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WHY MULTINATIONAL COMPANIES DOING BUSINESS IN CHINA FALL INTO THE TRAP OF MAKING PAYMENTS TO CHINA'S POLICE

*Daniel C.K. Chow**

ABSTRACT

Multinational Companies (MNCs) doing business in China often fall into the trap of making payments to the Public Security Bureau (PSB), (China's police force), in order to enlist the help of the PSB in law enforcement. The MNC might have suffered a theft of intellectual property rights or be faced with an issue of unfair competitor involving an ex-employee and a competing business operator. The MNC believes that criminal enforcement will send a stiff message and will be a more effective deterrent against future offenses. Under China's laws, many economic offenses can give rise to criminal liability but in order to initiate a criminal investigation, the MNC is often asked by the PSB for the payment of an administrative fee, often couched as advanced payment for the reimbursement of expenses needed for the investigation. The payment is usually small, several thousand dollars, and seems innocuous to the MNC. Although the initial payment may seem harmless, it may lead to a string of additional demands by the PSB for additional and larger payments and MNC's can become enmeshed in entanglements with other PRC authorities, brought in by the PSB, that also demand payments. A string of multiple payments then becomes much more problematic for the MNC and the entanglements might become hostile as the MNC feels increasingly trapped and exploited.

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* Frank E. and Virginia H. Bazler Chair in Business Law, The Ohio State University Michael E. Moritz College of Law. The author lived and worked in China as in-house counsel for a major multinational company and has first-hand experience in dealing with Public Security officials (PSB), and their requests for payments. The author also served recently as an expert in a major litigation on behalf of a multinational company alleging violations of its intellectual property violations in China. During the course of the litigation, the author discovered indications that the multinational company had made numerous payments to the PSB as well as to a state-owned technology appraisal consultancy organization. The author's own on the ground experience and work on recent cases form the basis for the main analysis in the discussion above. The author continues to watch developments in China on intellectual property enforcement and other business and trade issues generally.

I. INTRODUCTION

Multinational companies (MNCs) doing business in the People's Republic of China (PRC or China) often fall into the trap of making payments to China's police, the Public Security Bureau (PSB).[1] At least initially, MNCs make these payments voluntarily; the PSB does not extort initial payments from MNCs, make threats, or apply pressure to obtain these payments.[2] Instead, MNCs seek out the PSB and then voluntarily make payments to the PSB as an administrative fee in exchange for the PSB's commencement of an investigation into the MNC's claims that it has been the victim of economic crimes such as thefts of intellectual property (IP) rights, industrial espionage (including the theft of trade secrets), commercial bribery, unfair competition, or acts by rogue employees of the MNCs in stealing assets from the MNC.[3] One common scenario is when the PSB couches the payment not as a bribe or an illegal payment to the PSB, but in more innocent terms such as an advance for reimbursement of expenses necessary for the investigation of the crime.[4]

The initial payment is usual small, involving no more than several thousand dollars, a trivial amount for MNCs. The payment is not made to the individual account of any particular official, but is usually given to the PSB's coiffures as a general contribution.[5] The PSB assures the MNC that there is nothing illegal or unethical about making such a small payment.[6] The small size of these fees and the common use of this practice means that they occur on a regular basis and are not a case of concern to other PRC enforcement authorities or higher officials, even though China is in the midst of a highly publicized crackdown on corruption.[7] These minor or trivial fees have so far fallen under the level of scrutiny that is being reserved for high and mid-level officials of the party[8] and bribery cases involving hundreds

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[1] *See* discussion of the Public Security Bureau and its role in the PRC political and legal system, *infra* Part II.

[2] *See infra* Part II. B. (discussing the low priority of economic crimes and how the Public Security Bureau will often ask for payments in order to investigate such crimes).

[3] *See infra* notes 41-42 (detailing the specific provisions of PRC law applying to these economic crimes).

[4] *Infra* Part III. A. (discussing how the Public Security Bureau will couch the demand as an innocent advance for expenses).

[5] *Id.*

[6] Daniel C.K. Chow, *How China's Crackdown on Corruption Has Led to Less Transparency in the Enforcement of China's Anti-Bribery Laws*, 49 UC DAVIS L. REV. 685, 687 (2015).

[7] *Id.* at 701.

[8] *See* Javier C. Hernandez, *China's Corruption Fight Extends to Top Officials in Beijing and Shanghai,* N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/

of millions dollars involving MNCs.[9] Yet, these fees are raise troublesome issues— they might fall under U.S. law for the MNC, such as the Foreign Corrupt Practices Act ("FCPA"),[10] a topic that is beyond the scope of this present study but is reserved for a separate study,[11] and such payments are technically illegal under PRC law, despite any assertions to the contrary by the PSB.[12] Yet, the PSB regularly demands these payments and MNCs continue to regularly make them.[13] Why this occurs and the risks of doing so under the legal and political system are the subject of this study.

Many MNCs may initially find the option of using the PSB to prosecute economic crimes an attractive option. For many economic offenses, such as intellectual property violations, the MNC has the option of using administrative enforcement authorities, the PSB (in some

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11/12/world/asia/china-crackdown-corruption-beijing-shanghai-ai-baojun-lu-xiwen.html. (Noting that since taking office in 2012, President Xi Jinping has implemented a crackdown on official graft that shows no sign of abating, and is using the anti-corruption campaign to target his political enemies and to consolidate power). If the crackdown is politically motivated to root out Xi's enemies as suggested, China would likely have little interest in petty corruption of the type set forth in the discussion above. The PSB officials discussed above would not be considered even low level bureaucrats (subject to the crackdown) but would be considered to be a level below, i.e. "on-the-ground" state workers with no managerial responsibilities.

[9] *See, e.g.,* Hester Plumridge and Laurie Burkitt, *Glaxo Smith Kline Guilty of Bribery in China*, WALL STREET JOURNAL (Sept. 19, 2014), http://www.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817 (discussing the record fine of nearly $500 million imposed by China on Glaxo for bribery).

[10] *See* 15 U.S.C.S. §§ 78b, 78dd-1-3 (2006), *See also* Daniel C.K. Chow, *China Under the Foreign Corrupt Practices*, 2012 WIS. L. REV. 574 (2012) (discussing of the special issues that arise in connection of the application of the FCPA to China) [hereinafter "Chow, *China under the FCPA*"].

[11] *See infra* note 62 (discussing briefly the FCPA issues that are involved).

[12] *See* Circular of the Ministry of Public Security on Prohibition of Demanding Money and Valuables from All Parties and Supporters during Criminal Case Proceeding, Notice No. 725, Art. II (1998). ("It is strictly prohibited to charge all parties during criminal processing under various names. It is not allowed to accept the case processing fee paid by the interested parties in various names for any reason. Where commission may be or is permitted during case processing as previously provided, immediate rectification shall be carried out. Any violation against provisions shall be investigated and punished strictly"). It would appear that characterizing a case fee as an advance reimbursement of expenses, as the PSB will often do, would fall under this law. Of course, the real issue is that the PSB is in charge of enforcing this law, so the PSB is in essence interpreting this law for itself and is policing itself. This might explain why these fees are still common.

[13] This is confirmed by the author's own recent on the ground research in China and in discussions with a number of PRC attorneys and government officials.

cases), and the courts.[14] Using the courts can be an ineffective process to combat intellectual property rights violations, because if the intellectual property infringer is a counterfeiter or a copyright pirate, the suspect will disappear at the first sign of litigation.[15] Counterfeiters and pirates are individual petty criminals or can be members of large criminal organizations.[16] In either case, they have no wish to deal with the courts but will simply vanish at the first hint of official investigation only to reappear in the market in short order under a new name and identity to continue the same illegal business.[17] Using the courts involves the formal process of filing a complaint and giving notice to the defendant, who then promptly disappears.

Administrative enforcement is often preferred by MNCs because administrative authorities can act quickly, without notice to the suspect, preserving the element of surprise.[18] Administrative authorities have proven to be quite responsive to complaints by MNCs. For example, MNCs are often able to have an administrative authority initiate a raid within half an hour.[19] If the authorities have conducted raids on behalf of the MNC before and are familiar with the MNC's

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[14] For example, in the case of trademark infringement, the trademark owner is allowed to use administrative authorities (the local Administration for Industry and Commerce) or file a case in court. *See* PRC Trademark Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, revised Aug. 30, 2013), Art. 60, available at http://www.wipo.int/wipolex/en/details.jsp?id=13198. ("the trademark registrant or an interested party may bring a lawsuit to the competent people's court, or ask the competent administration for industry and commerce to address the dispute"). If the case is filed with an administrative authority, the authority has the option of transferring the case to the PSB if criminal liability is involved. *See id.* at Art. 61 ("In the event of an act of infringement of the exclusive right to use a trademark, the Administrative departments for industry and commerce shall be granted with authority under the law to investigate and punish on it. If it constitutes a criminal offense, they shall promptly transfer the case to a judicial authority for settlement in accordance with the law."). By "judicial authority," the statue is referring to the PSB. The courts, procuratorates, and the PSB are considered to be "judicial organs" of the PRC. *See* DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 199 (3d ed. 2015) [hereinafter "CHOW, LEGAL SYSTEM OF CHINA"].

[15] *See generally* Daniel C.K. Chow, *Organized Crime, Local Protectionism, and the Trade in Counterfeit Goods*, 14 CHINA ECON. REV. 473 (2003) (discussing of the role of organized crime in counterfeiting).

[16] *See id.* at 483-84.

[17] *Id*.

[18] *Id.*

[19] Daniel Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China: How a Flawed Approach is Making Counterfeiting Worse*, 41 GEO. J. INT' L. 749, 761 (2010) [hereinafter "Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China*"].

private investigators, an oral complaint might be enough to initiate a raid with fifteen minutes.[20] The authorities will then conduct a surprise raid of the suspect premises, with representatives of the MNC present, and seize all illegal product and cash found on the site.[21] While the raid itself can be dramatic, the final effect of the raid can be rather limited because the consequences to the counterfeiter are minor, if not trivial.[22] The administrative authorities are limited in their enforcement power; their powers are limited to confiscating the contraband and to imposing fines.[23] These fines are usually so small that they do not act as a deterrent to repeat offenses.[24] The administrative authorities also do not have the power to impose criminal penalties.[25] All criminal actions must be conducted through the PSB.[26] To initiate a criminal case after the administrative authorities have conducted a raid, the administrate authorities must transfer the case to the PSB.[27] Many administrative authorities, once they have conducted a raid, are reluctant to transfer the case to the PSB because they must also transfer the confiscated assets (which are otherwise auctioned off) and will have less to report on their own regular statistics that are submitted to higher administrative authorities in their chain of command.[28] PSBs, for reasons explained below, may also be reluctant to accept the case, leaving the MNC with only the seized assets and a small fine on the suspect. For this reason, MNCs find that the use of administrative authorities, while dramatic, has little or no long-term effect in deterring counterfeiters. In fact, an argument can be made that administrative enforcement actually leads to an increase in counterfeiting and only makes the problem worse.[29] Nonetheless, the use of administrative enforcement continues to be the most popular vehicle for relief for intel-

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[20] *Id.*

[21] *Id.*

[22] *See* DANIEL C.K. CHOW AND THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 540 (3d ed. 2015) [hereinafter "CHOW AND SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS"] (summary in table of fines and criminal prosecutions of counterfeiters by PRC authorities). The average fine imposed on a counterfeit after a raid is just $1206— the cost of doing business for many counterfeiters.

[23] *See id.*

[24] *See supra* note 13.

[25] *See* Chow, *China under the FCPA, supra* note 10, at 594.

[26] *Id.*

[27] *Id.*

[28] See Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L. Q. 1, 32 (2000).

[29] *See* Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China*, *supra* note 19, at 765.

lectual property violations in China due to its speed and short term impact, i.e. the seizure of contraband materials.

Faced with the ineffectiveness of court proceedings in many cases and the low deterrence effect of administrative enforcement, many MNCs look to criminal punishment as the most effective form of deterrence and are drawn to this option when using the police is a presented as an available option. As noted above, however, using the PSB invariably requires the payment of fees.[30] No matter how innocently the payments are characterized, paying the fees required by the PSB can become a trap. What can ensue is that the MNC becomes entangled in a web of further payments and involvements with other bureaucracies that begin to become assume a more dubious legality.[31] The MNC can also find itself caught in arrangements with the PSB and other Chinese authorities that become increasingly tense and hostile as demands for further payments ensue and, in the end, the MNC never achieves the result that it hoped when it first started on this path. How and why this process begins and how matters begin to spiral out of control is the subject of the following discussion about the role of the Police (i.e., the Public Security Bureau) in China's government and society.

II. The Role of the Public Security Bureau in China's Law Enforcement Regime

Under China's legal regime, the Ministry of Public Security, under the State Council (China's executive arm), has overall responsibility for the supervision of the local Public Security Bureaus, China's main police force in charge of all on the ground enforcement against crime.[32] The primary objective of the PSB is to enforce laws against violent crimes that threaten the security of citizens and society.[33]

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[30] *See* Chow, *China under the FCPA, supra* note 10, at 595.

[31] This observation is based upon the author's recent experience as an expert witness in a theft of trade secrets case involving a multinational company that become embroiled in making dubious payments to Chinese authorities.

[32] *See* Chow, Legal System of China, *supra* note 14, at 98, 267.

[33] *See* People's Police Law of the People's Republic of China, art. 1 (1995) (revised 2012) ("The present law is enacted . . . for the purpose of safeguarding State security [and] maintaining public order."); *See also id*. at Art. 2 ("Tasks of the people's police are to safeguard State security, maintain public order, protect citizens' personal safety and freedom and their legal property, protect public property, and prevent, stop and punish illegal and criminal activities."); *See id.,* While intellectual property and unfair competition law offenses arguably fall within the scope of these articles, the overall structure and tone of the Police Law is directed at State security and protection of citizens' personal safety.

China has a low crime rate overall compared to other countries;[34] one reason is that violent crimes, such as homicide, kidnapping, robbery, or assault are dealt with swiftly and ruthlessly.[35] Other types of crimes that threaten society, such as drug trafficking[36] or political dissent,[37] are similarly dealt with in a merciless manner. A detailed consideration of the considerable power of the PSB is beyond the scope of this present discussion, but any involvement with the PSB usually cre-

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[34] *See* OVERSEAS SECURITY ADVISORY COUNCIL [OSAC], U.S. DEP'T OF ST., CHINA 2016 CRIME AND SAFETY REPORT: BEIJING (2016) (The State Department does not provide country-wide crime ratings but only urban crime statistics in cities, such as Beijing, Shanghai, and Hong Kong. These cities have low average crime ratings), https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=19585; OSAC, U.S. DEP'T OF ST., CHINA 2016 CRIME AND SAFETY REPORT: SHANGHAI (2016), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=19088; OSAC, U.S. DEP'T OF ST., CHINA 2016 CRIME AND SAFETY REPORT: HONG KONG (2016), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=19028.

[35] Under the PRC Criminal Law, the death penalty is "applied to criminals who have committed extremely serious crimes." The statue allows PRC authorities wide discretion in deciding what constitutes an "extremely serious" crime. *See* PRC Criminal Law, art. 48 (1997) (revised 1999, 2001, 2002, 2005, 2006, 2009, 2011, & 2015). One of the most notable changes in the 2011 revision was the elimination of thirteen non-violent crimes previously subject to capital punishment. Prior to 2011, crimes that once were subject to the death penalty included:

> (1) smuggling of cultural relics; (2) smuggling of precious metals: (3) smuggling of precious animal or their products; (4) smuggling of ordinary freight and goods; (5) fraud connected with negotiable instruments; (6) fraud connected with financial instruments; (7) fraud connected with letters of credit; (8) false invoicing for tax purposes; (9) forging and selling value-added tax invoices; (10) larceny; (11) instructing in criminal methods; (12) excavating and robbing ancient cultural sites or ancient tombs; and (13) excavating and robbing fossil hominids and fossil vertebrate animals.

