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Organized Crime and Corruption in Russia: Implications for U.S. and International Law

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Abstract

This Essay discusses organized crime and corruption in Russia and their effects on US businesses and US foreign policy. This Essay recommends that US businesses operating in Russia take steps to ensure that their local offices and representatives in Russia are not violating the anti-bribery laws of the United States. This Essay also recommends that the US Government create a procedure for Russian and foreign businesses, in cooperation with the Russian Government, for reporting requests for bribes from Russian Government officials. Finally, this Essay recommends that US anti-bribery laws be amended to provide US businesses with the right to commence civil actions against companies and individuals who make illegal bribes to the competitive detriment of US firms.

ORGANIZED CRIME AND CORRUPTION IN RUSSIA: IMPLICATIONS FOR U.S. AND INTERNATIONAL LAW

*Scott P. Boylan**

I. SUMMARY

This Essay is both a warning and a recommendation. It is a warning to U.S. businesses and businessmen that bribing Russian Government officials is a risky and illegal process under both Russian and U.S. laws. It is also a warning to the U.S. Government that the bribery of Russian Government officials by U.S. and foreign businesses and businessmen is seriously undermining the transformation to democracy in Russia.

This Essay recommends that U.S. businesses operating in Russia take steps to ensure that their local offices and representatives in Russia are not violating the anti-bribery laws of the United States. This Essay also recommends that the U.S. Government create a procedure for Russian and foreign businesses, in cooperation with the Russian Government, for reporting requests for bribes from Russian Government officials. Finally, this Essay recommends that U.S. anti-bribery laws be amended to provide U.S. businesses with the right to commence civil actions against companies and individuals who make illegal bribes to the competitive detriment of U.S. firms.

II. INTRODUCTION

Corruption has become a way of life for government officials in Russia.¹ Bribe-taking, in fact, is a widespread practice throughout the Russian bureaucracy.² A number of U.S. and

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1. *Somebody Put a Dollar Bill in His Hand*, KOMSOMOLSKAYA PRAVDA, Dec. 23, 1994, at 2.

2. *See Nothing for Nothing*, ROSSISKAYA GAZETA, Jan. 6, 1993, at 2. The Author notes that when U.S. businesses negotiate commercial contracts with their Russian counter-

other Western businesses and businessmen routinely pay bribes to Russian government officials in order to conduct their businesses in Russia.³ Indeed, the most prevalent crime in Russia today is bribery.⁴ Of those charged with bribery and corruption in Russia in 1993, over forty-two percent were government officials⁵ and over twenty-five percent were law enforcement officers.⁶ Not only do Russian officials routinely accept and even demand bribes,⁷ they have also entered into an illicit partnership with organized crime and with clandestine business groups.⁸ Former Communist apparachiks, who continue to work within the Russian bureaucracy, exploit previously made black-market relationships to profit in the new post-Revolutionary Russian system.⁹ Thus, a partnership formed long before the attempted coup of 1991 by organized crime and Communist government officials now threatens the growth of democracy in Russia.¹⁰

parts, they are often, indeed always, requested to pay government officials for the latter's acquiescence in the deal. These officials represent a wide range, from low-level bureaucrats to high-ranking Russian government employees.

3. See Von Der Heydt, *Russia's Spiritual Wilderness*, 70 POL'Y REV. 12 (1994).

4. *To Whom Belongs Power in Russia? Ministry of Thieves-in-Law: An Attempt at Breaking into Politics*, IZVESTIA, July 20, 1994, at 1, 5 [hereinafter IZVESTIA].

5. George Nikides, *Journalists Hit TV Mafiya*, MOSCOW TIMES, Oct. 5, 1994, at 10. While virtually all activities were controlled by the Government in the former Soviet Union, there are now a large number of government officials working in what is now the private sector. *Id.* As the Author notes:

[C]orruption in advertising on [Russian] state television began seven years ago, when executives first debated the cost of a minute of air time. They came up with a figure of 2,000 rubles a minute, a price so low it invited executives to demand additional payment, or bribe, of 10,000 rubles before an ad would go on the air.

Id. On November 7, 1994, the exchange rate was approximately 3200 Rubles for one U.S. dollar. *Id.*

6. *Id.*

7. Leonid Zhukhevitsky, *Crash Course for International Businessmen, Part II*, THE RUSSIAN, June 1995, at 66.

8. *To Whom Belongs Power in Russia?*, *supra* note 4, at 1, 5. According to Russian police sources, there has been a gradual alliance formed between Mafiya organizations, Russian government bureaucrats, and legitimate and illegitimate businessmen. As a result of this alliance, 70% of the privatization auctions were shams where the buyer was selected well in advance. *Money Talks*, NEWSWEEK, Nov. 14, 1994, at 10. Corruption "risks causing political unrest or, no better, a backlash against free-market reform." *Id.*

9. Post-Revolutionary Russian system refers to the period after the Revolution of 1991.

10. See *To Whom Belongs Power in Russia?*, *supra* note 4, at 1, 5; *Money Talks*, *supra* note 8, at 10. STEPHEN HANDLEMAN, *COMRADE CRIMINAL* 55-56 (1995). The Author notes that criminality "was at the heart of the Soviet system The huge profits that

Not only does the Mafiya¹¹ kill and steal in Russia, it does so in the United States as well.¹² The Russian Mafiya is increasingly engaged in crime in the West.¹³ Mafiya members are involved in "theft, extortion, money-laundering,^[14] gun-trafficking, drug running, prostitution, smuggling, loan sharking, contract killing and more."¹⁵ The U.S. Department of Justice ("DOJ") has established task forces to deal with the Russian Mafiya in New York, Los Angeles, and Miami. Thus, U.S. businesses that pay bribes and protection money in Russia may be unwittingly financing Russian criminal activity back in the United States.¹⁶ As one commentator notes, businessmen:

[W]ho pay protection money to the Russian Mafia are helping to cement anarchy for years to come and prevent the establishment of the rule of law in Russia. And those who hope that their compromises will in the long run promote the penetration of a less corrupt "Western Culture" are lying to themselves. If Russia recovers, it will be despite and not because of the Mafia, despite and not because of passive collaboration by foreign businessmen.¹⁷

Clearly, it is not in the best interests of the United States for Russia to become a criminal oligarchy. Following the demolition

the crime lords began to earn in the black market could only have been possible with the tacit approval, if not the open cooperation, of government authorities and police." *Id.*

11. See Stephen Handelman, *The Russian Mafiya*, FOR. AFF., Nov./Dec. 1994, at 2. "Mafiya" is the transliteration from Russian. *Id.* As discussed below, the Russian Mafiya is different from the Sicilian mafia. *Id.* The two terms should be differentiated; thus the difference in spelling. *Id.*

12. Allan Friedman, *The Organizatsiya: Brooklyn's Booming Russian Mob is Slicker, Smarter, and Much Meaner than La Cosa Nostra*, N.Y. MAG., Nov. 7, 1994, at 50.

Just a few years ago, the FBI denied there even was a Russian mob. But five months ago, in the wake of at least fifteen gang-hit murders in Brighton Beach and evidence of a burgeoning alliance between Russian gangsters and the Italian Mafia, the FBI set up an elite squad to combat what experts say is the most important organized crime wave of the nineties The Russian mob . . . has more than 300 members in the New York area alone, making it larger than the Bonanno, Colombo, or Lucchese crime families.

Id.

13. Daniel Klaidman, *How To Police an Ex-Police State*, LEGAL TIMES, July 11, 1994, at 12.

14. COMRADE CRIMINAL, *supra* note 10, at 131-43.

15. *Id.*

16. Ulrich Schmid, *The Russian Mafia and the Rule of Law*, SWISS REV. OF WORLD AFF., Oct. 3, 1994, at 1.

17. *Id.*

of the Berlin Wall and the collapse of the Soviet Union, many observers were euphoric about a potential future partnership between the United States and other Western democracies and a new democratic Russia. In some ways this type of partnership has emerged, but it has not been free of problems. The initial euphoria has been tempered by the sobering facts of reality. Optimism has surrendered to pessimism as the reality of Russia's difficult transition from a command government, economy, and society to a liberal government, economy, and society has presented Russia and the World with enormous and difficult challenges. It is now apparent that a major hurdle for Russia on the road to democracy is the issue of crime and official corruption.

Recent visits to Russia by U.S. law enforcement officials have made it clear that the U.S. Government is concerned about crime and corruption in Russia.¹⁸ The Director of the Federal Bureau of Investigation ("FBI"), Louis Freeh, has said that the growth of organized crime in Russia and Eastern Europe is a "threat to the integrity of government."¹⁹ The Russian people have also expressed their deep concern about crime and its negative impact upon reform in Russia. President Boris Yeltsin²⁰ has expressed concern about Mafiya influence in government and has said that "organized crime is persistently trying to gain access to Big Politics and the machinery of state."²¹

The success of Russian democracy represents a fundamental pillar of U.S. foreign policy. The U.S. Government spends millions of U.S. tax dollars to promote democratic and market, economic reforms in Russia. Meanwhile, U.S. businesses and businessmen who pay bribes to Russian government officials may be unwitting supporters of organized crime in Russia. More impor-

18. Lee Hockstader, *Moscow Insists Criminals Can't Get at Nuclear Weapons*, INT'L HERALD TRIB., July 1, 1994, at 2. Louis J. Freeh, Director of the Federal Bureau of Investigation ("FBI") visited Russia "to focus attention on increased threats from international crime groups, terrorism and drug trafficking." *Id.* Director Freeh had previously testified before Congress that the FBI was concerned that nuclear materials from Russia could find their way into the hands of organized crime or terrorist groups in the West and that this constitutes "the greatest long term threat to the security of the United States." *Id.*

19. Klaidman, *supra*, note 13, at 12.

20. See R.W. Apple, Jr., *V-E Day Plus 50: The Overview; Allied Victory in Europe Is Commemorated in Moscow*, N.Y. TIMES, May 10, 1995, at A1 (discussing Boris Yeltsin, President of Russia, in V-E Day celebration in Moscow).

21. IZVESTIA, *supra* note 4, at 5.

tantly, bribery of Russian government officials undercuts efforts to create an open and democratic government in Russia.²² The U.S. Government should not permit the U.S. business community in Russia to work at cross-purposes with U.S. foreign policy by indirectly financing criminal activity in Russia and the United States.

The current Administration in Washington is searching for means to combat the rise of crime and criminal elements in Russia.²³ Indeed, it is a cornerstone of U.S. foreign policy and the key to the post-Cold War era that democracy take root and flourish in Russia. Much effort is being made by the United States and other democratic nations to assist Russia in its metamorphosis from a corrupt totalitarian regime to a popular democracy. These nations should, therefore, not tolerate support of corrupt officials and organizations by private businesses in direct contradiction to this policy.

The United States currently has the means to combat the payment of bribes by U.S. citizens to corrupt Russian Government officials through the Foreign Corrupt Practices Act ("FCPA").²⁴ Unfortunately, U.S. officials have failed to vigorously enforce this legal mechanism vis-à-vis corrupt practices in Russia and the former Soviet Union.

The FCPA prohibits the payment of bribes or other illicit payments to government officials.²⁵ Congress enacted the law to prohibit the payment of bribes to foreign government officials and to prevent any adverse effects such illicit payments would and could have on U.S. foreign policy, foreign governments, and U.S. businesses operating abroad.²⁶

The U.S. business community in Russia should be aware

22. Klaidman, *supra*, note 13, at 12.

23. *Id.* at 1. The Director of the FBI took a tour of Russia and Eastern Europe during which he constantly stressed the need for international police cooperation in combating the "new tyranny" of international organized crime. *Id.* The United States is not alone in the effort to thwart organized crime on an international level. *Id.* The United Nations has begun to focus on organized crime, which has become increasing international in scope. See *UN Gears Up for Landmark Conference on Organized Crime*, MOSCOW TRIB., Nov. 11, 1994, at 4. International organized crime also involves "corruption among officials at all levels [of government] and undermines the confidence people have in their government's ability to uphold the law." *Id.*

24. S. REP. NO. 114, 95th Cong., 1st Sess. 3-4 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4101.

25. *Id.*

26. *Id.*

that the U.S. Government will likely seek to enforce this law with all due diligence.²⁷ U.S. law enforcement agencies have already begun to cooperate with Russian authorities in combating organized crime and corruption. It is only a matter of time, and perhaps another Russian election, before Russian and U.S. law enforcement agencies recognize the potential of the FCPA in fighting official corruption in Russia. U.S. businesses should take care that they are operating in Russia in a manner that does not work at cross-purposes with U.S. foreign policy by taking steps to ensure that their Russian operations fully comply with the FCPA. Only by doing so will they avoid what may prove to be crushing losses to their economic and business interests in the future.²⁸

The current "Wild East"²⁹ atmosphere in Russia, hopefully, will not endure. As Russia moves toward the establishment of democratic rule and a market economy, it is highly unlikely that rampant bribery of government officials will continue to be tolerated or that past illegal conduct will be easily forgiven. Enforcement and punishment of such practices will begin³⁰ and U.S. businesses that do not rectify their conduct in accordance with FCPA may encounter severe problems in the future.

III. *THE FALL OF THE SOVIET UNION AND THE RISE OF THE MAFIYA*

With the fall of the Soviet Union and rise of market reforms in Russia, a then-existing group consisting of corrupt criminal officials, ex-black-marketeers, and common criminals took advantage of the lack of commercial regulation and crumbling police power to prey on the nascent commercial enterprises of the resurrected Russia.³¹ The Mafiya is not a new force in Russia.³²

27. 126 CONG. REC. S2550 (daily ed. May 28, 1980).

28. *Id.*; *Business Accounting and Foreign Trade Simplification Act: Hearings on S. 708 Before the Subcomm. on Securities and the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. 1-2 (1981)* [hereinafter *Hearings on S. 708*]. Lockheed Corporation recently paid a US\$24.8 million fine for violating the FCPA. *Id.*

29. See Seymour Hersh, *The Wild East*, ATLANTIC MONTHLY, June 1994, at 61. Mr. Hersh notes that "organized crime has strangled business in Russia, and is now reaching for the nation's nuclear stockpile." *Id.*

30. The Author knows that the Foreign Corrupt Practices Act ("FCPA") investigations are currently being conducted in Russia. It is likely that the number will increase if the Yeltsin Administration is replaced in the June 1996 elections.

31. Handelmann, *supra* note 11, at 67-72.

32. Yuri Shchekochikhin, *Where does the "Mafiya" Come From?*, 2 DEMOKRATIZATSIYA

The entire Soviet system has long operated with a flourishing black-market supervised and controlled by this group.³³ The black-market is a key to understanding not only the history of the Soviet Union, but also the problems Russia is presently facing in its gradual transformation into a democratic, free market society.³⁴ The black-market and trade Mafiya has long existed in Russia. It flourished during the Brezhnev years and in the 1980's.³⁵

The virtually unregulated market in Russia has created a wealth of opportunities for criminal organizations, from the shake-down of small kiosk operators for protection money³⁶ to the peddling of stolen nuclear fuel on the international market.³⁷ Official corruption is rampant. In 1995, criminal proceedings were instituted against two-thousand employees of the Russian Ministry of Internal Affairs.³⁸

IV. DEMOCRATIC REFORMS IN RUSSIA: THREATENED BY CRIME

In a poll conducted by the Public Opinion Foundation in 1994, only fourteen percent of Russians living in Moscow said

192 (1994). Some have dated the first appearance of organized crime in the former Soviet Union to the late 1960's, when the reform-minded Nikita Krushchev loosened just a little bit of the restraints on the Soviet citizens. *Id.*

33. COMRADE CRIMINAL, *supra* note 10, at 64.

34. *Id.*

35. See Shchekochikhin, *supra* note 32, at 192-94. By the end of the Brezhnev era, corruption "had reached such heights that it was possible to bribe your way out of any situation." *Id.*; COMRADE CRIMINAL, *supra* note 10, at 31-34. Organized crime had its beginnings in Russia with organized peasant bands in the sixteenth century. *Id.* The serfs who worked the land and the land itself belonged to the Czar. *Id.* As robbing government functionaries took on a Robin Hoodesque image, the lines between banditry and brigandry blurred. *Id.* Stealing from the state was viewed by some as an act of political rebellion and not simply crime, a mindset that reemerged during the Soviet era. *Id.* The repressive Czarist Government was succeeded by an equally or more repressive Communist regime. *Id.* Stealing from both regimes was seen by many as an act of rebellion and by many more as simply justified. *Id.*

36. See Von Der Heydt, *supra* note 3, at 12.

37. See Hersh, *supra* note 29, at 61 (commenting that "organized crime has strangled business in Russia, and is now reaching for the nation's nuclear stockpile"); see also COMRADE CRIMINAL, *supra* note 10, at 224-27.

38. *Some Results of the Last Year*, OGONEK, Jan. 1996, at 10. In the Tula Oblast, government money intended to purchase food for residents was given by government officials to a private company that transferred the money to banks overseas. *Id.*; see Zhudakayev, IZVESTIA, Dec. 28, 1995, reprinted in FBIS-SOV (Suppl. Issue), Jan. 12, 1996, at 35.

they considered Russia a democracy.³⁹ Twenty-three percent of Russians living in urban areas believe that organized crime, not the Government, runs the country.⁴⁰ One U.S. Government official notes that "the Russian criminal organizations not only threaten government authority but, in some instances, are viewed by citizens as alternatives to state authority because of the service they supply."⁴¹ Those Russians who do not view criminal organizations in a positive light seem willing to tolerate extreme measures to combat crime.⁴²

Government officials in the United States, from the White House to Capitol Hill, have expressed concern about crime in Russia and its threat to democratic reforms.⁴³ In testimony before Congress in 1994, Director of the Central Intelligence Agency ("CIA") James Woolsey commented outright that organized crime was a threat to democratic reform in Russia.⁴⁴ Russian bankers agree with the CIA and have called upon President Yeltsin to provide bankers with protection from organized crime.⁴⁵ Bank managers and officials who are not willing to assist the Russian Mafiya are, and have been, routinely assassinated

39. *Poll Queries Democracy*, MOSCOW TIMES, Apr. 19, 1994, at 4 (poll conducted by Public Opinion Foundation at Interfax).

40. Pyotr Yudin, *City Dwellers Think Power Lies with Mafia*, MOSCOW TIMES, Apr. 9, 1994, at 4.

41. *Mafia Rules Russia: CIA*, MOSCOW TRIB., Sept. 28, 1994, at 4 (quoting statement of James Woolsey, Director of Central Intelligence Agency ("CIA")). Among the services provided by organized crime in Russia are:

[S]ecurity in the form of protection for individuals and property, arbitration in the form of settling disputes, or seeing that business contracts are honored, financial assistance in the form of loans, often at lower rates than banks, and even some social services such as assistance to the needy through criminally owned philanthropic organizations.

Id.

42. Hockstader, *supra* note 18, at 2. Law and order were the primary reasons people voted for Vladimir Zhirinovskiy in the December 1993 parliamentary elections in Russia. *Id.* Yeltsin issued a decree that took effect in June 1993 allowing the police to hold a suspect for up to 30 days without bringing charges and giving police expanded powers to search homes and offices. *Id.*

43. See *Mafia Rules Russia: CIA*, *supra* note 41, at 4. CIA Director Woolsey notes that the implications of organized crime influence in Russia and its negative impact on democratic reforms are "enormous." Handelman, *supra* note 11, at 88 (noting that Russian authorities readily acknowledge that mixture of unbridled capitalism, organized crime, and official chicanery has produced crisis of governance).

44. *Mafia Rules Russia: CIA*, *supra* note 41, at 4.

45. See *Open Letter*, KOMSOMLSKAYA PRAVDA, July 17, 1994, at 1 (noting that "killings occur when banks refuse to pay the mafia either protection money or loans . . . Violence has become a means of intimidating bankers and the ministry and the prosecu-

by organized crime groups.⁴⁶ To combat this wave of terrorism against bankers, in 1994 the Association of Russian Bankers hired as its director a former Russian Interior Ministry official who is spearheading lobbying efforts to convince the Government to provide better protection for banks and bankers against crime.⁴⁷ U.S. businessmen have also been threatened with violence by criminal groups.⁴⁸

Moreover, the crime wave in Russia has, indirectly, already had a strongly negative impact on democratic reforms.⁴⁹ Russians have become disheartened with democratic reform, and have begun to equate democracy with lawlessness and a sharp decrease in personal safety and well-being.

In an effort to combat rising crime and corruption within the Government, President Boris Yeltsin promulgated a stringent decree to fight crime that grants the police the right to detain a criminal suspect for up to thirty days before bringing formal charges.⁵⁰ Ironically, many view this decree as a blow to democratic reform in Russia.⁵¹ The Russian Duma,⁵² passing a resolution by 279 votes to 10, held that Yeltsin's decree "restricts the constitutional rights and citizen's freedom without sufficient basis."⁵³

In addition, a conservative version of an organized crime

tor's office has been reluctant to take on organized crime."); Paul Podolsky, *New Bank Chief to Fight Crime*, MOSCOW TIMES, May 19, 1994, at 14.

46. See Peter Fuhrman, *The Man from Most*, FORBES, Dec. 5, 1994, at 78. Such developments lead to the suspicion that successful Russian banks are somehow connected to the Mafiya and "crooked" politicians. *Id.*

47. Podolsky, *supra* note 45, at 14.

48. Irina Dyomina, *The New Klondike Myth Is Dispelled*, MOSCOW NEWS, Aug. 26-Sept. 1, 1994, at 11.

49. COMRADE CRIMINAL, *supra* note 10, at 315-16.

50. Hockstader, *supra* note 18, at 2.

51. Klaidman, *supra* note 13, at 13. Sergei Sirotkin, Vice Chairman of the Presidential Commission for Human Rights called Yeltsin's *ukase* (or decree) a violation of the Russian Constitution and of basic human rights. *Id.* He was also very critical of the Director of the FBI for tacitly endorsing the *ukase*. *Id.*; Abraham Brumberg, *Building a Democracy*, MOSCOW TIMES, Nov. 1, 1994, at 8 (noting that "the decree on crime . . . flagrantly violates basic human rights and several critical articles of the new [Russian] constitution").

52. The "Russian State Duma," ("Duma") referred to in this Essay is the lower house of the Russian national legislature, a body that is roughly equivalent in size to the U.S. House of Representatives.

53. Thomas deWaal, *Crime Decree Flouts Law, Duma Charges*, MOSCOW TIMES, June 23, 1994, at 3. Many members of the Duma were concerned that the decree could be used against them by the executive branch. *Id.*

bill currently pending in the Duma, "would set up special courts of three professional judges to rule on matters involving organized crime, require that banks report on any suspicious activity by their clients and give law enforcers the power to provoke suspects into criminal actions."⁵⁴ Liberals in the Duma have criticized this bill, arguing "that the special courts would barely differ from the notorious troikas set up by Joseph Stalin to persecute political opponents without a proper trial."⁵⁵ Such undemocratic tendencies in the Russian Government are being fueled by official corruption and crime. Since most Russian government officials gained their experience in the totalitarian Soviet regime, the solutions they formulate in response to crime and corruption often draw on this "totalitarian" experience. Democratic principles of restraint are often overlooked. Indeed, it is difficult not to doubt the sincerity of the anti-crime political rhetoric when many of these same officials are "profiting from the legal chaos of New Russia."⁵⁶

V. *CRIME IN RUSSIA*

Crime and its impact on the development of democracy is the primary concern of many Russian politicians. As mentioned above, President Boris Yeltsin has taken strong measures against crime in his anti-crime decree, even as the Law has alarmed defenders of individual and human rights in the Russian Duma.⁵⁷ Still other members of the Russian legislature have expressed concern that Russia will become a criminalized society if economic reform is not pushed through the Russian Duma and corrupt influences are not eliminated from government.⁵⁸

Russian politicians themselves have not been immune from the crime wave gripping Russia. A Communist member of the Duma died on November 5, 1994, from head injuries sustained in an attack near the entrance to his home in Moscow four days earlier.⁵⁹ The Communist Party issued a statement stating that:

54. Leonid Bershidsky, *Duma Passes Disputed Media Law*, *MOSCOW TIMES*, Nov. 11, 1994, at 3.

55. *Id.*

56. *COMRADE CRIMINAL*, *supra* note 10, at 285.

57. *Id.*

58. *Russia's Choice Is Reform or Crime*, *MOSCOW TRIB.*, Apr. 14, 1994, at 10.

59. Charles Hecker & Pyotr Yudin, *Deputies' Murder Shakes Duma*, *MOSCOW TRIB.*, Nov. 9, 1994, at 1.

The tragic death of our comrade is not a coincidence — it is a direct result of the outburst of crime, lawlessness and chaos in society which has occurred because of the loss of governance in the country, and the paralysis of its structures of authority.⁶⁰

In April 1994, another Russian Member of Parliament (“MP”)⁶¹ was gunned down in front of his home on the outskirts of Moscow in a gang-style shooting.⁶² In commenting on this incident, members of the Duma have expressed their displeasure with having to serve alongside other members of the Duma who are connected, or believed to be connected, to organized crime groups.⁶³ In fact, Mafiya leaders actually encourage criminals to seek seats in the Duma because of the broad immunity conferred on those elected to the Russian parliament,⁶⁴ and it is a well-known fact that a number of individuals have run for office solely to avoid prison sentences.⁶⁵ One operator who established a large pyramid scheme to bilk thousands of Russians out of millions of dollars actually avoided detention by successfully running for a seat in the Duma.⁶⁶ Following the December 1995 Duma elections, the Russian Central Election Commission noted that over seventy of the registered candidates seeking election have criminal records or criminal charges pending against them.⁶⁷ President Yeltsin even informed regional leaders at the time that “some candidates had already come under pressure to drop out of December’s [1995] election to boost the chances of

60. *Id.* It is conceivable that the Communist Party sees crime as a possible vehicle to assist its return to power, a development that would severely threaten democracy in Russia.

61. “MP,” or member of parliament, is the acronym used in this Essay to refer to a member of the Russian Duma.

62. Pyotr Yudin, *Motive for Murder Unknown*, MOSCOW TIMES, Apr. 28, 1994, at 1.

63. In a meeting with members of the Russian Duma, I was told that there was concern that criminal elements were buying seats on party lists and elections with funds procured from Russian banks, widely believed to be controlled by organized crime and corrupt Government officials.

64. Ingra Saffron, *Run for Legislature in Russia and Beat the Rap: Murder? Fraud? Lawmakers Have Immunity from Nearly Every Prosecution*, PHIL. INQUIRER, Oct. 21, 1995, at A1; *Law on Status of Deputies*, FBIS-SOV-94-072, Apr. 14, 1994. Members of the Duma receive nearly complete immunity from prosecution. *Id.*

65. Saffron, *supra* note 64, at A1.

66. *Id.*

67. *Monitor: A Daily Briefing on the Post-Soviet States*, OMRI DAILY REPORT, PART I, Oct. 26, 1995.

criminals getting elected."⁶⁸

Members of the Duma have also been linked to organized crime.⁶⁹ Vladimir Zhirinovskiy, leader of the ultranationalist Liberal Democratic Party, is alleged to have received hundreds of thousands of dollars for the party's most recent electoral campaign, held in 1992, from reputed gangsters.⁷⁰

Top government officials have admitted that the Russian bureaucracy and police organizations have joined with organized crime to become the chief antagonist of independent businessmen.⁷¹ As one observer notes, "the unofficial alliance between [Russian] officialdom and criminal syndicates is no secret."⁷² Russian businessmen are afraid to register their companies with local governments for fear of having their financial information passed on to criminal groups who will then use the information to extort money from them.⁷³

A. *The Mafiya*

It is important to clarify the point referred to above that the Russian Mafiya differs from the Italian mafia as the latter has been portrayed in "The Godfather" and other movies. In some respects, the Russian Mafiya is even more frightening because it represents a virtual, if not actual, partnership between government officials and criminals.⁷⁴ Many believe that this corrupt influence reaches to the highest levels of the Russian Government,⁷⁵ a belief for which there is ample precedent.⁷⁶ Through-

68. Timothy Heritage, *Yeltsin Worries Criminals Will Enter Parliament*, REUTER TEXTLINE, Oct. 13, 1995, at 1, available in LEXIS, News Library, CURNWS File.

69. *Paper Says Zhirinovskiy Tied to Mob*, MOSCOW TIMES, Oct. 6, 1994, at 4.

70. *Zhirinovskiy and Mafia*, LITERATURNAYA GAZETA, Oct. 5, 1994, at 1 (noting that Sergei Goroshkov, whom Russian police suspect of involvement in numerous money-laundering schemes, has donated over US\$300,000 to Zhirinovskiy's party).

71. COMRADE CRIMINAL, *supra* note 10, at 70. As noted above, the genesis of the bureaucracy-mob partnership was the black market during the Soviet period. *Id.*

72. *Id.* at 88.

73. *Id.*

74. *Id.* at 320.

75. Shchekochikhin, *supra* note 32, at 191.

Today's [Russian] mafia . . . [are] the same as before—the ones who had the power to sign documents giving someone the right to do something A woman whose husband works close to Yeltsin told me that if her husband can organize the signature of the three top persons in the government on a license to export oil, his commission will be \$50 million.

Id.

76. COMRADE CRIMINAL, *supra* note 10, at 335.

out the Soviet era, the Communist Party was largely seen as the most powerful of all criminal organizations.⁷⁷ The Party controlled not just one aspect of an illicit economy but the entirety of a nation and its resources.⁷⁸

The Russian Mafia also represents an attitude, not merely an organization. This attitude, developed during the years of Communist Party rule, is rooted in the belief, held by many government officials to this day, that if something is not nailed down, or placed within their power, they can treat it as their own property.⁷⁹ These former Communist apparachiks are not adverse to taking, selling, or auctioning off to the highest bidder any thing or authority entrusted to them. In some instances, businessmen have "rented" government-owned airplanes to transport goods.⁸⁰ Such incidents only came to light after the rented planes were overloaded with cargo and subsequently crashed.⁸¹ In addition, corrupt former Communist, now Russian, officials have sold secret military hardware to the United States,⁸² indicating that if the price is right, even treason is not an impediment to a lucrative deal.⁸³

One must not be misled by the attitude held by a large number of Russians that anyone who engages in commercial ac-

77. DAVID REMICK, *LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE* 183 (1993).

78. *Id.* at 183.

The Communist Party apparatus was the most gigantic mafia the world has ever known. It guarded its monopoly on power with a sham consensus and constitution and backed it up with the force of the KGB and the Interior Ministry police. There were also handsome profits. The Party had so obviously socked away money abroad and sold off national resources, including the country's vast gold reserves, that after the collapse of the August coup, the Party's leading financial officer took a look into the future and threw himself off a high balcony to his death.

Id.

79. *Somebody Put a Dollar Bill in His Hand*, *supra* note 1, at 1. See also *Kirov Embroiled in Bribery Scandal*, *MOSCOW TRIB.*, Oct. 13, 1995, at 1. Government-appointed director of the Kirov Ballet, now the Marinsky Ballet in Russia, was arrested for allegedly taking bribes to grant the right to organize the company's foreign tours. *Id.* Bribe-taking was supposedly a routine practice at the ballet when dealing with foreign partners. *Id.*

80. *Id.*

81. *Id.*

82. John Mintz & Benjamin Weiser, *Secret Deals Bring Russia's Secret Weapons to U.S.*, *WASH. POST*, Dec. 23, 1994, at A1. The Pentagon paid US\$50 million for an advanced Russian air defense system that it plans to assemble in the United States to test its ability to spot U.S. planes and missiles. *Id.*

83. *Id.* at A11; see *COMRADE CRIMINAL*, *supra* note 10, at 235-36.

tivity, who buys and sells, or who is from the Caucasus region,⁸⁴ is a member of the Mafiya. As one observer notes, during the communist era, the term “mafiya” “became the mutter of explanation for every shortage and inequity, and only foreigners made the mistake of thinking the term referred exclusively to the hustlers at the bottom of the criminal structure.”⁸⁵ Mafiya means many things to many people, especially Russians, but when the term is defined as government corruption and organized crime it is a real, current, and dangerous Russian problem.

B. *The Mafiya and the Russian Government*

During the Soviet era, the Mafiya and government officials formed partnerships that controlled the lucrative “black” and “grey” markets of the Soviet Union.⁸⁶ Nonetheless, as one specialist observes, “communist authorities themselves, however, took second place to no one in criminal behavior Russians first began to use the word ‘Mafiya’ in [the 1970’s and 1980’s] to describe the large networks of corruption lurking inside regional and central [government] ministries.”⁸⁷ Regional party chiefs became their own regional chieftains, feudal overlords of vast criminal networks.⁸⁸ The Government and the Mafiya became one.⁸⁹ In 1993, the Russian Security Ministry reported that “more than half of Russia’s criminal groups had close ties with government ministries and agencies.”⁹⁰

The Russian Mafiya is distinctively menacing in light of its close connections with key sections of the government bureau-

84. See Shevardnadze, *Reclaiming Job, Appeals to Rebels*, N.Y. TIMES, Sept. 16, 1993, at A6 (discussing Shevardnadze’s visit to “troubled Caucasus nation”).

85. REMICK, *supra* note 77, at 202.

86. Handelman, *supra* note 11, at 86.

87. *Id.*

88. REMICK, *supra* note 77, at 181.

Once installed as republican Party chief, [Geidar] Aliyev [Communist Party boss of Azerbaijan] ruled Azerbaijan as surely as the Gambino family ran the port of New York. The Caspian Sea caviar mafia, the Sumgait oil mafia, the fruits and vegetables mafia—they all reported to him, enriched him, worshipped him [J]udges, police captains, and prosecutors were generally well fed and not meant to stand up for anything more than their share of the booty.

Id.

89. *Id.*

90. COMRADE CRIMINAL, *supra* note 10, at 130.

cracy.⁹¹ While it is true that as the Communist Party faded from power, more conventional organized criminal structures emerged, these connections persist.⁹² It is estimated that the Russian criminal world spends fifty percent of its income on bribes to government officials alone.⁹³ Nor is it unusual for underpaid Russian government employees to seek out criminal groups to offer their services.⁹⁴

C. *The Russian Mafiya in the United States*

The Russian Mafiya has been operating in the United States for years.⁹⁵ With the fall of the Soviet Union, the activities of Russian organized crime groups have spread in the United States and Europe and it is possible that such groups possess the capability to steal nuclear weapons or weapons-grade nuclear materials.⁹⁶ Recently, several professional Russian hockey players in the United States have complained of being shaken down by Russian Mafiya members who demand money in exchange for protecting the players' families.⁹⁷

Moreover, smuggled Russian commodities have negatively impacted the world commodities markets,⁹⁸ as a result of which five-thousand U.S. smelter jobs were lost in 1994.⁹⁹ Presently, the U.S. and Russian Governments are cooperating in efforts to combat criminals operating in the United States and Russia.¹⁰⁰ The FBI has assigned agents to the U.S. Embassy in Moscow, while U.S. Department of Justice prosecutors currently reside in Moscow. Presumably, these individuals will continue to seek and enforce effective measures to combat crime "imported" from

91. Handelman, *supra* note 11, at 84.

92. REMICK, *supra* note 77, at 522.

93. Alexander Kryshstanovskaya, *Bribery Cost of Business for Mafiya*, IZVESTIA, Sept. 21, 1995.

94. *Id.*

95. Friedman, *supra* note 12; see Jo Durden-Smith, *Marks of a Criminal Elite*, MOSCOW TIMES, June 4, 1994, at 9.

96. *Russian Mafia Spreading in U.S. and Europe*, MOSCOW TRIB., May 26, 1994, at 2. The National Academy of Sciences described the stockpiles of Russian weapons grade plutonium as "a clear and present danger to [U.S.] national . . . security." *Id.*; Jessica Mathews, *Beware the Loose Nukes*, WASH. POST, Oct. 31, 1995, at 20.

97. Gennady Fyodorov & Randall Smathers, *Violent Times for Post-Soviet Sport*, MOSCOW TIMES, May 18, 1995, at 18.

98. COMRADE CRIMINAL, *supra* note 10, at 252.

99. *Id.*

100. *Russian Businessman Accused of Extortion*, MOSCOW TRIB., May 18, 1992, at 3.

Russia.¹⁰¹

VI. *CRIME AND BUSINESS: Doing Business in Russia*

Bribe-taking is standard practice among Russian Government officials,¹⁰² a fact of which the Yeltsin Administration is well aware.¹⁰³ In 1994, the Yeltsin Government reported that seventy to eighty percent of private businesses were paying extortion money to organized criminal gangs.¹⁰⁴ Eighty percent of all U.S. businesses in Russia have bribed a Russian government official at least once.¹⁰⁵

It is not uncommon for businesses in Russia to employ assassins in the collection of business debts.¹⁰⁶ In 1993, organized crime controlled forty percent of the turnover in goods and services in Russia, according to the Russian Ministry of Internal Affairs.¹⁰⁷ Moreover, the growth of organized crime has severely hampered the growth of private small businesses in the Country.¹⁰⁸

101. Klaidman, *supra* note 13, at 12. The Director of the FBI's visit to the former Soviet Union and Eastern Bloc emerging democracies is but one example.

102. *Somebody Put a Dollar Bill in His Hand*, *supra* note 1, at 2.

103. Leonid Bershidsky, *Aids Say State Loans Still Open to Bribery*, *MOSCOW TIMES*, July 13, 1994, at 1-2. Officials in the Yeltsin Administration admitted that bribes often determine who and what organizations get government loans and assistance. *Id.*

104. Yudin, *supra* note 62, at 1.

105. Louise Shelley, