id.*

[FN93]. See *id.* at 941-42.

[FN94]. See *id.* at 942.

[FN95]. *Id.*

[FN96]. See *id.* The Korea Supply Company ("KSC") originally asserted three causes of action: (1) conspiracy to interfere with prospective advantage, (2) intentional interference of KSC's relationship with MacDonald Detwiler and Associates Ltd. ("MacDonald"), and (3) unfair competition under California state law.

[FN97]. See *id.* at 947-50.

[FN98]. The Court stated:

[The] elements are usually stated as follows: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Id. at 950 (quotation marks and citations omitted).

[FN99]. Section 766B reads:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue a prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Restatement (Second) of Torts <section> 766B (1979).

[FN100]. *Korea Supply Co.*, 63 P.3d at 954 (citations omitted).

[FN101]. Korea is a party to the Convention and has its own legislation implementing its obligations, yet KSC chose to bring its claims in California rather than Korea. That decision may be based on an assessment of political factors or the court systems that arguably would have jurisdiction over the case. Such an evaluation would need to take into account the time it would take to have the case heard and the appeal process completed, the risk that a court's decision might be on the basis of something other than the merits (e.g., corruption, political interference by the government of the alleged bribe payer and the government where the bribe was paid), or the possibility of developing a case (e.g., access to witnesses and documents of both the opposing and third parties). See Christopher K. Carlberg, A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards, 26 B.C. Int'l & Comp. L. Rev. 95, 102-11 (2003) (criticizing the Convention's enforcement and calling for the unification of rules concerning statute of limitations (e.g., 5 years) and sanction (not less than \$175,000)).

[FN102]. Germany's Review of Implementation of the Convention and 1997 Recommendation to the OECD <section> 3.7, <http://www.oecd.org/dataoecd/14/1/2386529.pdf> (last visited May 4, 2006).

[FN103]. *Id.* at 10.

[FN104]. See Asian Development Bank Governance Website, <http://www.adb.org/Governance/default.asp> (last visited May 4, 2006); Asian Development Bank Law and Policy Reform Website, <http://www.adb.org/Law/default.asp> (last visited May 4, 2006).

[FN105]. See European Bank for Reconstruction and Development Website, <http://www.ebrd.org/oppo/procure/guide/fraud/index.htm> (last visited May 4, 2006) (examining procurement fraud and corruption).

[FN106]. See Inter-American Development Bank ("IADB") Website, <http://www.iadb.org/news/articledetail.cfm?Language=En&parid=3&artType=AN&artid=2834> (last visited May 4, 2006) (discussing its policy of zero tolerance towards corruption). For example, the IADB assisted U.S. law enforcement officials in the prosecution of a former employee who has since pleaded guilty to wire fraud involving the Bank's resources. IADB uncovered the criminal conduct and referred the matter to U.S. law enforcement authorities.

[FN107]. See World Bank Anti-Corruption Website, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,menuPK:384461~pagePK:149018~piPK:149093~theSitePK:384455,00.html> (last visited May 4, 2006) [hereinafter Anti-Corruption Website] (examining corruption); see also World Bank Development Committee, Strengthening Bank Engagement on Governance and Anticorruption (2006), <http://www.worldbank.org/html/extdr/comments/governancefeedback/gacpaper.pdf> (last visited Sept. 8, 2006) (memorializing World Bank's policy on governance and anti-corruption). There is much to commend in this document. It evinces an appreciation of the interplay between corruption and development. It recognizes the importance of greater transparency with respect to the Bank's operations. It seeks to better coordinate activities both within the bank and other development banks as well as organizations like the OECD. Unfortunately, the document contains some troubling provisions. For example,

it maintains a country-focused approach, rather than a people-focused approach, and it does not treat acts of bribery by corporations as severely as might be expected.

[FN108]. World Bank Anti-Corruption Website, *supra* note 91.

[FN109]. See Parthapratim Chanda, *The Effectiveness of the World Bank's Anticorruption Efforts: Current Legal and Structural Obstacles and Uncertainties*, 32 *Denv. J. Int'l L. & Pol'y* 315, 316 (2004). According to Mr. Chanda, corruption at the World Bank continues to be a problem. For example, he stated the following:

Disbursing over \$19 billion in loans per annum, the World Bank is exposed to significant operational risk for corruption and fraud. For example, Northwestern University political economist Jeffrey Winters estimates that corruption diverted upwards of 30 percent of development funds lent to Indonesia by the World Bank, totaling over \$11 billion. Several high-profile cases involving multinational Western firms in World Bank financed projects confirm the transnational nature of such corruption. In 2000, for example, the World Bank suspended its support for a \$100 million water project in Ghana awarded to a unit of Enron Corporation, citing an unexplained \$5 million payment by Enron.

Id. (citations omitted). Mr. Chanda identifies the Bank's own administrative rules in coordination with local law enforcement as factors that hinder the effective anticorruption measures. See *id.* at 319-53.

[FN110]. Some multilateral development banks ("MDBs") observers note that the MDB role in international financing is decreasing. Private banks increasingly encroach on projects that MDBs have traditionally financed in recent years. Because private sector institutions are often more entrepreneurial than inter-governmental institutions, there is reason to believe that MDBs may play a decreasing role in large international projects in the future.

[FN111]. See Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives From The NGO Community*, 19 *Am. U. Int'l L. Rev.* 1265, 1278-80 (2004). On non-governmental organization ("NGO") accountability, see Robert Charles Blitz, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 *Buff. Hum. Rats. L. Rev.* 261 (2004). Although Blitz focuses on accountability and quality control in human rights monitoring, these characteristics are also needed for monitoring efforts to combat corruption.

[FN112]. See James Boxell & Fiona Harvey, *BP Sacked 252 in Corruption Drive*, *Fin. Times*, Apr. 12, 2005, at 22.