CHOW, LEGAL SYSTEM OF CHINA, *supra* note 14, at 333-34. The range of crimes subject to the death penalty until 2011 suggests how harsh the criminal justice system was (and is) in China. *Id.*

[36] HARM REDUCTION INT'L, THE DEATH PENALTY FOR DRUG OFFENCES: GLOBAL OVERVIEW 2011, at 3, 25, *available at* https://www.hri.global/files/2014/08/06/IHRA_DeathPenaltyReport_Sept2011_Web.pdf (listing China amongst only six global countries that regularly and "aggressively" execute drug offenders).

[37] *See* Peter Beaumont, *Why is China so terrified of dissent?*, THE GUARDIAN (Jan. 16, 2010), http://www.theguardian.com/world/2010/jan/17/china-terrified-dissent-dissident-chinese.

ates extreme fear in most PRC citizens.[38] If a defendant is found guilty, punishments can be draconian by international standards.[39]

A. The Role of the PSB in Initiating a Criminal Investigation

Not only does the PSB play a primary role in law enforcement, but every criminal case in China must be formerly initiated by the PSB[40] regardless of whether the case proceeds to trial or not. China's prosecutorial organ, the Procuratorate, will prosecute the case if a trial is necessary but the initiation of the case must always start with the PSB. This feature of China's legal system means that MNCs must deal directly or through their agents with the PSB if MNCs wish to pursue the criminal prosecution of an economic crime.

MNCs in China are faced with myriad economic offenses that do not arise to the level of criminal liability in some developed countries, such as the United States. For example, offenses involving copyright infringements and patent violations are not punishable as criminal offenses in the United States, but can be subject to criminal liability in China if the offense involves profits that cross a certain monetary threshold.[41] Other offenses such as trademark counterfeiting and theft of trade secrets on a relatively small scale can also trig-

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[38] *See* CHOW, LEGAL SYSTEM OF CHINA, *supra* note 14, at 274

[39] *See, e.g.*, AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS 211-12 (Jon Yorke ed., 2008) (discussing the continued international pressure on China's increased use of the death penalty); *See China Executes More People Than the Rest of the World Combined*, AMNESTY INT. U.S.A. (Mar. 31, 2015) (discussing Amnesty International's assessment of China's execution statistics, *available at* http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2014 ("China again carried out more executions than the rest of the world put together. Amnesty International believes thousands are executed and sentenced to death there every year, but with numbers kept a state secret the true figure is impossible to determine.").

[40] *See* CHOW, LEGAL SYSTEM OF CHINA, *supra* note 14.

[41] *See* Zhuanli Fa [Patent Law] Art. 63 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 27, 2008, effective Oct. 1, 2009) (China), (1984); PRC Copyright Law Art. 48 (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010) (China), (1990). Both of these provisions providing for criminal liability are vague. Both refer to criminal liability to be imposed in circumstances "where a crime" has occurred without further elaboration of what constitutes a crime. This type of vagueness in PRC law is common. The PRC Criminal Law contains specific provisions imposing terms of incarceration for violations of patents (Art. 216), trademarks (Art. 213 to -15), copyrights (Art. 217), and trade secrets (Art. 219). These provisions provide for incarceration of three years or more in prison if the "circumstances are serious" or the amounts of illegal gains is "large" or losses caused are "heavy." PRC Criminal Law Art. 213 to -17, Art. 219 (promulgated by the Standing Comm. of Nat'l People's Cong., Feb. 25, 2011) (China) (1979).

ger criminal liability in China;[42] while both of these offenses can also constitute crimes in the United States, simple counterfeiting offenses on a small scale are not subject to criminal liability in the United States but only more complex crimes such as racketeering and trafficking in counterfeit goods on a commercial scale are criminally punishable.[43] Other examples are various methods of unfair competition, as detailed in the Anti-Unfair Competition Law, such as charging predatory low prices and stealing trade secrets.[44]

B. The Low Priority of Economic Crimes for the PSB

Since the primary mandate of the PSB is to protect society against violent crimes and other offenses that threaten social stability, the PSB tends to view economic crimes suffered by MNCs as of lesser importance.[45] Many economic crimes, such as intellectual property violations are considered to be victimless crimes and the only harm suffered is that a wealthy MNC earns fewer profits. Reflecting these priorities, the PSB is often unenthusiastic when a representative of an MNC approaches it with a case involving an economic crime.[46] The PSB will need to devote its limited personnel, time, and resources in pursuing a crime that is not considered to be a priority by its supervising authorities and for which the PSB might not receive much credit.[47] Moreover, economic crimes, such as counterfeiting, might be complex and time consuming involving a number of different individuals or in some cases, criminal organizations.[48] The case could also involve es-

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[42] PRC Trademark Law Art. 61 (promulgated by the Standing Comm. Of Nat'l People's Cong., Aug. 30, 2013) (China), (1982). Article 61 of the Trademark Law, like the Patent and Copyright Law, also refers to criminal prosecution in circumstances in which "a crime is suspected to have been committed." Circumstances constituting a crime is not further defined.

[43] Counterfeiting can be a predicate under 18 U.S.C. §1963 (2009). Trafficking in counterfeit goods is criminalized by 15 U.S.C. §2320 (2016). 18 U.S.C. §1832 (2016) criminalizes theft of trade secrets for foreign government as well as for private purposes when the theft involves interstate commerce even if the recipient is another business.

[44] PRC Anti-Unfair Competition Law Art. 8 (China) (1993) (commercial bribery), Art. 10 (stealing trade secrets). Criminal liability for bribery is contained in Art. 22 of the Anti-Unfair Competition Law and for theft of trade secrets in Art. 219 of the PRC Criminal Law, *supra* note 41. The same vague terms used in connection with trademarks patents, and copyrights, such as or if a crime has occurred or serious circumstances are used in these statutes as well.

[45] The discussion in this part of the text stems from the author's own interactions with the PSB while working as a lawyer in China and, more recently, as an expert witness on cases involving enforcement of intellectual property rights in China.

[46] *Id.*

[47] *Id.*

[48] *Id.*

tablishing a documentary trail in order to charge the defendant with a crime; this is time consuming work and outside the scope of the regular law enforcement role of the PSB in suppressing violent crimes. As the PSB is often unenthusiastic about accepting such cases and using the resources in its budget necessary to pursue such a case, the PSB often asks for a case file, i.e. a fee to initiate the case that also includes an advance on expenses needed to pursue the case. The case fee is usually 20,000-30,000 Renminbi (RMB or (people's currency)) or $3,000 to $5,000.[49] Of course, the PSB has its own budget and could use its own resources to investigate an economic crime.[50] But that would mean devoting these limited resources to a crime that means very little to the PSB; so the PSB is instead asking a deep pocketed MNC to foot those expenses instead.

C. Why the MNC Makes the Payment

An MNC might be willing to make such a payment for a number of reasons. The prospective of criminal punishment and the real deterrence that it promises can be enticing to MNCs that are weary of the repeat offenses by the same suspect that constantly occurs in crimes such as counterfeiting.[51] The amount of the case fee is small or even trivial for MNCs, which might have an annual budget of several million dollars or more to fight counterfeiting alone.[52] Many MNCs today have a brand protection unit within the company, tasked specifically with pursuing infringers of the MNC's intellectual property assets.[53] At many MNCs the employee in charge of the brand that is being counterfeited—known as a brand manager— might be a marketing manager, or a a mid to high-level executive, The brand manager usually has a business background (such as an MBA) and might lack a legal background.[54] They might see no reason or might not wish to consult with the MNC's legal department, and might see (or wish to

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[49] These numbers are based on the author's own experiences with the PSB in actual cases. The author has since checked with lawyers in China who have confirmed the amounts of the case fees demanded by the PSB.

[50] *Id*.

[51] *See* Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China*, *supra* note 12, at 762.

[52] *See id*. at 767.

[53] *See id*. at 760.

[54] *See* Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China*, supra note 12, at 76) (discussing the role and back of the brand manager as a "business manager of a particular brand or trademarked product. Within an MNC in China, a business manager will be assigned to manage the advertising, marketing, and sales of a famous trademarked or branded product and will be evaluated based on the total sales revenue and market penetration of the product").

see) nothing dubious about the payment. In another scenario, instead of a brand manager, the persons in charge of brand protection within the MNC might be lower level inexperienced PRC nationals who see nothing wrong with making the payment and who might be used to the culture of petty corruption in business common and tolerated in China.[55]

Many MNCs employ private investigation companies to pursue counterfeiters.[56] Locating counterfeiters can be a dangerous activity that involves the use of false identities by persons seeking to penetrate the counterfeiting ring.[57] Exposure of the impersonator could subject that person to safety risks. The MNC usually does not wish to subject its own personnel to such dangerous work but will hire outside private entities to engage in this risky activity.[58] The private investigation company might make the payment of the case fee to the PSB and never inform the MNC of the payment, or might inform the MNC only after the payment is made.[59] The private investigation company might make the initial payment on behalf of the MNC and then hide the payment by charging it to the MNC as a general expense.[60] The private investigation company then explains to the MNC that it was able to file a criminal case on behalf of the MNC to pursue the suspects of the economic crime. The MNC is elated and wishes to proceed expeditiously without knowledge that the payment was made only to learn later as the PSB makes additional demands.[61] Whatever the reason for the initial payment, it might start a chain of events that will lead to further entanglements for the MNC.

III. Complications that Arise from Making Payments to the Police

Once an initial payment is made, there are usually two types of complications that arise causing issues under the PRC domestic legal and political systems. Aside from these concerns, there is a separate but very serious set of serious legal issues might arise from the applicability of FCPA to the MNC's payments, but that discussion is omit-

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[55] Many local employees in an MNC's business operations in China may have little interest in abating the risk to the MNC by making such payments. *See* Chow, *China Under the FCPA*, *supra* note 10, at 603.

[56] For a fuller discussion of private investigation companies and the lucrative, but murky terrain that they occupy in law enforcement in China. *See Anti-Counterfeiting Strategies of Multi-National Companies in China*, *supra* note 20, at 763-64.

[57] *See id*. at 763.

[58] *See* Chow, *China Under the FCPA*, *supra* note 10, at 593.

[59] *See id.* at 595.

[60] *See id.* at 595-96.

[61] *Id*. at 596.

ted here as it is reserved for a separate and extensive analysis of its own.[62] What follows below are complications for the MNC in the context of the PRC legal and political system, aside from any additional questions involving foreign law, such as the FCPA, as applied to acts of MNCs within the PRC.

A. The Initial Payment is Followed by Demands for More

The initial payment to the PSB might only signal the first demand by the PSB. The PSB will often cite its limited budget as a justification for the initial payment or case fee.[63] If the investigation of the case involves additional expenses, the PSB will demand additional payments. For example, if the investigation uncovers numerous additional suspects, the PSB might cite additional resources need to be spent as the scale of the investigation has expanded beyond its original scope.[64] If the PSB investigates a counterfeiting case, PSB officials might trace the counterfeiter or its associates to a remote location.[65] The PSB might then demand travel expenses for hotels, lodging, and

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[62] The FCPA prohibits payments by U.S. companies to foreign officials for the purpose of obtaining or retaining business or to secure an improper advantage that will assist in obtaining or retaining. See 15 U.S.C. §§ 78dd-1(a)-(c). Obtaining or retaining business does not mean the award of a government contract but is interpreted more broadly to include acts that indirectly benefit the business of the U.S. company. See United States v. Kay, 359 F.3d 738 (5th Cir. 2004) (business nexus requirement of FCPA broad enough to include the payment of bribes to customs officials to lower customs duties due on U.S. companies' imports of sugar into Haiti). The FCPA also includes a so-called "grease" payment exception, i.e. there is no FCPA liability if the payment is a facilitating or expediting payment to a foreign official to secure the performance of a "routine" government action by a foreign official. See 15 U.S.C. §§ 78dd-1(b). A "routine government action" refers to clerical actions such as issuing permits, licenses, processing visas but also includes "police protection." See 15 U.S.C. §§ 78dd-1(f)(3)(A)(i)-(iii). How case fees and payments to state-owned technology appraisal and consultancy organizations would need to be analyzed in detail under these and other provisions of the FCPA and existing case law, a subject for a separate study.

[63] This observation is based upon the author's experience as the head of the legal department of a large multinational company's China headquarters. In the late 1990s, the author lived and worked in China and handled all aspects of the China's legal work, including protecting the company's intellectual property rights. In this role, the author was frequently asked for payments by PRC authorities in any case involving enforcement of the company's intellectual property rights. These demands were always refused. Recently, the author served as an expert witness in a trade secrets case in which a U.S.-based multinational company was pressured by Chinese authorities to make illegal payments. The author was able to uncover these payments by reconstructing a paper trail of receipts.

[64] *See id.*

[65] *See id.*

meals in order to continue the investigation. The PSB might argue that it needs additional equipment (i.e. computers and mobile phones) to pursue the investigation because its own equipment is currently tied up in use for violent crimes. If the PSB confiscates materials on the suspect premises, the PSB might demand that the MNC pay a storage fee for the materials.[66] The PSB has a yearly budget to defray its expenses, but the PSB might not wish to uses its own budget when it now has a wealthy MNC, with deep pockets, in the grip of an ongoing investigation. In practice, the PSB can devise any number of different reasons for additional payments usually without any documentation or justification. Costs, which might have been minor at the outset of the case, now begin to expand. A one-time payment becomes a continuing chain of payments, which begins to cast greater doubt on the legality of the payments under PRC domestic law.

B. The Need to Involve Other PRC Authorities

The PSB might lack the expertise to fully conduct a criminal investigation in any number of cases involving economic crimes. The PSB is comprised of law enforcement officials trained in the use of force to suppress violent crimes in the streets and are not trained in the often complex and sophisticated legal issues involved in some types of economic crimes. For example, if the PSB is investigating an industrial espionage case involving the theft of trade secrets or other intellectual property rights, the PSB will lack the expertise to make the critical substantive determination of whether a crime (the theft of intellectual property) has occurred and whether an arrest is warranted.[67] Most PSB officials have only a layperson's vague understanding of intellectual property. In a typical case involving theft of trade secrets, an employee of the MNC's China operations leaves the employment of the MNC armed with propriety information protectable as trade secrets and goes to work for a competitor and provides the competitor with the trade secrets causing injury to the MNC.[68] Trade secrets can include scientific processes, methods, or business information consisting of marketing and advertising strategies, new product development strategies, customer lists, and financial data about the MNC.[69] To prove the theft of a trade secret to justify an arrest, the PSB will need to find that a trade secret exists in accordance with ap-

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[66] *See id.*

[67] *See* id.

[68] *See* Marisa Anne Pagnattaro, Protecting Know-How from Walking Out the Door in China: Protection of Trade Secrets, 55 Bus. Horizons, 329, 329 (2012).

[69] *See* the definition of a trade secret under PRC Law set forth in note 42 infra.

plicable PRC law[70] and that there has been a theft of the trade secret.[71] Determining what information qualifies as a trade secret is outside the expertise of the PSB. Determining whether a theft of a trade secret has occurred is also outside the expertise of the PSB. The MNC might allege that the theft of the trade secret is evidenced by the competitor's use of the MNC's proprietary method protected by a trade secret in producing the competitor's product.[72] The only way to prove this allegation is to make a scientific analysis of the competitor's product, its production processes, and then compare them to the MNC's trade secret. This type of analysis is far outside the expertise of the PSB. Additional examples would include cases involving criminal copyright, trademark, and patent violations. The PSB has no training or expertise in trademark, copyright, or patent law and is incapable of making a determination that a copyright violation, a trademark violation, or a patent infringement has occurred. The PSB cannot make an arrest and pursue an investigation until a determination of probable infringement has occurred.

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[70] The basic law that applies to trade secrets is the PRC Anti-Unfair Competition Law (1993) (hereinafter "AUCPL"). Although the law is now over twenty years old, a new revision of the AUCPL has been in progress for years and has still not yet been completed. Article 10 of the AUCPL states;

> "[T]rade secret" shall mean technical information and business information that is unknown to the public, can bring economic benefits to the rights owner, is of a practical nature and is protected by confidentiality measures taken by the rights owner.

Article 10 of the AUCPL, *supra*.

[71] Article 10 of the AUCPL describes acts that infringe a trade secret, which includes

> (1) Obtaining a rights owner's trade secret by theft, luring by promise of gain, duress, or any other unfair means;
>
> (2) Disclosing, using, or permitting others to use a right owner's trade secret that was obtained by any of the means set forth in the preceding item; or
>
> (3) Disclosing, using, or permitting others to use a right owner's trade secret in that operator's possession, thus violating agreement or the rights owner's requirement to keep the trade secret confidential.

Article 10 of the AUCPL, *supra* note 42.

[72] This observation is based on the author's recent role as an expert witness in a trade secrets case involving a U.S.-based MNC's China subsidiary. The MNC was required by PRC authorities to provide documentary evidence that its trade secret had been stolen; this process involved the use of highly technical documentation of the existence of the trade secret and a comparison of the trade secret with a competitor's product, which would serve as proof that the trade secret had been misappropriated.

In complex cases, the PSB will then need to enlist the services of a third party expert.[73] In many cases, the PSB will entrust the technical legal issues to a state-owned technology appraisal consultancy organization. The PRC has a large number of these technology appraisal organizations to assist the courts and enforcement authorities on any number of technical and scientific issues that arise in the course of an enforcement action.[74] The PSB will entrust the technical issues, which could involve intellectual property rights (such as trade secrets and copyrights) to the technology appraisal organization. The PSB will act only upon a final report issued from the technology appraisal organization that finds that an intellectual property rights violation has occurred. The state-owned technology appraisal organization will charge an appraisal fee for its services, which could be in the tens of thousands of dollars or more, depending on the complexity of the issues.[75] The process can also take months, raising additional concerns for the MNC if it believes that there is a continuing breach of its intellectual property rights. As the PSB is the entrusting organization, the PSB should be the entity that pays the appraisal fee,[76] but the PSB will usually ask the MNC to pay the fee.[77] At this point, with a lot time and resources invested in the investigation, the MNC may agree reluctantly to pay the fee, knowing that failing to pay the fee will likely end the investigation immediately. As the state-owned technology appraisal consultancy organization knows that the outcome of the case depends on its analysis, the appraisal organization may begin to make demands of its own on the MNC.[78] The appraisal organization might claim that the analysis is more complex than anticipated and will begin to demand payments directly from the MNC in

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[73] *See id.* The PSB are China's Police. China's police officers are law enforcement officials and lay no claim to being experts in intellectual property.

[74] For the list of approved state technology appraisal and consultancy organizations, *see* the Supreme People's Court, Reply to China Science and Technology Consultancy Service Center about "Report of Application for Incorporation of Judicial Appraisal Institutions in the Roster" (April 9, 2003).

[75] *See* Article 8 of the Decree of the Ministry of Justice on General Rules on the Procedures for Judicial Appraisal (2007) ("The judicial appraisal institutions shall uniformly charge for the judicial appraisal fees. The charging items and standards shall be subject to relevant national standards.").

[76] *See* id. at Article 11 (the technology appraisal and consultancy organization must be entrusted with the appraisal and the entrusting party must pay the appraisal fee as it is the entrusting party that requests the appraisal).

[77] The author was an expert witness in a recent case that involved the payment of the judicial appraisal fee by the MNC when the PSB was the entrusting entity.

[78] *See* id. The author was able to uncover the demands by examining a paper trail. The MNC also kept records of interviews with its local employees; from examining these records, the author was able to determine that the employees had been pressured by Chinese authorities for payments.

order to complete its analysis. The appraisal organization has a lot of leverage because it can hold up the entire investigation by delaying its report and may threaten not move ahead without additional payments from the MNC.[79] The state-owned appraisal consultancy organization might begin to demand hefty fees, hinting that without the payment of such fees, the outcome might be long delayed or even unfavorable to the MNC, i.e. a negative finding of an intellectual property violation, which would terminate the case immediately.

C. The Growing Web of More Payments and Entanglements

What began as a single payment of a case fee can lead to multiple payments to the PSB and, in some cases, multiple payments to other organizations such as the state-owned technology appraisal consultancy organization discussed above. A one-time payment of several thousand dollars can mushroom into total payments exceeding $100,000 or even more, stopping only when until the MNC is finally unwilling to pay more. As these payments begin to multiple and as the entanglements with other organizations begin to deepen, the MNC might begin to feel exploited by the endless demands for payments. It may begin to believe that it is at risk of violating local PRC law since the situation increasingly looks as if the MNC is making illegal payments under PRC law in exchange for favorable treatment by the PRC authorities.[80]

In some cases, the relationship between the MNC and the PSB and other PRC organizations could easily become hostile.[81] The MNC complains that it has made multiple payments and has received nothing in return but long delays as the technology is been assessed. The MNC might become angry about the shoddy treatment that it is receiving from PRC authorities. The MNC might even then complain directly to the PSB or the state-owned technology appraisal consultancy company. Confronting the PSB is always unwise; the PSB and the appraisal organization will not be receptive to threats from MNCs.[82] The MNC is in no position to contest the authority of these organizations, which will only respond by being less cooperative, which could grind the investigation to a halt.[83] The PSB might respond coldly to the

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[79] *See* id.

[80] *See* id.

[81] *See* id. The author found letters in which the MNC made complaints to the PSB and the state-owned technology consultancy organization and threatened to take the matter to higher-level authorities. These letters were met with a cold response by Chinese authorities, which then seemed to lose all interest in proceeding further with the case.

[82] *See* id.

[83] *See* id.

MNC by reporting that the case has been suspended indefinitely. The MNC has no recourse when faced with this decision. Whether to proceed with an investigation is solely up to the discretion of the PSB. Nothing in PRC compels the PSB to pursue the investigation of a criminal case; the PSB has the discretion to decide for itself whether to pursue an investigation.[84] There is no appeal from such a decision not to pursue a criminal investigation.[85] Complaining to higher-level PSB authorities or to other government officials will be met with an equally cold response.[86] No one within the PRC government wants to give involved in a messy dispute between an MNC and the PSB involving payments. The end result may be that the MNC has wasted a great deal of time and made many payments without any tangible results and may be caught in a web of entanglements of questionable legality. The most serious consequence of this course of action is that the MNC has exposed itself to potential legal liability for making illegal payments to PRC authorities, a crime punishable under the PRC domestic law[87] and possibility under foreign law, such as the FCPA.[88]

IV. Conclusion

Although many MNCs may welcome the prospect of having the PSB initiate a criminal case against a suspected infringer of its economic rights (including intellectual property rights), MNCs must refuse any requests for payments by the PSB. The MNC must understand that the initial payment will likely not be the last. The request for a single payment from the MNC can quickly turn into continuing, multiple demands for payments. The first payment, characterized as a case fee and an administrative fee to initiate case, will then lead to demands for payments that begin to seem less credible and more exploitative. The MNC might find that a seemingly innocuous request for a single payment becomes a stream of endless demands for additional payments with the threat of the investigation being terminated unless the demands are met. Some MNCs might then feel that they are caught in a trap without any viable means of escape. The MNC must either give in and make the payment or scrap the time and

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[84] *See* id.

[85] *See* id.

[86] *See* id. The MNC did not appeal to higher level authorities for fear that it would be met with an equally cold response that it received from the lower level authorities.

[87] There are two types of illegal payments under PRC law. The payment of the fees to the PSB, *see supra* note 8, and the payment by the MNC to the state-owned technology consultancy appraisal organization, a fee that should have been paid directly by the PSB, *see supra* note 47.

[88] *See supra* note 40.

money invested in a long investigation and start anew against an adversary that has now enjoyed the benefits of months of freedom to exploit the MNC's stolen property. Refusing to make the additional payments could make the PSB or a state-owned technology appraisal consultancy company angry and uncooperative.[89] It is never a good idea to offend the PRC authorities as the MNC may need to deal with the same authorities or related authorities again and on a regular basis. Officials who work for PRC authorities are a tight knit group who often socialize with each other after work hours. The MNC might find that other authorities, such as tax and customs authorities, will also begin to adopt a negative attitude towards the MNC, creating a difficult problem as the MNC must deal with these types of authorities on a regular, even daily basis. This choice is made more difficult because the more complicated the entanglements and the higher the payments, the more likely that the whole scheme runs afoul of PRC domestic law.

In some cases, the PSB might ask for payments that seem to be blatantly unethical and illegal. The PSB might ask for a "reward" for the capture and arrest of each counterfeiter (the "reward" could be about $10,000).[90] Now the legal lines appear to have been crossed since the PSB is now asking for a bounty for the arrest and capture of criminals. If the PSB makes these types of demands, the only response is a polite no and to leave the meeting as soon as possible.

If the PSB will not file a case unless the MNC pays a case fee, then the best option at this point is to consider alternatives to the PSB. These alternatives, with all of their flaws, are still preferable to the PSB trap that is awaiting the MNC. In asking for a case fee, the PSB is giving an unmistakable signal that it does not consider this case to be a priority but as a source of a revenue from the MNC and will exploit this case to obtain additional revenue to the fullest extent possible for the remainder of the investigation. Instead of using the PSB, the MNC could use administrative authorities (or the courts if circumstances allow), with all of their limitations. Although these authorities are limited in power, the MNC is less likely to become entangled in a stream of endless and dubious payments that begins with a single innocuous request for a filing fee and ends in hostile relationships with PRC authorities without the achievement of any tangible results. Of course, the best long term solution is reform of the PSB so that it takes eco-

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[89] *See supra* note 81.

[90] Acting as in-house counsel for an MNC, the author was the recipient of this request for a "reward" for each capture of a counterfeiter. The answer was no. Aside from the legal and political issues, the author's immediate thought was if the Police are corrupt enough to offer a "reward" for the capture of each counterfeiter, what would prevent the police from accepting a similar payment from the captured counterfeiter to dismiss the charges or to ensure that the counterfeiter serves no jail time? The answer: nothing.

nomic crimes suffered by MNCs seriously and will perform its duties without demanding payments. But that solution might take years or decades or may never occur. Discussion of that prospect would involve a deeper analysis of the issue of government corruption at all levels of the PRC, a fundamental problem. In any event, such a prospect or analysis that could require decades to implement would be of little use or interest to MNCs doing business in China today faced with the daily reality of falling into the trap of making payments to China's police. This daily reality means that higher management within MNCs doing business in China must have controls in place to ensure that inexperienced low level employees or third parties, such as investigation companies, do not, under any circumstances, make payments to China's police.

The traps that arise from making payments to the PSB should caution MNCs that they must simply refuse to make these payments, even if it means that they must use other options that are have their own flaws or even if they cannot enforce their rights at all. The payments are technically illegal under PRC law and help to perpetuate a culture of petty corruption within the PSB and other PRC organizations that now see the MNC as a target for exploitation and will behave accordingly. MNCs must be aware that whatever the shortcomings of using administrative authorities, the courts, or forgoing enforcement altogether, these shortcomings are generally less costly over the long term than the traps that can arise from making payments to China's Police.

LOBBYING FOR BRIBES? TRANSPARENCY IN LOBBYING THROUGH ANTI-CORRUPTION LAW

Eugene Efimov

I. INTRODUCTION

The cost of corruption in the European Union ("EU") is approximately €120 billion per year,[1] which is just a little less than its annual budget of €145 billion.[2] In the EU, the problem of corruption is acute, yet the EU government is limited by budgetary and human resource constraints to fight corruption adequately.[3] Further contributing to the discord is the fact that many EU member states have not implemented anti-corruption instruments or simply are not enforcing them.[4]

As corruption scandals undercut the democratic legitimacy of the EU, the EU has committed itself to transparency in the policy-making process.[5] The European Commission ("Commission") has recognized the need to engage civil society in the decision-making process.[6] To this end, the EU relies on input from interest and lobby groups in policy formulation.[7] Although lobbying serves a legitimate purpose, effectively informing government officials about necessary policy action, proximity to policy-makers enables lobbyists to easily bribe government officials and in this way gain unfair business advantage for clients. The Commission recognizes this situation and acknowledges that lobbying can increase the risk of corruption.[8]

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[1] *See* Press Release, European Commission, Commission Unveils First EU Anti-Corruption Report (Feb. 3, 2014), http://europa.eu/rapid/press-release_IP-14-86_en.htm.

[2] *See* TOPICS OF THE EUROPEAN UNION – BUDGET, http://europa.eu/pol/financ/index_en.htm (last accessed October 24, 2016).

[3] *See* EU ADMINISTRATION-STAFF, LANGUAGES AND LOCATION, http://europa.eu/about-eu/facts-figures/administration/index_en.htm (last accessed October 24, 2016).

[4] *See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Fighting Corruption in the EU*, at 8-10, COM (2011) 308 final (June, 6, 2011).

[5] *See Commission White Paper on European Governance*, COM (2001) 428 final (July, 25, 2001) [hereinafter *White Paper*].

[6] *Id.*

[7] *Id.*

[8] *See Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, at 20, COM (2014) 38 final (Feb. 3, 2014) [hereinafter *Anti-Corruption Report*].

To alleviate the concerns of corruption in lobbying, the Commission along with the European Parliament ("EP") created a common transparency register for lobbyists.[9] Nevertheless, the transparency register is set up on voluntary basis and lobbyists are not required to register their activity by law.[10] Furthermore, the register does not cover activities of law firms,[11] which have been secretly lobbying EU policy-makers.[12] Despite the EU's efforts to make lobbying transparent, recent corruption scandals have brought the issue of corruption in lobbying to the forefront of the European populace.[13]

In light of these scandals, this paper analyzes whether the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Anti-Bribery Convention") reaches the conduct associated with corruption in lobbying. Further, the paper assesses whether such conduct should fall within the scope of the Anti-Bribery Convention. To this effect, Part II outlines EU's institutional reliance on lobbying and transparency. It highlights EU's struggle with the *democratic deficit*[14] and explains how the EU attempts to engage its constituency through interest representation. Also, Part II outlines the regulation of lobbying practice that guides the engagement of interest groups in the EU policy-making process.

Although lobbying serves a legitimate purpose, Part III illustrates that there is little transparency in EU lobbying. It will outline how the transparency register is not meeting its goals and highlight a number of lobbying corruption scandals that have surfaced in the last few years. Part IV will analyze whether the Anti-Bribery Convention reaches the conduct associated with corruption in lobbying. Conclud-

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[9] *See* Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, 2011 O.J. (L 191) 29 [hereinafter *Interinstitutional Agreement*].

[10] *Id.* at 30. "All organisations and self-employed individuals, irrespective of their legal status, engaged in activities falling within the scope of the register are *expected* to register." (Emphasis added).

[11] *Id.*

[12] *See* Eric Lipton & Danny Hakim, *Lobbying Bonanza as Firms Try to Influence European Union*, N.Y. TIMES, Oct. 18, 2013, http://www.nytimes.com/2013/10/19/world/europe/lobbying-bonanza-as-firms-try-to-influence-european-union.html?_r=0.

[13] *See* Laurence Peter, *Fourth Euro MP named in lobbying scandal*, BBC NEWS (Mar. 28, 2011), http://www.bbc.com/news/world-europe-12880701.

[14] "The democratic deficit is a concept term used by people who argue that the EU institutions and their decision-making procedures suffer from a lack of democracy and seem inaccessible to the ordinary citizen due to their complexity." *Democratic deficit*, EUROPA.EU, http://eur-lex.europa.eu/summary/glossary/democratic_deficit.html?locale=EN (last accessed Oct. 25, 2016).

ing that it does not, it then argues for the need to amend the OECD convention to include lobbying within its scope. The risk of corruption in lobbying is very high, particularly in a situation such as in the EU. By including lobby-related provisions within the Anti-Bribery Convention, authorities will effectively dissuade lobbyists from bribing government officials for risk of prosecution.

II. EU'S INSTITUTIONAL RELIANCE ON LOBBYING AND TRANSPARENCY

A. Addressing the "Democratic Deficit"

Scholars have long criticized the EU, an international organization of twenty-eight member states, for democratic deficit.[15] The core of this criticism is aimed at the decision-making practice in the EU and its being removed from the European constituency.[16] The *deepening and widening*[17] of the EU, dilutes the power of national governments and concentrates it with the supranational authority.[18] The lack of "European-wide" elections undermines the credibility of the EU while a number of prominent corruption scandals among EU officials fuel the discontent of the constituency even further.[19]

The European Commission recognized the need to bridge the gap between the constituency and the policy makers. In 2001, the Commission issued a White Paper[20] on European Governance,[21] which "linked the need to improve governance in the European Union with the objective of encouraging European citizens to trust the EU institutions."[22] The White Paper aimed at creating greater openness in the EU policy-making process by encouraging a dialogue between the EU institutions and the civil society.[23] The White Paper recognized that

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[15] *See* Paola Michelle Koo, Note, *The Struggle for Democratic Legitimacy Within the European Union*, 19 B.U. INT'L L.J. 111, 111 (2001).

[16] *See id*. at 112-114.

[17] "Deepening" refers to deeper policy integration between the current Member States of the European Union. "Widening" refers to the European Union's growth through an increased membership. *Deepening and Widening*, E!SHARP, http://esharp.eu/jargon/deepening-and-widening// (last visited Oct. 25, 2016).

[18] *See* Andreas Follesdal & Simon Hix,, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 JCMS 533, 534-35 (2006).

[19] *Id.* at 535-36. EU citizens are only able to elect members of the European Parliament, not of the European Commission of the European Council.

[20] EUROPA.EU – GLOSSARY – WHITE PAPER, http://europa.eu/legislation_summaries/glossary/white_paper_en.htm (last visited Oct. 26, 2016) ("Commission White Papers are documents containing proposals for European Union action in a specific area.").

[21] *See White Paper*, *supra* note 5, at 3.

[22] Caroline Bradley, *Transparency and Financial Regulation in the European Union: Crisis and Complexity*, 35 FORDHAM INT'L L.J. 1171, 1188 (2012).

[23] *See White Paper*, *supra* note 5, at 13.

"[c]ivil society plays an important role in giving voice to the concerns of the citizens . . . [n]on governmental organisations play an important role at global level in development policy . . . [while] [t]rade unions and employers' organisations have a particular role and influence."[24]

Considering the diversity of views among the EU's constituents, spread over the twenty-eight member states, EU institutions rely on lobbyists to bring the views of concerned parties to the attention of the EU policy-makers.[25] Indeed, the European Commission believes that lobbying is "a legitimate part of the democratic system, regardless of whether it is carried out by citizens, companies, or firms working on behalf of third parties, think tanks, lawyers, [or] public affairs professionals."[26] The Commission seeks engagement of lobbies, as such activity promotes evidence-based policy-making and upholds accountability of the EU institutions.[27] Essentially, by engaging lobbyists in the policy-making process, the EU attempts to close the democratic gap between institutions and constituents

B. (Self) Regulation of Lobbying Activity

Heavily dependent on lobbyists, the EU has stepped away from stringent regulation of lobbying practice.[28] This is likely due to the EU's objective of engaging interest groups in the policy-making process. Further contributing to the lack of stringent regulation is the fact that the European Commission, the body responsible for proposing legislation,[29] is not elected by popular vote,[30] making it less dependent upon campaign contributions, which in turn makes it less prone to outside influence.[31] Similarly, the European Council consists of the

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[24] *Id.* at 14.

[25] *See* Henry Hauser, *European Union Lobbying Post-Lisbon: An Economic Analysis*, 29 BERKELEY J. INT'L L. 680, 684 (2011).

[26] *Id.* (citing Directorate General for Research, Lobbying in the European Union: Current Rules and Practices (Apr. 2004)).

[27] *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Smart Regulations in the European Union*, COM (2010) 543 final (Oct., 8, 2010) ("Stakeholder consultations and impact assessments are now essential parts of the policy making process. They have increased transparency and accountability, and promoted evidence-based policy making. This system is considered to be good practice within the EU and is supporting decision-making within the EU institutions.").

[28] *See* Paul Flannery, *Lobbying Regulation in the EU: A Comparison with the USA & Canada*, 20 SOC. & POL. REV. 69, 72 (2010).

[29] *See* Consolidated Version of the Treaty of the European Union Art. 17(2), October 26, 2012, 2012 (C 326) 13 [hereinafter TEU].

[30] *Id.* at Art. 17(7).

[31] *See* Flannery, *supra* note 28, at 76.

Heads of States or national member state governments and is therefore more likely to be focused on national agenda rather than the agenda of big business in the EU common market.[32]

Although the 2001 White Paper on Governance recognized the need to involve civil society within the European policy-making process, it was only in 2006 that the European Commission recognized the need to regulate the involvement of lobbyists.[33] To this effect, it drafted a Green Paper[34] on the European Transparency Initiative.[35] In the Green Paper, the European Commission reiterated its commitment to openness and accountability, and identified areas for further development, namely transparency in representation.[36] The Green Paper also recognized that "the traditional concept at European level has put the onus on the ethical behaviour of the representatives of the institutions themselves rather than laying down additional legally binding rules on the conduct of lobbyists."[37]

The Green Paper on the European Transparency Initiative provided the necessary push to develop a transparency register, which was set up in 2011 in an inter-institutional agreement between the European Parliament and the European Commission.[38] This document defined the scope of the register, a code of conduct for lobbyists, and reiterated the voluntary nature of the register.[39] Although the EP and the EU Commission would have liked making the transparency register mandatory, the Commission has acknowledged that it has proved difficult to find an adequate legal base in the EU Treaty[40] to make the register mandatory.

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[32] *See* TEU, *supra* note 29, at Art. 15(2).

[33] *See Commission Green Paper on European Transparency Initiative*, COM (2006) 194 final (May, 3, 2006) [hereinafter *Green Paper*].

[34] "Green Papers are documents published by the European Commission to stimulate discussion on given topics at the European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers." Europa.eu – Glossary – Green Paper, (last visited Apr. 22, 2014), http://eur-lex.europa.eu/summary/glossary/green_paper.html?locale=EN.

[35] *See Green Paper*, *supra* note 33.

[36] *Id.* at 3-4.

[37] *Id.* at 9. *See also* TEU, *supra* note 29, at Art. 17(3).

[38] *See Interinstitutional Agreement*, *supra* note 9.

[39] *Id.* at 30.

[40] Press Release, European Parliament, Joint Transparency Register to be Reinforced and Ultimately Made Mandatory (Dec. 16, 2013), http://ec.europa.eu/transparencyregister/public/openFile.do?fileName=mailing_template_jory_joint_transparency_register_final.pdf [hereinafter Joint Transparency Press Release].

The register covers all activities related to lobbying except "activities concerning the provision of legal and other professional advice . . . [including] advisory work and contacts with public bodies in order to better inform clients about a general legal situation or about their specific legal position."[41] As such, law firms are effectively exempted from the voluntary registering process. The inter-institutional agreement also recommends a code of conduct for individuals involved in the practice of lobbying.[42] The code of conduct is limited to twelve (12) basic sets of action, requiring lobbyists to observe the proper norms of behavior.[43]

The code of conduct does not appear to provide anything specific regarding lobbyists' trading cash for influence, however. As far as it relates to corruption, two paragraphs are relevant. Paragraph (b) provides that lobbyists shall "not obtain or try to obtain information, or any decision, dishonestly, or by use of undue pressure or inappropriate behaviour."[44] Further, paragraph (f) provides that lobbyists shall "not induce Members of the EU institutions, officials or other staff of the EU, or assistants or trainees of those Members, to contravene the rules and standards of behaviour applicable to them."[45] These two rules appear broad in scope and could encompass bribery, yet the transparency register is voluntary in nature and thus, not all the lobbyists are ultimately bound by the code of conduct.[46]

Notwithstanding the fact that the transparency register is voluntary in nature, the EU puts the onus of ethical behavior on government officials rather than lobbyists.[47] To this effect, Article 17(3) of the Treaty on the European Union (TEU) provides that "the Commission shall be completely indendent . . . [it] shall neither seek nor take instructions from any Government or other institution, body, office or entity."[48] Similarly, the European Parliament is guided by its own rules of procedure.[49] The EP's rules of procedure contain a newly drafted code of conduct,[50] which, among other things, requires Mem-

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[41] *Interinstitutional Agreement*, *surpa* note 9, at 30.
[42] *Id.* at 36.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 30.
[47] *See Green Paper*, *supra* note 33, at 9.
[48] TEU, *supra* note 29, at Art. 17(3).
[49] *See* Consolidated Version of the Treaty on the Functioning of the European Union, Art. 232, 2010 O.J. C 83/01, [hereinafter TFEU] ("The European Parliament shall adopt its Rules of Procedure.").
[50] *See* Press Release, European Parliament, New Code of Conduct for MEPs Approved (Dec. 1, 2011), http://www.europarl.europa.eu/news/en/news-room/20111201IPR32927/new-code-of-conduct-for-meps-approved.

bers of the European Parliament ("MEPs") to "act solely in the public interest and refrain from obtaining or seeking to obtain any direct or indirect financial benefit or other reward"[51] in the exercise of their duties.

Essentially, in battling corruption in lobbing, the EU relies on self-regulation of lobbyists and good moral character of the Members of the EU Commission and the European Parliament.

III. Lobbying Practice in the EU is Prone to Corruption

A. Lack of Transparency

Although the EU aims to be transparent in its policy-making process, the lobbying practice is quite opaque.[52] It is safe to say that because of the voluntary nature of the transparency register, not all organizations choose to register their lobbying activities. A total of approximately six thousand (6,000) companies (e.g. lobbying and non-profit groups) have joined the register.[53] This means that, "an estimated 75% of all relevant business-related entities and around 60% of NGOs operating in Brussels have registered."[54] Clearly, many lobby groups choose to operate outside of the transparency register.[55] According to Maroš Šefčovič, the vice president of the European Commission, law firms are least compliant with the register.[56]

Although the transparency register is voluntary, law firms enjoy a special exemption from registering.[57] The fact that law firms are choosing not to register is nevertheless disconcerting because the presence of law firms has grown in Brussels and law firms in Brussels engage in lobbying "behind closed doors," citing attorney-client confidentiality.[58] One possible explanation for this expansion is the reinvigorated negotiation between the United States ("US") and the European Union to conclude the Transatlantic Trade and Investment

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[51] European Parliament, *Rules of Procedure of the European Parliament, Code of Conduct for Members of the European Parliament with Respect to Financial Interests and Conflicts of Interest*, 126 (Mar. 2014), Annex I, Art. 11(b), http://www.europarl.europa.eu/pdf/meps/201305_Code_of_conduct_EN.pdf (last visited Apr. 26, 2014) [hereinafter EP Code of Conduct].

[52] *See Top European Companies "Lobbying in Secret," Says NGO*, EurActiv (May 26, 2010), http://www.euractiv.com/pa/top-european-companies-lobbying-news-468173.

[53] *See* Lipton & Hakim, *supra* note 12.

[54] Press Release, European Commission, Vice-President Maroš Šefčovič: Joint Transparency Register to be stronger and keep its unique scope (Dec. 13, 2013).

[55] *See e.g., Id.*

[56] *See* Lipton & Hakim, *supra* note 12.

[57] *See Interinstitutional Agreement*, *supra* note 9, at 30.

[58] *See* Lipton & Hakim, *supra* note 12.

Partnership.[59] In this view, businesses engage Brussels-based law firms to lobby EU officials with a goal to "harmonize the regulatory systems of the United States and Europe, so that companies can meet a single standard – worth hundreds of millions of dollars, if not billions, in savings for businesses, particularly if they can persuade negotiators to accept less strict rules in the process."[60]

Many of the law firms representing business interests in Brussels are American, and these same firms, which do not register their lobbying practice in the EU, are registered back home with the mandatory US lobby register.[61] Thus, for example, Hogan Lovells and Covington & Burling, two firms prominently featured in the New York Times investigation, are top-20 earners in terms of lobbying revenue in the US.[62] Similarly, businesses mandatorily registered in the US report spending top money on lobbying US legislators.[63] Yet in the EU, these same businesses are either not registered in the transparency register whatsoever or report lobbying expenses that are over seventeen (17) times lower than what they are in the US,[64] despite the fact that the EU is "a regulatory superpower affecting 28 countries that collectively form the world's largest economy."[65] In fact, twenty (20) of the largest fifty (50) European companies which are registered in the U.S. are absent from the EU transparency register.[66]

Clearly, transparency in EU lobbying is undermined by the voluntary nature of the register. As it currently stands, there seems to be little incentive for businesses or lobby firms to register their activity.[67] Nevertheless, because of the lack of valid legal basis, the transparency register will likely remain in its current form. Indeed, the European Commission has affirmed that,

> For the time being, the register will remain voluntary due to the lack of clear and straightforward legal basis

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[59] *See Time for Commissioner Šefčovič to get Tough on Secretive Lobbying Lawyers*, CORPORATEEUROPE.ORG, (Dec. 9, 2013), http://corporateeurope.org/lobbycracy/2013/12/time-commissioner-ef-ovi-get-tough-secretive-lobbying-lawyers.

[60] Lipton & Hakim, *supra* note 12 (internal quotations omitted).

[61] *Id.*

[62] *See* The Hill Staff, *Lobbying Revenue 2013 Third Quarter*, THE HILL, Oct. 22, 2013, http://thehill.com/business-a-lobbying/329921-lobbying-revenue-2013-third-quarter.

[63] *See* NATACHA CINGOTTI & PAUL DE CLERCK, LOBBYING IN BRUSSELS, HOW MUCH DO THE TOP 50 COMPANIES IN THE EU SPEND? 15 (Helen Burley, 2010) https://www.foeeurope.org/sites/default/files/publications/foee_lobbying_in_brussels_0410_0.pdf.

[64] *Id.* at 5, 8, 15.

[65] Lipton & Hakim, *supra* note 12.

[66] *See* CINGOTTI & DE CLERCK, *supra* note 63, at 5.

[67] *See Interinstitutional Agreement*, *supra* note 9.

> for a mandatory register, and a desire on behalf of the Commission and the Parliament to remain open to dialogue with all stakeholders regardless of their status. [T]he only legal basis for a mandatory register is Article 352 of the Treaty on the Functioning of the European Union.[68] Using this article would raise a great number of complex legal issues, in particular with regard to the scope of the register, and compliance with other articles of the treaties. Article 352 requires unanimity in the Council, and in several Member States, approval by national Parliaments as well.[69]

It appears that the transparency register will remain voluntary and a large number of lobbyists will continue operating in the shadows of the EU policy-making practice. Businesses will likely keep taking advantage of such favorable lobbying conditions as they navigate the regulatory pitfalls of the EU's common market. Clearly, the current system works favorably for business interests, as the old adage "if it ain't broke, don't fix it" rings true for businesses and policy-makers alike.[70] In this light, Hogan Lovells "helped an American semiconductor company secure an exemption in European environmental law that allowed it to continue using a potentially hazardous substance in the computer chips it makes."[71] Further, Covington & Burling "successfully lobbied to weaken a proposed regulation intended to curb the ability of European pension funds to invest some of their money with private equity firms."[72] Additionally, Facebook and Amazon made a

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[68] In part, Article 352(1) states, "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament." TFEU, *supra* note 49, at Art. 352(1).

[69] *See* European Commission, Memo, *The Revised Transparency Register: More Information, More Incentives, Tougher on Those who Break the Rules*, (Apr. 15, 2014), http://europa.eu/rapid/press-release_MEMO-14-302_en.htm.

[70] *See* Letter from Rebecca Harms and Daniel Cohn-Bendit, Co-Presidents of the Greens/EFA Group in the European Parliament, to Martin Schulz, President of the European Parliament, (Nov. 5, 2013) http://www.greens-efa.eu/fileadmin/dam/Documents/Letters/20131105%20Wiesland%20letter.pdf (Vice-president Wieland, the chair of the working group on the reform of the transparency register, "is himself involved in lobbying activities, as a partner in the Brussels-based counseling agency Theumer, Wieland & Weisenburger.").

[71] Lipton & Hakim, *supra* note 12.

[72] *Id.*

push "to weaken the proposed legislation in order to continue profiting from virtually unrestricted use of online personal data."[73]

Some European legislators also appear to be interested in preserving the status quo.[74] The New York Times reported that "opponents of the mandatory registry included members of Parliament who work at law firms, including Klaus-Heiner Lehne, a Christian Democrat from Germany who is a partner at the British-based law firm Taylor Wessing and advises clients on European regulations, while serving as chairman for Parliament's committee on legal affairs."[75] Working for a law firm and as an MEP would appear to raise potential conflict of interest questions, yet the European Parliament's code of conduct does not strictly prohibit such an engagement.[76]

The EP's code of conduct does not prohibit MEPs from working a second job as article 4(2)(c) of the EP's code of conduct only requires that MEPs declare "any regular remunerated activity which the Member undertakes alongside the exercise of his or her office, whether as an employee or as a self-employed person."[77] Moreover, the code of conduct does not outright prohibit MEPs' "holding in any company or partnership, where there are potential public policy implications or where that holding gives the Member significant influence over the affairs of the body in question"[78] as long as MEPs declare this information.

The EP's code of conduct maintains that MEPs shall "not solicit, accept or receive any direct or indirect financial benefit or other reward in exchange for influencing, or voting on, legislation, motions for a resolution . . . and shall consciously seek to avoid any situation which might imply bribery or corruption,"[79] but it does not outright prohibit MEPs from working a second job, either in a law firm or in a lobby group as long as that job does not influence MEPs' voting and

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[73] Lobbycracy, *Belgian MEP in Lobby Amendments Scandal*, CORPORATEEUROPE.ORG, (Nov. 22, 2013), http://corporateeurope.org/lobbycracy/2013/11/belgian-mep-lobby-amendments-scandal.

[74] *See* Dominic Robinson, *Brussels Waters Down Euro-Parliament Code of Conduct*, TRANSPARENCY INTERNATIONAL, (Sep. 6, 2012), http://blog.transparency.org/2012/09/06/brussels-waters-down-euro-parliament-code-of-conduct/ (stating that a body in the European Parliament recently took steps that could water down the legislatures code of conduct).

[75] Lipton & Hakim, *supra* note 12.

[76] *See* EP Code of Conduct, *supra* note 51, at 126-129. (describing a conflict of interest where a Member of the European Parliament has a personal interest that could improperly influence the performance of his or her duties as a Member).

[77] *Id.* at 127.

[78] *Id.*

[79] *Id.* at 126.

they declare such activity.[80] Where MEPs fail to make requisite disclosures, the code of conduct provides for sanctions.[81] Sanctions may include a

> [R]eprimand, forfeiture of entitlement to the daily subsistence allowance for a period of between two and ten days . . . temporary suspension from participation in all or some of the activities of Parliament for a period of between two and ten consecutive days . . . suspension or removal from one or more of the offices held by the Member in Parliament.[82]

Although Article 11(2) of the Treaty on the European Union (TEU) clearly states that "[t]he [EU] institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society,"[83] it is clear that the rules are set up in such a way that lobbying takes place in secrecy, veiled in attorney-client confidentiality.[84] Furthermore, the weak code of conduct for the MEPs enables MEPs to moonlight in law firms or lobby groups; as long as their second job does not interfere with their voting and they declare their second jobs with the European Parliament.[85] In case of a breach of the EP's code of conduct, sanctions appear minimal. Essentially, the lobbying practice in the EU is set up in a way that increases the potential for bribes. Lobbying practice is not regulated, nor is it transparent. The moral onus is on EU politicians, but where MEPs breach the code of conduct, the sanctions do little to dissuade MEPs from accepting cash for influence.

B. "Cash-for-Laws"

Despite the EU's focus on transparency in policy-making, numerous corruption scandals have undermined the legitimacy of such efforts. In 2011 the Sunday Times uncovered lobby-related corruption in the European Parliament.[86] Posing as lobbyists, the undercover *Sunday Times* reporters exposed three members of the European Par-

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[80] *Id.* at 127.
[81] *Id.* at 91 (Art. 153).
[82] *Id.*
[83] TEU, *supra* note 29, at Art. 11(2).
[84] *See* Paul Flannery, *supra* note 28, at 73. (discussing the weak regulations placed upon special interest groups across the EU compared to that of the United States and Canada).
[85] *See* EP Code of Conduct, *supra* note 51, at 127.
[86] *See Euro MP in cash-for-amendments sting faces a decade in jail,* THE SUNDAY TIMES, (Aug. 12, 2012) http://www.thesundaytimes.co.uk/sto/news/uk_news/article1102092.ece; YOUTUBE, *Adrian Severin – Lobby, Cash and Carry* (last accessed April 14, 2014) http://www.youtube.com/watch?v=JTS4rpIuwAE; YOUTUBE, *Cash-*

liament, including a former deputy prime minister, willing "to put forward amendments believing they would be paid for this work with a $100,000 annual salary, a consultancy fee or both."[87] The MEPs expected this income on top of their £190,000 MEP salary and allowances.[88]

In putting forth the amendments, Adrian Severin, the former Romanian deputy prime minister, provided the lobbyists with a $12,000 invoice for his "consulting services concerning the codification of the Directive 94/19/EC, Directive 2009/14/EC and the amendments thereto."[89] Zoran Thaler, "former Slovenian foreign minister . . . asked for the cash to be routed through a London company to keep it secret"[90] while Ernst Strasser, former interior minister of Austria, boasted that he shadows as a lobbyist and that he has five business clients, each paying him $100,000 per year for his services.[91] Shortly after the initial scandal broke, a fourth MEP, Pablo Zalba from Spain, was caught in similar fashion, but did not accept the cash.[92] Although Mr. Zalba claimed that he was deceived by the lobbyists,[93] the undercover video clearly shows that both parties were of mutual understanding that Mr. Zalba was going to be paid.[94] Asking Mr. Zalba to put forth an amendment on behalf of their "client," a *Sunday Times* reporter says, "obviously we would pay you for your time and your work . . . which we'd do as a consultancy at this stage . . . it might be easier for you to do it as a consultant now"[95] and Mr. Zalba responds, "Yes. Brilliant."[96]

Further undermining the democratic legitimacy of the EU were lobby-related corruption scandals of 2012 and 2013. In 2012, the European Commissioner for Health and Consumer Policy, Mr. John Dalli, resigned over lobby-related allegations of corruption.[97] In its investi-

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for-laws: Pablo Zalba Bidegain, (last accessed April 14, 2014) http://www.youtube.com/watch?v=nztsmH9kdRo.

[87] *Euro MPs Exposed in "Cash-for-Laws" Scandal; Insight MEP's $500,000 a year from lobbying*, THE SUNDAY TIMES, Mar. 20, 2011 [hereinafter SUNDAY TIMES].

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *See* Laurence Peter, *Fourth Euro MP Named in Lobbying Scandal*, BBC NEWS (Mar. 28, 2011), http://www.bbc.com/news/world-europe-12880701.

[93] *Id.*

[94] YOUTUBE, *Cash-for-laws: Pablo Zalba Bidegain*, (last accessed April 14, 2014) http://www.youtube.com/watch?v=nztsmH9kdRo

[95] *Id.* at 2 min. 09 sec.

[96] *Id.* at 2 min. 24 sec.

[97] *See* Andrew Rettman, *EU freezes tobacco law after lobbying scandal*, EUOBSERVER.COM (Oct. 17, 2012), http://euobserver.com/institutional/117898.

gation, the European Union's Anti-Fraud Office (OLAF) discovered that Swedish Match, a snus producer, "was asked for nearly $80 million by [a] Maltese middleman to use his influence with Mr. Dalli to end the snus ban . . . [and the company] should be prepared to hand over the first $13 million directly to Mr. Dalli."[98] In 2013, a Belgian documentary, *Privacy for Sale*,[99] exposed EU "lobbying wars," by confronting a Belgian MEP, Louis Michel, a former EU Commissioner for Development, who tabled "no less than 229 amendments to the proposed [privacy] legislation, including 158 that are strongly anti-privacy"[100] related to technical data protection issues.[101] While Mr. Michel is regarded as an expert in African development policy, he is not widely known for "delving into technical protection issues."[102] Amid intense media coverage of the incident, Mr. Michel later claimed that his assistant electronically tabled the amendments without his knowledge while he was abroad.[103]

Big business can easily target MEPs while lobbying for favorable legislation.[104] An illicit payment "routed through a London company"[105] or "channeled through [a] Viennese company"[106] is all that is necessary to gain favor amongst EU legislators. Such "cash for influence" deals between the MEPs and the lobbyists certainly under-

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[98] James Kanter, *Europe's Top Health Official Quits, and the Bloc Has a Mystery on Its Hands*, N.Y. TIMES (Oct. 24, 2012), http://www.nytimes.com/2012/10/25/world/europe/dalli-resignation-leaves-eu-with-a-mystery.html.

[99] *Belgian MEP in lobby amendments scandal,* CORPORATE EUR. OBSERVATORY (Nov. 22, 2013), https://corporateeurope.org/lobbycracy/2013/11/belgian-mep-lobby-amendments-scandal.

[100] *Id.*

[101] *Id.*

[102] Nikolaj Nielsen, *Belgian MEP blames assistant for industry-scripted amendments*, EUOBSERVERCOM (Nov. 22, 2013), http://euobserver.com/institutional/122205.

[103] *Id.*

[104] *See* Lobbying in Europe: Hidden Influence, Privileged Access 6, 54-55, Transparency Int. (2015), http://www.transparencyinternational.eu/wp-content/uploads/2015/04/Lobbying_web.pdf (discussing "secrecy and unfair advantage" in lobbying practices within core European Union governing bodies); *See also* Sarah Biontino et al., *The Boundaries of Antitrust Law: Where Do Public Affairs and Politics Fit into EU Enforcement Policies?* 7 NO. 2 COMPETITION L. INT'L 54, 55 (2011) ("There is also a sort of in-built procedural 'gap' as there are no formal contacts provided for in the rule book between the hearing and the adoption of a decision and some say that this induces worried CEOs to try and get a steer on outcomes.").

[105] SUNDAY TIMES, *supra* note 87. (reporting that Zoran Thaler asked "for the cash to be routed through a London company to keep it secret").

[106] *Id.* (Ernst Srasser asked for the money "to be channeled through his Viennese company."). *See also* Andrew Willis, *Buzek allows Olaf probe, continues to deny access to offices*, EUOBSERVER (Mar. 31, 2011), https://euobserver.com/news/32101.

mine the democratic legitimacy of the European Union. However, considering the current system in place concerning EU lobbying practices,[107] it is doubtful whether such "cash-for-laws" deals actually violate established EU rules.

Caught "red handed" while accepting bribes from "lobbyists," Romanian MEP Severin immediately pointed out that, "[he] didn't do anything that was . . . illegal or against any normal behavior we have here."[108] Unfortunately for Mr. Severin, he was caught by a hidden video camera while accepting cash for amendments.[109] Mr. Severin tried to cover up his actions by invoicing the lobbyists for "consulting services concerning the codification of the Directive 94/19/EC, Directive 2009/14/EC and the amendments thereto."[110] This would have been acceptable by the EP's code of conduct since the EP's Code of Conduct allows MEPs to work a second job as consultants[111] and further allows MEPs to provide consultancy services to interested parties.[112] Had Mr. Severin not been caught on video accepting money in exchange for amendments, he would have likely argued that such financial gains were for legitimate business purposes and, therefore, he did not violate any EP rules.

In similar fashion, the European Anti-Fraud Office did not find any evidence to support suspicion of wrongdoing against Slovenian MEP Zoran Thaler.[113] The EP's code of conduct prohibits accepting "financial benefit . . . in exchange for influencing or voting on legislation,"[114] yet if an MEP "consults" a lobbyist on legislation, but does not "influence" it then such action is not against the rules. Essentially, an MEP can moonlight as a lobbyist, so long as the second job does not improperly influence performance of MEP's duties.[115] In this regard, Vice-President Rainer Wieland, the chair of the working group on the reform of the transparency register, "is himself involved in lobbying activity as a partner in the Brussels-based counseling agency

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[107] *See* EP Code of Conduct, *supra* note 51, at 126; *Interinstitutional Agreement*, *supra* note 9, at 36.

[108] SUNDAY TIMES, *supra* note 87.

[109] *Id.*

[110] *Id.*

[111] *See* EP Code of Conduct, *supra* note 51, at 126-129.

[112] *Id.* at 126-29, 185 (advising that while MEPs shall "refrain from obtaining or seeking to obtain any direct or indirect financial benefit or other reward," MEPs may work as consultants or lawyers).

[113] *See OLAF Clears Disgraced MEP Thaler of Corruption Suspicion*, SLOVENSKA TISKOVNA AGENCIJA (STA) (Feb. 3, 2012), https://english.sta.si/1722763/olaf-clears-disgraced-mep-thaler-of-corruption-suspicion.

[114] EP Code of Conduct, *supra* note 51, at 126.

[115] *Id.*

Theumer, Wieland & Weisenburger,"[116] which prompted the European Free Alliance to file a complaint with the President of the European Parliament, citing conflict of interest.[117] Nevertheless, where there is no such obvious conflict, an MEP can moonlight as a consultant, which raises the risk of corruption in lobbying.

IV. Transparency in Lobbying through Anti-Corruption Law

A. The OECD Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions makes it a criminal offense

> [F]or any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[118]

By hiring lobbyists to persuade EU officials, business clients aim to gain a business advantage by influencing favorable legislation.[119] Where there is no transparency in lobbying, and lobbying takes place behind closed doors, the risk of corruption is very high. Thus, the key question is whether the language in Article 1(1) of the OECD Anti-Bribery Convention applies to corruption in lobbying.

The OECD Anti-Bribery Convention was patterned after the US's Foreign Corrupt Practices Act ("FCPA"),[120] which exempts lobbying from its provisions.[121] In drafting the FCPA, drafters made "clear that the reference to corrupt payments for 'retaining business' . . . should not, however be construed so broadly as to include lobbying or other normal representations to government officials."[122] The OECD Anti-Bribery Convention was tailored after the FCPA and it does not

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[116] Harms & Cohn-Bendit, *supra* note 70.
[117] *Id.*
[118] Convention on Combating Bribery of Foreign Pub. Officials in Int'l Bus. Transactions Art. 1(1), Dec. 17, 1997, S. Treaty Doc. No. 105-43 [hereinafter OECD Anti-Bribery Convention].
[119] Lobbying the European Union: Institutions, Actors, and Issues 145 (David Coen & Jeremy Richardson eds., 2009).
[120] *See* Alejandro Posadas, *Combating Corruption Under International Law*, 10 Duke J. Comp. & Int'l L. 345, 383 (2000).
[121] *See* Dep't Just. & Sec. Exch. Comm'n, FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act 107 (2012) [hereinafter FCPA Resource Guide].
[122] *Id.*

contain any specific reference to lobbying.[123] The legislative history of the FCPA could possibly inform us about the scope of the OECD Convention's application, but FCPA's legislative history is not controlling in this case.[124] In order to assess whether lobbying comes within the scope of the OECD Anti-Bribery Convention, it is necessary to analyze its provisions piece by piece.

In accordance with Article 1(1) of the OECD Anti-Bribery Convention, five elements must be satisfied for action to fall within the scope of the Convention's provisions: (1) any person directly or through intermediaries; (2) intentionally offers, promises, or gives any undue pecuniary advantage; (3) to a foreign public official; (4) to act or refrain from acting in relation to performance of the official duties; (5) in order to obtain or retain business, or other improper business advantage.[125]

In its reference to "any person," the first prong is not limited to natural persons as each Party to the Convention "shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official."[126] Yet where national legal systems do not provide for criminal responsibility of legal persons, those Party states "shall not be required to establish such criminal responsibility."[127] Criminal responsibility for natural persons is within the scope of the Convention, but the Convention does not necessarily apply such responsibility to legal persons where national law of a Party state does not provide for it.[128] Nevertheless, the Convention provides for civil liability of legal persons.[129] Thus, where a natural or a legal person directly solicits an improper payment to a foreign government official, or recruits an intermediary (i.e. a lobbying firm) to transmit an illicit payment to a foreign official, such action falls within the scope of the Convention.[130]

The second prong is straightforward, the person (natural or legal) must intentionally offer, promise, or give undue pecuniary advantage to a foreign government official.[131] Article 1(4)(a) of the Anti-Bribery Convention provides that "foreign public official" means "any

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[123] *See generally* OECD Anti-Bribery Convention, *supra* note 118.

[124] *See* S. Exec. Rep. No. 105-19, at 6, 30, 33 (1998).

[125] OECD Anti-Bribery Convention, *supra* note 118, at Art. 1(1).

[126] *Id.* at Art. 2.

[127] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, *15, Dec. 17, 1997, S. Treaty Doc. No. 105-43 [hereinafter *Convention Commentaries*].

[128] *See* OECD Anti-Bribery Convention, *supra* note 118, at Art. 1(1).

[129] *Id.* at Art. 3(2).

[130] *Id.* at Art. 1(1).

[131] *Id.*

official or agent of a public international organization."[132] The EU is a public international organization, and MEPs are its agents.[133] Consequently, EU officials are "foreign officials" for purposes of the Convention. Similarly, Article 1(4)(c) explains that "to act or refrain from acting in relation to performance of the official duties" encompasses "any use of the public official's position, whether or not within the official's authorized competence."[134] The "improper business advantage" component "refers to something to which the company concerned was not clearly entitled."[135]

In the case of lobbying, such as that seen in the EU, the second prong appears to be the most difficult criterion to satisfy. In soliciting a foreign official for a business advantage, it mandates a person "*intentionally* offer, promise, or give any undue pecuniary or other advantage."[136] Where a person or a corporation come to a lobby firm and says, "Here is a suitcase full of cash, we will bribe EU Official Bob so we would get a particular business advantage, please make sure EU Official Bob gets the suitcase," this would clearly fall within the scope of the Convention.[137] Yet business corporations do not usually come to lobbyists with such requests.

In retaining a law firm for lobbying purpose, a corporation hopes that the firm will successfully persuade an official to steer legislation in a favorable business direction for that corporation. Certainly, in making a payment to a lobby firm, the corporation has clear *intention* to influence a government official and gain business advantage, but the payment is not "*undue*" or illicit.[138] The payment is intended for the firm for its lobbying service and not for the government official.[139] Therefore, it does not appear that a corporation is subject to criminal or civil liability in accordance with the Anti-Bribery Convention, as it would not meet the "intent" requirement.

In the language of the FCPA, this situation runs into a "local law" defense.[140] The Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions specify that, "it is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country."[141] In retaining a lobbying firm, a corporation

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[132] OECD Anti-Bribery Convention, *supra* note 118, at Art. 1(4)(a).
[133] *See* TFEU, *supra* note 49.
[134] OECD Anti-Bribery Convention, *supra* note 118, at Art. 1(4)(c).
[135] *Convention Commentaries*, *supra* note 127, at *14.
[136] OECD Anti-Bribery Convention, *supra* note 118, at Art. 1(1) (emphasis added).
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *See* FCPA RESOURCE GUIDE, *supra* note 121, at 23.
[141] *See Convention Commentaries*, *supra* note 127, at *15.

aims to gain a particular business advantage by influencing a government official to favor particular legislation. As already discussed, the EU's institutions actually welcome consultations with lobbyists.[142] Moreover, retaining a law firm for its lobbying service is not against EU law.[143] Thus, it appears that paying money to a law firm to influence an EU official does not violate the Anti-Bribery Convention.

Nevertheless, MEPs can moonlight as lobbyists or consultants in law firms and retain their "holding in any company or partnership where there are potential public policy implications or where that holding gives the Member significant influence over the affairs of the body in question"[144] as long as they disclose their involvement and do not "solicit, accept or receive any direct or indirect financial benefit or other reward in exchange for influencing, or voting on legislation."[145] Therefore, in the EU, a business corporation could retain a law firm, with an MEP as one of the firm's partners, to influence an EU official to vote favorably on business legislation. The corporation's payment in that instance, although legal and made to a law firm for lobbying purposes, would directly benefit the MEP (i.e. a law firm partner gets a portion of the firm's profits). Although the partner/MEP could arguably stand in violation of the EP's code of conduct,[146] the real question is whether the solicitor of an illicit payment (i.e. the corporation that lawfully retained a law firm for lobbying purposes) stands in violation of the Convention by retaining such law firm.

From the cursory glance of the language of the Convention, it appears that the corporate entity, which retains a law firm for lobbying purposes, where an MEP serves as a partner, does not stand in violation of the Convention.[147] In reviewing the elements of Article 1(1) of the Anti-Bribery Convention, it becomes obvious that even though there is (1) a legal person directly and (2) intentionally making a payment (giving a pecuniary advantage), that payment is not "undue" or illicit.[148] The payment is rightful and purposeful, made to retain lobbying services of a law firm. The corporate intent does not appear to be on corrupting foreign government officials as much as it is on legitimately influencing their action.

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[142] *See White Paper*, *supra* note 5, at 11.
[143] *See* Lipton & Hakim, *supra* note 12.
[144] *See* EP Code of Conduct, *supra* note 51.
[145] *Id.* at Art. 2(b).
[146] It appears that in a situation similar to this one, one could successfully argue both sides of the argument.
[147] *See generally* Convention on the fight against corruption involving officials of the European Communities or Officials of Member States of the European Union, 1997 O.J. (C195) 1.
[148] *Id*. at 3 (emphasizing that the official has to deter from his official duty for it to be corruption).

Furthermore the payment is not made directly (3) to a foreign official, it is made to a law firm to retain lobbying services. Albeit, a foreign official, who serves as a partner in that law firm, will retain a part of the firm's profits, which are not "undue" or illicit. The fourth prong, (4) to act or refrain from acting in relation to performance of the official duties, is similarly difficult to establish. Where a corporation submits a payment to a law firm for lobbying purposes, it is difficult to say if an MEP/partner in that law firm will be forced to act or will refrain from acting in his MEP capacity because of this lobby-related retainer. It is likely that the corporation is retaining the law firm to lobby a different MEP on a different legislative portfolio than the partner/MEP. The fifth prong, (5) "in order to obtain or retain business advantage" appears to be easily satisfied as, in hiring lobbyists, corporate clients aim to gain a business advantage through successful persuasion of government officials and the consequent passage of favorable legislation.[149]

One can safely suppose that corporate clients do not intentionally aim to corrupt foreign government officials in retaining a law firm for lobbying purposes. Nevertheless, the situation in the EU, where lobbying practices take place "behind closed doors," veiled in secrecy and shrouded in attorney-client confidentiality,[150] with MEPs openly serving as law firms' partners, is disconcerting.[151] There is an obvious appearance of impropriety, which presupposes bribery or corruption of EU officials.

B. Amending Anti-Corruption Law to Encompass Lobbying

Where there is a lack of transparency, such as in the EU, lobbying should fall within the scope of the OECD Anti-Bribery Convention. The lobbying situation in the EU presents ripe conditions for bribery of government officials to take place. The voluntary nature of the transparency register,[152] the registration exemption for law firms,[153] the ability of MEPs to serve as consultants and hold shares in partnerships,[154] coupled with the legality of retaining lobbyists to influence government officials,[155] creates a perfect situation for certain corporations to exploit weak rules and possibly bribe government officials in order to obtain business advantage.

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[149] Jill E. Fisch, *How do Corporations Play Politics? The FedEx Story*, 58 VAND. L. REV. 1495, 1566 (2005).
[150] *See* Lipton & Hakim, *supra* note 12, at 3.
[151] *See* EP Code of Conduct, *supra* note 51, at Art. 4(2)(a)
[152] *See Interinstitutional Agreement*, *supra* note 9, at 30.
[153] *Id.*
[154] *See* EP Code of Conduct, *supra* note 51, at Art. 4(2)(a).
[155] *See Interinstitutional Agreement*, *supra* note 9, at 36.

In the EU, corporate clients can retain law firms for lobbying purposes, yet there is no telling whether the retainer payment was intentionally made to persuade a particular partner/MEP to vote a certain way on legislation or possibly put forth amendments, or whether it was a legitimate payment to retain the firm's lobbying services.[156] Because the transparency register is voluntary, many law firms choose not to register, citing attorney-client confidentiality.[157] In not registering, firms do not disclose their clients, budgets, or lobbying portfolios. This lack of transparency does not allow understanding whether the corporate payment to the law firm was made with an intention to corrupt the MEP/partner, and in that way exchange "cash for laws."

As discussed previously, the prevailing issue is corporate *intent* and whether, in hiring a law firm, the intent is to corrupt a particular MEP/partner, or whether it is a legitimate attempt to lobby government officials. An additional problem with the lack of transparency in lobbying is that even where a lobby firm provides an illicit payment to a government official with a purpose of gaining a business advantage for their corporate clients, the corporate client can claim that *its* intent was not to corrupt a government official, but rather it was simply to retain a law firm for its lobbying services.[158] Thus, the situation in the EU presents a convenient "way out" for corporations by citing the legality of their action (i.e. retaining a law firm for lobbying purpose). As lobbying can take place in secrecy, there is no telling what the actual corporate intent really is.

Furthermore, the Treaty of Lisbon introduced qualified majority voting in a number of fields, which previously required unanimity, and thus increased the legislative influence of the European Parliament.[159] This new development is certain to increase activity of lobbyists in Brussels, since it will be easier to achieve successful legislative results for corporate clients as "Qualified Majority Voting will increase legislative output and thus enhance the rewards of lobbying as interests groups vie to influence a larger portfolio of regulations and directives."[160] These developments signal that in the European Union corruption through lobbying should be controlled more effectively, as lobbyists now have a greater stake in the legislative outcome and might resort to corrupt means of achieving a favorable result.

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[156] *See generally* NINA KATZEMICH, ALLIANCE FOR LOBBYING TRANSPARENCY AND ETHICS REGULATION, LOBBYING LAW FIRMS – UNFINISHED BUSINESS (2016).

[157] *See* Lipton & Hakim, *supra* note 12, at 6.

[158] *See generally* Katzemich, *supra* note 156.

[159] *See* Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity under the Treaty of Lisbon*, 50 VA. J. INT'L L. 919, 922 (2010).

[160] *See* Hauser, *supra* note 25, at 681.

Lobbying in the EU, in-and-of-itself as a business, presents a ripe situation for corruption of government officials. Recalling the language of Article 1(1) of the Anti-Bribery Convention, (1) any person (2) intentionally offers, promises, or gives any undue pecuniary advantage; (3) to a foreign public official; (4) to act or refrain from acting in relation to performance of the official duties; (5) in order to obtain or retain business, or other improper business advantage.[161] In considering the business of lobbying, these provisions perfectly fit the lobby practice.

Thus, a lobbyist, who holds access to an MEP's office, can intentionally provide an illicit payment in order to induce the MEP to act in their official capacity, similar to how MEPs acted in the "cash for laws" scandal. Now, the business purpose or the improper business advantage that a law/lobby firm would gain by bribing an EU official would be to show how effective the firm can be in influencing politicians, thus, boosting their own future clientele. In light of the new voting rules in the EU and the reinvigorated negotiation between the US and the EU regarding the Transatlantic Trade and Investment Partnership, millions of dollars are at stake.[162] Where a law/lobby firm capitalizes off of its success in influencing government officials, and attracts and retains just one additional client, it could mean a substantial income for that firm. The Commentaries on the OECD Anti-Bribery Convention are clear that a business advantage could be minimal as "it is also an offence irrespective of, *inter alia*, the value of the advantage."[163] Clearly, lobbying practice, as a business itself, falls within the scope of the OECD Anti-Bribery Convention.

Notwithstanding the fact that lobbying is "a legitimate part of the democratic system, regardless of whether it is carried out by citizens, companies, or firms working on behalf of third parties, think tanks, lawyers, [or] public affairs professionals,"[164] where there is no transparency in the lobbying process, the OECD Anti-Bribery Convention should apply. It will promote transparency and deter corruption in lobbying. Influencing government officials in secrecy should not be the way. The EU recognizes that citizens' participating in the decision-making process should take place in a transparent and inclusive manner. Here, TFEU Article 15(1) provides, "[i]n order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as

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[161] *See* OECD Anti-Bribery Convention, *supra* note 118, at Art. 1(1).

[162] *See Time for Commissioner Šefčovič to get Tough on Secretive Lobbying Lawyers*, CORPORATEEUROPE.ORG, (Dec. 9, 2013), http://corporateeurope.org/lobbycracy/2013/12/time-commissioner-ef-ovi-get-tough-secretive-lobbying-lawyers.

[163] *Convention Commentaries*, *supra* note 127, at *15 (emphasis in the original).

[164] *See Green Paper, supra* note 33, at 2.

openly as possible."[165] Yet there is no genuine transparency in lobbying EU institutions at this time.

By clearly outlining that the OECD Anti-Bribery Convention applies to lobbying, transparency in the EU decision-making process would be furthered. Aware that they might be criminally or civilly responsible for bribing government officials, corporate clients will force their lobby representatives to be as transparent as possible in dealings with government officials. Moreover, lobbyists themselves will be deterred from bribing government officials because they will face increased criminal and civil penalties as well as a possibility of damaged reputation. The current structure of the lobbying practice in the EU is skewed towards bribery of government officials. The moral onus is on MEPs to resist such bribes,[166] yet because bribes take place behind closed doors, routed through international financial services companies,[167] it appears to be quite easy for lobbyists to bribe the politicians. By extending the scope of the OECD Anti-Bribery Convention to lobbying practice, transparency without corruption in lobbying can be achieved.

V. Conclusion

As a result of its limited resources, the EU engages lobbyists in the policy-making process. The EU welcomes lobbyists' substantive input. As a result of its reliance on lobbyists, the EU stepped away from stringent regulation of the lobbying practice, putting the ethical onus on EU officials instead. Nevertheless, a number of prominent corruption scandals pushed the EU towards regulation of the lobbying practice.[168] To this effect, the European Commission, together with the European Parliament, established a transparency register.[169]

Yet, the transparency register is set up on a voluntary basis and lobby groups do not have to register. Law firms, in particular, are exempt from registering. In not registering, law firms involved in lobbying and lobby groups do not disclose their clients, budgets, or lobbying portfolios. With Members of the European Parliament being able to moonlight as consultants and retain holding in partnerships, lack of transparency presents an intricate situation where businesses have

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[165] TFEU, *supra* note 49, at Art. 15(1).

[166] *See Green Paper*, *supra* note 33, at 9.

[167] *See* Sunday Times, *supra* note 88 (Ernst Srasser asked for the money "to be channeled through his Viennese company" while Zoran Thaler asked "for the cash to be routed through a London company to keep it secret.").

[168] Gianluca Sgueo, *Transparency of Lobbying at EU Level,* (2015), *available at* http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)572803

[169] *Id.* at 3.

easy access to EU officials and can easily exchange "cash for influence."[170]

High profile, lobby-related corruption scandals brought the issues to the forefront.[171] Nevertheless, the Commission has been hard-pressed to find legal basis in the treaties to make the register mandatory, and it appears that the register will remain in its current form in the future. This paper examined whether the OECD Anti-Bribery Convention applies to the practice of lobbying, concluding that it did not, it argued that the Convention should apply to lobbying, particularly in situations where there is no transparency in the process, such as in the European Union.

The practice of lobbying *per se* could fall within the provisions of the Convention, yet public policy and the heavy EU reliance on lobbyists stand in the way. Nevertheless, by extending the scope of the OECD Anti-Bribery Convention to lobbying, it is possible to promote transparency in the lobbying process. In order to avoid liability, corporate clients will demand that lobbying firms register their efforts in the transparency mechanism and report all the requisite information. Further, lobbying firms themselves will be more willing to forego illicit means of winning favor with politicians and clients as getting caught in a bribery scandal could ruin the business reputation of a firm. By extending the scope of the OECD Anti-Bribery Convention to lobbying, it is possible to promote transparency and deter corruption in the lobbying process.

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[170] *Id.*
[171] *Id.*

A RED CARD FOR FIFA: CORRUPTION AND SCANDAL IN THE WORLD'S FOREMOST SPORTS ASSOCIATION

Chance Esposito

I. Introduction

On a global scale, soccer (or as it is commonly called in most other countries "football") is the most popular sport based on its numbers alone with over 250 million players.[1] In recent years, the sport has become increasingly popular in nations or territories such as the United States.[2] As a result of this increased interest, the sport and its governing organization, The Fédération Internationale de Football Association ("FIFA") has been thrown into the global media arena in the past two decades. The organization itself is one that promotes the sport worldwide through tournaments and sponsorship from major companies.[3] Recently unearthed information, however, has put the actions of this organization at the center of controversy for alleged charges including conspiracy and bribery of officials with regard to tournament locations and media rights agreements.[4] With billions of dollars in revenue and a major global presence in the world of sports[5], the scandal surrounding FIFA and its officials will likely have significant ramifications on the operations of the organization and how it will continue after the investigations have concluded. This controversy is ongoing and new information is constantly being brought to light.

The first part of this article will address the background and organization of FIFA as a governing body for the world of soccer. The structure of this organization will prove to be important both for purposes of this article and for the overall case against FIFA. The second part of this article will center on the World Cup, its bidding process and the global impact that this event imposes. The third part of this article will focus on the Justice Department's indictment and the corruption charges asserted against the FIFA officials, their scope and potential ramifications of this case.

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[1] Jack Rollin, *Football*, Encyclopedia Britannica. (December 8, 2015). http://www.britannica.com/sports/football-soccer

[2] *Id*.

[3] *Id*.

[4] *Fifa corruption crisis: Key questions answered*. BBC NEWS. (December 21, 2015). http://www.bbc.com/news/world-europe-32897066

[5] *Id*.

II. Background and Structure of the FIFA Organization

A. History of the Organization

The history and structure of the FIFA organization, while lengthy, will serve as an important learning tool in understanding how this scandal came to light and what it means on a global scale. A good starting place is the mission of the organization. As listed on the organization's official website, there are three main objectives: (1) "Developing football everywhere and for all"; (2) " Organizing inspiring tournaments"; and (3) "Caring about society and the environment".[6] To explore these in a little more detail, the website states: "FIFA's primary objective is "to improve the game of football constantly and promote it globally in the light of its unifying, educational, cultural and humanitarian values, particularly through youth and development programmes". FIFA's second objective is to organize international football competitions. Football is much more than just a game. This is the third crucial pillar of FIFA's mission: building a better future for all through football."[7] Overall, the main goal of this governing body seems to have remained the same since its founding: the promotion of football.

Representatives of various football associations from the countries of France, Belgium, Denmark, Netherlands and Switzerland founded FIFA in Paris in the year 1904.[8] From there, the organization began to lay the foundation for its structure by means of statutes providing for the governing laws that would reign supreme over international football.[9] The organization also composed a Congress that would have the final say in almost all matters it was presented.[10] In addition to statutes and a congressional body, the organization created committees (executive and emergency, in addition to others that were added later), elected a president to oversee the organization and began to look outward to attract global attention.[11] After a few years of being primarily restricted to European countries, efforts of the organization to globalize its reach succeeded. In 1909 South Africa joined the ranks of the organization, only to be followed by Argentina and Chile in 1912, and the United States in 1913.[12] With the continuing addition of vari-

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[6] *What we stand for*. FIFA. http://www.fifa.com/about-fifa/who-we-are/explore-fifa.html?intcmp=fifacom_hp_module_corporate

[7] *Id*.

[8] *History of FIFA – Foundation*. FIFA. http://www.fifa.com/about-fifa/who-we-are/history/index.html

[9] *Id*.

[10] *Id*. *History of FIFA – FIFA takes shape*. http://www.fifa.com/about-fifa/who-we-are/history/fifa-takes-shape.html

[11] *Id*.

[12] *Id*.

ous countries and other associations to the FIFA roster, the organization realized its goal of international competitions by conducting the first World Cup in 1930.[13] Although riddled with issues ranging from participation debates and refusals to enter, the first World Cup competition was described as a defining moment for international soccer and was held in the host country of Uruguay.[14] The organization furthered its goal to conduct global competitions following the first world cup and its history has proven to be problematic in the first formative years (largely as a result from outside factors such as the British economic crisis and the development of World War II).[15] However, since the end of World War II, the organization has been increasingly successful in achieving its goals.[16]

FIFA today is composed of 211 member associations (which represent organized soccer for various nations or territories) that are part of the six larger confederations based on their regional location.[17] The structure has largely remained the same with the exception that it has expanded greatly with the inclusion of numerous associations from many nations or territories over the years.

B. Structure of FIFA

As mentioned, the globe has been sectioned off into six confederations based on regional location.[18] The six confederations are listed below along with their respective association count of member nations or territories, founding dates, and a brief description:

- Confédération Africaine de Football ("CAF"); The governing body of African football; 54 associations; founded 1957.[19]
- Asian Football Confederation ("AFC"); The governing body of Asian football; 46 associations; founded 1954.[20]
- Union of European Football Associations ("UEFA"); The Union of European Football Associations is the governing body of European football; 55 associations.[21]
- The Confederation of North, Central America, and Caribbean Association Football ("CONCACAF"); the continental governing body for association football in North America,

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[13] *History of FIFA – the first FIFA World Cup*. FIFA. http://www.fifa.com/about-fifa/who-we-are/history/first-fifa-world-cup.html
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Associations*. FIFA. http://www.fifa.com/associations/
[18] *Id*.
[19] *Background*. CAF. http://www.cafonline.com/en-us/caf/background.aspx
[20] *About AFC*. AFC. http://www.the-afc.com/about-afc
[21] *About UEFA*. UEFA. http://www.uefa.org/about-uefa/index.html

Central America and the Caribbean; 41 associations; founded 1961;[22]

- Oceania Football Confederation ("OFC"); OFC is the umbrella organization of the national football associations within Oceania. 11 associations; conceptualized in 1964; approved in 1966.[23]
- Confederacion Sudamericana de Futbol ("CONMEBOL"); governing body of South American football; 10 associations.[24]

FIFA provides support to these confederations in return for upholding the ideals and statutes of the organization.[25] Additionally, each of these confederations hold independent tournaments at the club and international levels in order to further develop the sport.[26]

In addition to being members of the separate confederations, member associations participate in various areas of the organizational structure of FIFA such as voting in the presidential election as members of the Congress.[27] Each member association is granted one vote, for example, in the FIFA presidential election process.[28] This means that even those member associations who are not heavily invested in the sport are still eligible for casting a vote for leadership (among a few other areas of interest such as committee elections).[29] However, for decisions such as who should host the next World Cup, the voting power does not extend to the member associations. Instead, the FIFA Council reigns supreme.[30] The FIFA Council is a "non-executive, supervisory and strategic body" chaired by the FIFA president and consists of eight other vice-presidents and fifteen additional members who are appointed by various means adopted by the confederations and the member associations.[31] Any disputes or unresolved issues from the FIFA Council are handed over to the Emergency Committee, which is com-

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[22] *CONCACAF*. http://www.concacaf.com/concacaf

[23] *History*. OFC. https://www.oceaniafootball.com/about-ofc/history/

[24] *The National Associations of CONMEBOL*. CONMEBOL. http://www.conmebol.com/en/content/national-associations-conmebol-0

[25] *Associations, supra* note 17.

[26] *Id*.

[27] FIFA Statutes, April 2015. http://www.fifa.com/mm/document/affederation/generic/02/58/14/48/2015fifastatutesen_neutral.pdf

[28] *Id*.

[29] *Id*.

[30] *FIFA Council*. FIFA. http://www.fifa.com/about-fifa/committees/committee=188 2019/index.html

[31] *Id*.

prised of one member from each of the six confederations and the president of FIFA.[32]

The FIFA Congress serves as the supreme body of the organization.[33] This body is responsible for a number of items at their annual meeting including decisions related to the governing statutes (implementation, additions, revisions); addition, suspension, or expulsion of a member association; location of the FIFA headquarters; and more.[34] The overall goal of this legislative body is to further develop the sport on a global level.[35]

The structure and history of the FIFA Congress is an essential part to understanding the current turmoil that FIFA faces today. The next section of this article will dive deeper into the organization's primary revenue maker, the World Cup.

. III. The World Cup

As discussed above, since the formation of FIFA the goal has been to bring the sport of soccer to the global stage.[36] The World Cup is the event that allows FIFA to move closer to this goal every four years.[37] The tournament style event allows for 32 qualifying teams of the member associations to compete in stadiums constructed by host nations across the globe.[38] It is widely considered the largest single sporting event in the world due to its mass appeal and wide distribution.[39] The bidding process of the potential host nations and the marketing or advertising plans are at issue in the current controversy involving FIFA and will be discussed in further detail below.

A. Marketing, Influence, and Revenue

In order to truly grasp how influential and popular the World Cup has become (especially in recent years) a look at the numbers from past competitions is key. For example, the 2010 World Cup in South Africa was shown in 204 countries across the world with stadium attendance hitting a total of 3.1 million spectators.[40] In addition,

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[32] *Bureau of the Council*. FIFA. http://www.fifa.com/about-fifa/committees/committee=1882020/index.html

[33] *FIFA Congress*. FIFA. http://www.fifa.com/about-fifa/fifa-congress/all-you-need-to-know/index.html

[34] *Id*.

[35] *Id*.

[36] *What we stand for*. FIFA. http://www.fifa.com/about-fifa/who-we-are/explore-fifa.html?intcmp=fifacom_hp_module_corporate

[37] *FIFA World Cup*. FIFA. http://www.fifa.com/aboutfifa/worldcup/

[38] *Id*.

[39] *Id*.

[40] *Id*.

the World Cup competitions also serve as the main source of revenue for FIFA.[41] The 2014 Brazil World Cup allowed the organization to clear over 2 billion dollars in profit after deducting its costs from the total of 4.8 billion dollars it received.[42] These numbers show that the World Cup is a profit-creating event capable of keeping FIFA operational. The organization's revenue is generated almost entirely from "the sale of television, marketing, hospitality and licensing rights for the FIFA World Cup."[43] In fact, the broadcasting and sponsorship rights of the 2014 Brazil World Cup alone accounted for $3 billon in revenue.[44] FIFA has many sponsors that support its endeavors in the World Cup every four years and those sponsors often are considered global powers themselves. Some of the major sponsors include Coca-Cola, Visa, Hyundai, Adidas, Budweiser, McDonald's, and more.[45] These sponsors pay huge sums of money for various perks such as advertisements, promotion, and the use of FIFA official marks.[46] In addition to these perks, the sponsors also have some measure of power with regard to the organization. Following the charges brought against FIFA earlier this year, almost all of the major sponsors have called for further investigations and in some cases reform within FIFA itself.[47] Pending the current investigation, FIFA will need to make changes to its structure and performance in order to continue doing business with global powerhouse companies.

B. Bidding process

The process by which FIFA selects future host nations for the World Cup is called the bidding process.[48] FIFA's official website lists the following "milestones" as part of the bidding process:

- "FIFA sends out requests for expressions of interest
- Member Associations ("MAs") express an interest in bidding for a specific event

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[41] Paul Sargent, *How Fifa makes and spends its money*, BBC News. (May 2015), http://www.bbc.com/news/world-europe-32923882

[42] *Id*.

[43] *Finances*. FIFA. http://www.fifa.com/governance/finances/index.html

[44] *See*, Sargent*, supra* note 41.

[45] Isabelle Fraser, *A look at the massive sponsor contracts that FIFA could lose*. Business Insider. (May 2015). http://www.businessinsider.com/a-look-at-the-massive-sponsor-contracts-that-fifa-could-lose-2015-5

[46] *FIFA Partners*. FIFA. http://www.fifa.com/about-fifa/marketing/sponsorship/partners/

[47] Fraser, *supra* note 45.

[48] *Bidding process.* FIFA. http://www.fifa.com/governance/competition-organisation/bidding-process.html

- FIFA sends out bidding information, including the Bidding Manual and supporting documents (Hosting Agreements etc.)
- FIFA workshop for interested bidders
- MAs return the Bidding Agreement confirming compliance with bid requirements
- MAs submit bids in accordance with the Bidding Manual
- FIFA evaluates the bid submissions and identifies the selected candidate for approval.
- FIFA recommendation
- FIFA announces the successful host for the event"[49]

Bidding proposal requirements are substantial and the host nation must either meet or demonstrate that it will meet the requirements in order to be considered.[50] A reading of the proposal submitted by Japan for the 2022 World Cup shows the extensive nature of the bidding process. Among the written proposal are requirements for a set number of stadiums, each of which must meet stringent inspection standards, must be able to hold a specified number of spectators, which should ideally be located throughout the country.[51] In addition to specific stadium requirements, the applicant should be able to account for training sites for member competitors, hotels for both guests and for competitors, significant infrastructure and transportation guidelines, environmental guidelines, as well as support for how the host nation would further develop football around the world.[52] Following completion of the bidding processes, final reports are proposed containing risk analysis figures on the potential host nation and are supplied to the Executive Committee for consideration.[53]

The Executive Committee is responsible for the selection of the host nation by a vote of its twenty-four members (outlined above).[54] Executive Committee members visit each prospective host country to inspect the stadiums, infrastructure and the potential land in development.[55] Voting then takes place behind closed doors by means of secret

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[49] *Id*.

[50] Ewan Macdonald. *Goal.com's Ewan Macdonald looks at how the fate of the world's biggest tournament will be decided. . . .* Goal. http://www.goal.com/en/news/3512/20182022-world-cup-host/2010/11/29/2234600/world-cup-bidding-process-explained-how-the-2018-2022-world

[51] 2022 World Cup: Bid Evaluation Report: Japan. http://www.fifa.com/mm/document/tournament/competition/01/33/74/42/b1jpne.pdf

[52] *Id*.

[53] *Id*.

[54] Macdonald, *supra* note 50.

[55] *Id*.

ballot.[56] If the vote results in a tie, the President of FIFA will cast the deciding vote.[57] A winner is announced (usually for the next two World Cups) and the process concludes.

The bidding process in recent years has been the subject of much controversy amid allegations of bribery in the form of "cash for votes" and due to the secrecy of the FIFA site selection process (for example, some documents are made available to the public while others are kept private).[58] To some, the most recent decision by FIFA to award the 2018 World Cup to Russia and the 2022 World Cup to Qatar are viewed as the product of rampant bribery (more so in the case of Qatar).[59] While the small oil-rich company has not been named in any pending legal suits (either in the United States or in Switzerland), many cast doubts as to the innocence claimed by that country's officials in the World Cup bidding process.[60] A discussion of the legal charges brought against FIFA by the United States is the next focus of this paper. It is important to keep in mind the bidding process laid out above, as the indictments from the United States Department of Justice focus on this issue specifically.

IV. The United States Indictment of FIFA Officials

The United Stated Department of Justice has been actively investigating various charges against high-ranking FIFA officials for the past several years.[61] Although no specific reason for this investigation has been disclosed, some believe that the results of the bidding process for the 2018 and 2022 World Cup raised red flags for those involved.[62] At the present time, the United States Department of Justice has obtained: (i) an initial indictment in May of 2015 ("The First Indictment"); and (ii) a subsequent, more inclusive indictment in December

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[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] Rory Jones. *FIFA Scandal Prompts New Scrutiny of Qatar World Cup Bid.* Wall Street Journal. (May 2015). http://www.wsj.com/articles/fifa-scandal-prompts-new-scrutiny-of-qatar-world-cup-bid-1432920652

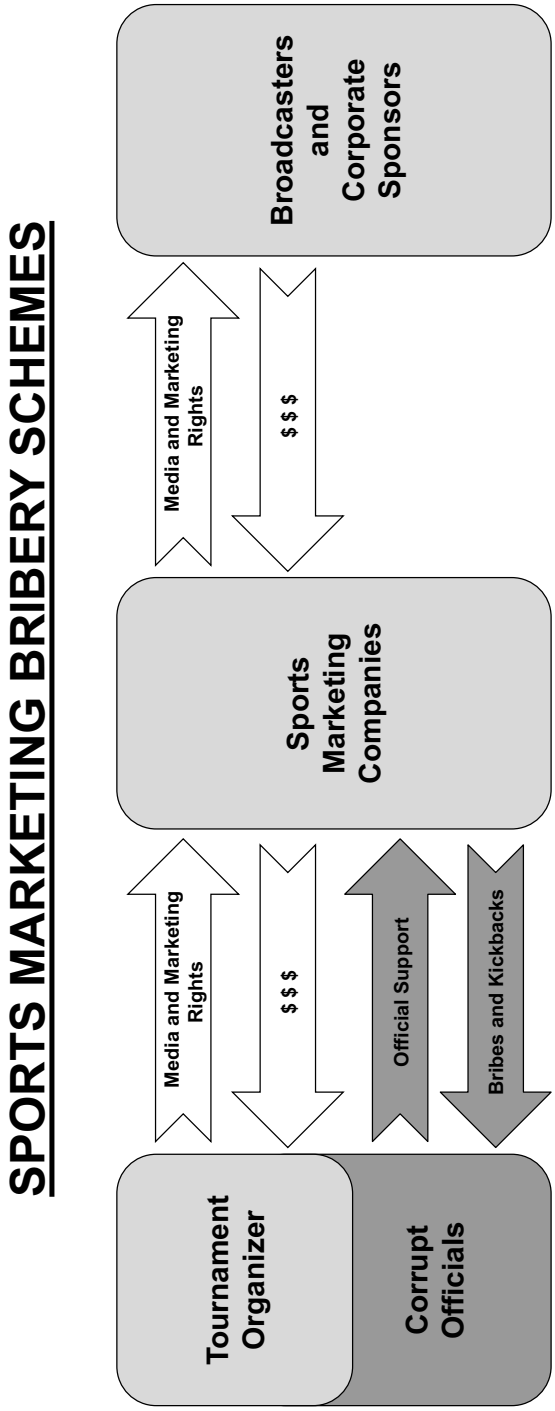
[60] *Id.*

[61] *Nine FIFA Officials and Five Corporate Executives indicted for Racketeering Conspiracy and Corruption.*, Department of Justice. (May 27, 2015), http://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and; *see* Paul Blake, *FIFA scandal: Why the US is policing a global game*, BBC News. (May 28, 2015), http://www.bbc.com/news/world-us-canada-32889845.

[62] Paul Blake, *supra* note 61.

of 2015 ("The Superseding Indictment").[63] This section of the article will discuss both in detail.

[63] *Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption*., Department of Justice. (December 3, 2015), http://www.justice.gov/opa/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption.



The Department of Justice provided this graphic as a tool to understand the allegations of its case.[64]

[64] http://www.justice.gov/opa/file/450251/download

A. The First Indictment

As mentioned, The First Indictment issued by the United States Department of Justice occurred in May of 2015 and was unsealed by a federal court in Brooklyn, New York.[65] The forty-seven-count indictment names fourteen separate defendants, nine of which are FIFA Officials.[66] The indictment includes charges of racketeering, wire fraud, and money-laundering conspiracies - among various other charges - and spans a "24 year scheme [by the defendants] to enrich themselves through the corruption of international soccer."[67] More specifically the indictment charges the defendants with abusing their "positions of trust to acquire millions of dollars in bribes and kickbacks."[68] The nine FIFA officials named in the indictment include: Jeffrey Webb (FIFA executive committee member, CONCACAF president, etc.), Eduardo Li (FIFA executive committee member, CONCACAF executive committee member), Julio Rocha (FIFA development officer, held roles on smaller associations as well), Costas Takkas (Attaché to the CONCACAF president), Jack Warner (Former FIFA vice president and executive committee member, CONCACAF president), Eugenio Figueredo (FIFA vice president and executive committee member), Rafael Esquivel (CONMEBOL executive committee member), Jose Maria Marin (member of the FIFA organizing committee for the Olympic football tournaments), and Nicolas Leoz (Former FIFA executive committee member and CONMEBOL president).[69] The other individual defendants are executives of sports marketing companies primarily located in North, Central and South American countries that are alleged to have committed the crimes in conjunction with those FIFA representatives named above.[70] It is clear that those involved in this scandal are key players in the FIFA organization.

The actual indictment recites numerous instances spanning from the early 1990s until more recently (the 2010s) in which the named FIFA officials entered into agreements with the leaders of the sports marketing agencies providing them with substantial systematic kickbacks and bribes in the amount of $150 million dollars in return for lucrative contracts.[71] As noted, the media and marketing rights for FIFA events are highly profitable. The difficulty with awarding contracts solely to those few companies that provide kickbacks and bribes is that the market is then essentially closed off, such that only a few

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[65] *Nine FIFA*, *supra* note 61.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

marketing companies obtain all of the rights to the preclusion of others.[72] In addition to this, the indictment alleges that the actions of these FIFA officials and the sports marketing executives have "deprived FIFA, the confederations and their constituent organizations – and therefore, the national member associations, national teams, youth leagues and development programs that rely on financial support from their parent organizations – of the full value of those rights."[73]

The United Stated Department of Justice cites proper jurisdiction over this case due to the fact that so many of the alleged offenses occurred entirely or at least partly within the United States - often within the State of New York.[74] Specifically, the indictment describes how the defendants ". . . relied heavily on the United States financial system in connection with their activities. . . ."[75] It is argued that a number of the wire transfers occurred within United States banks, branches of multiple United States institutions were used in dealings of these alleged misappropriated funds and more.[76]

At the time of the first indictment, Swiss authorities in Zurich arrested seven of the defendants charged in the indictment.[77] They currently face extradition to the United States provided that their cases comply with the extradition requirements/laws that have been established under Swiss law.[78] The first indictment was extensive and shocked much of the world when it was released. The superseding indictment created even greater shockwaves.

B. The Superseding Indictment

On December 3, 2015, an additional sixteen FIFA officials were indicted for racketeering, wire fraud, and money laundering conspiracies, "in connection with their participation in a 24-year scheme to enrich themselves through the corruption of international soccer."[79] The Superseding Indictment not only increased the number of defendants from nine to twenty-seven, it increased the number of charges from

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[72] *Id*.

[73] May 22, 2015 Indictment at 30., *United States v. Webb* (No. 15CR0252) http://www.justice.gov/opa/file/450211/download.

[74] *Id*. at 40-41.

[75] *Id* at 39.

[76] *Id* at 40.

[77] *Nine FIFA*, *supra* note 61.

[78] Clive Coleman, *FIFA, extradition and Blatter; How will it play out?*, BBC News. (June 2015). http://www.bbc.com/news/world-32973203

[79] *See* Press Release, Dep't of Justice, Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption (December 3, 2015) [hereinafter Dep't of Justice Press Release], http://www.justice.gov/opa/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption.

forty-seven to ninety-two.[80] The sixteen new defendants were all involved with the FIFA organization, either serving as high-ranking officials or general officials who operated "under the FIFA umbrella."[81] Among them were officials working primarily within CONCACAF and CONMEBOL.[82]

The time frame of the events listed in The Superseding Indictment aligned with that of The First Indictment (1991 until 2010), as do most of the charges alleged.[83] However, the range of charges was broadened after additional crimes were added. One of the additional crimes that seemed to be the most influential and problematic for the FIFA organization involved the voting process to nominate the host of the 2010 FIFA World Cup.

In 2004, FIFA's executive committee selected South Africa over Morocco and Egypt to host the 2010 World Cup.[84] Official allegations surfaced regarding internally-related FIFA bribes that were tied to Morocco and South Africa's candidacy to host the World Cup.[85] The parties mentioned in The Superseding Indictment included Jack Warner, who was named in The First Indictment as a defendant, Darren Warner, various unnamed co-conspirators, and Charles Blazer. The indictment alleges that Warner and Blazer traveled to Morocco in the months before the FIFA executive committee voted for the nomi-

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[80] *Id*.
[81] *Id*.
[82] *Id*. The new sixteen defendants are all ranking officials within the FIFA organization: Alfredo Hawit (FIFA vice president and executive committee member and CONCACAF president, former CONCACAF vice president); Ariel Alvarado (FIFA disciplinary committee and former CONCACAF executive committee member); Rafael Callejas (FIFA television and marketing committee member); Brayan Jimenez (current Guatemalan soccer federation president and member of FIFA committee for fair play and social responsibility); Rafael Salguero (Former FIFA executive committee member and Guatemalan soccer federation president); Hector Trujillo (current Guatemalan soccer federation general secretary); Reynaldo Vasquez (former Salvadoran soccer federation president); Juan Angel Napout (FIFA vice president and executive committee member and CONMEBOL president); Manuel Burga (FIFA development committee member); Carlos Chavez (CONMEBOL treasurer); Luis Chiriboga (Ecuadorian soccer federation president and member of the CONMEBOL executive committee); Marco Polo de Nero (president of the Brazilian soccer federation, former FIFA executive committee member); Eduardo Deluca (former CONMEBOL general secretary), Jose Luis Meiszner (CONMEBOL general secretary); Romer Osuna (member of the FIFA audit and compliance committee and former CONMEBOL treasurer); and Ricardo Teixiera (former Brazilian soccer federation president and FIFA executive committee member). *Id*.
[83] Indictment, U.S. v. Hawit, Cr. No. 15-252 (E.D. N.Y. Nov. 25, 2015).
[84] *Id*. at 92.
[85] *Id*. at 91- 2.

nee to host the 2010 World Cup,[86] at which time a "representative of the Moroccan bid committee offered to pay $1 million to Warner in exchange for his agreement to cast his secret ballot on the FIFA executive committee for Morocco."[87] This allegation, while shocking, was not the worst. After the alleged Moroccan bribe, Blazer learned from Warner that the South African government was prepared to pay $10 million to CFU – one of the smaller regional associations governed by Warner – to "support the African diaspora."[88] Blazer allegedly had knowledge that this offer was in exchange for the agreement of Warner, Blazer, and a co-conspirator, who was also a member of the executive committee at FIFA, to vote affirmatively for South Africa to become the 2010 World Cup host country.[89] Warner ultimately accepted the deal and promised to pay Blazer $1 million of the total $10 million South African payment.[90] In May of 2004, South Africa was declared to be the next host of the 2010 World Cup tournament.[91]

The indictment of the sixteen additional FIFA defendants further alleged a series of setbacks for payment of the $10 million. Eventually, however, another co-conspirator arranged for the separate installment payments that added up to roughly $10 million. These installment payments were wired to a single Bank of America account in New York that belonged to Warner.[92] Warner then laundered the funds from his Bank of America account to other accounts, thus allowing him to apportion money for his personal use.[93] Subsequently, Blazer stated that Warner was then able to make payments to Blazer that totaled $750,000.[94]

The detailed description of the 2010 World Cup bribery investigation is important for understanding the potential severity of the charges alleged and the implications of those actions. If the indictment is correct in its allegations, a series of very serious offenses have been committed by members of the FIFA organization raising questions of bribery and falsehoods in past and present World Cup tournaments. This will likely not be the last indictment that concerns this organization and its corruption.

The parties that have yet to be extradited to the United States still face a long road ahead. If found guilty, it is likely that their punishments will include a forfeiture of their bribes, as well as jail

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[86] *Id.* at 91.
[87] *Id.*
[88] *Id.* at 92.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*

sentences for some, if not all, defendants.[95] The United States Department of Justice press release announcing these indictments stated that "the indicted and convicted defendants face maximum terms of incarceration of 20 years for the Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, wire fraud conspiracy, wire fraud, money laundering conspiracy, and obstruction of justice charges."[96] In addition to the possibility of forfeiture of their bribes, the defendants also face mandatory restitution and fines.[97]

V. What this Scandal Means for FIFA Moving Forward

The scandal surrounding the world's foremost sports association will likely leave a negative mark on the organization for years to come. Reputation damage aside, however, current sponsors of the FIFA organization have already begun to voice their concerns of the corruption allegations.[98] Coca-Cola, for example, called for an independent third party restructuring of the organization, declaring, "We believe that establishing this independent commission will be the most credible way for FIFA to approach its reform process and is necessary to build back the trust it has lost."[99] McDonald's Corporation, another major sponsor of the FIFA World Cup, expressed similar concerns, stating, ". . . recent allegations and indictments have severely tarnished FIFA in a way that strikes at the very heart of our sponsorship . . . FIFA must not implement meaningful change to restore trust and credibility with fans and sponsors alike. The world expects concrete actions and so does McDonald's."[100]

Aside from sponsorship pressure, FIFA has come under intense scrutiny for its recent award of the 2018 (Russia) and 2022 (Qatar) World Cups. Following the indictments and corruption allegations regarding South Africa, many speculate that similar conduct occurred when FIFA selected Russia and Qatar as the host countries for 2018 and 2022.[101] If that is the case, many analysts have already begun looking into whether Russia and Qatar could be stripped of their hosting duties.[102] Any further discoveries of corruption and scandal will

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[95] Dep't of Justice Press Release, *supra* note 79.
[96] *Id*.
[97] *Id*.
[98] Dan Roan, *Fifa corruption: Sponsor Coca-Cola demands third party reform*, BBC (July 2015), http://www.bbc.com/sport/0/football/33575358.
[99] *Id*.
[100] *Id*.
[101] Owen Gibson, *Russia and Qatar may lose World Cups if evidence of bribery is found* (June 2015), http://www.theguardian.com/football/2015/jun/07/russia-qatar-lose-world-cups-if-bribery-found-fifa.
[102] *Id*.

make it that much harder for the organization and its accompanying member associations to return to the status they once held. The seed of doubt has already been planted in the minds of many FIFA fans and it will be up to the organization itself to regain the trust of the world.

VI. Conclusion

As stated at the beginning of this article, the South Africa World Cup scandal and the corresponding lawsuits are ongoing. With every new piece of information we must consider the potential implications that follow. As FIFA is the largest supporter and promoter of the sport of football, it will not be a stable journey from this point forward. The United States Department of Justice continues its investigation into more recent decisions, votes, and other functions of the organization. Substantial and systematic reform will be necessary in order for FIFA to regain the world's trust as a leading player in sports.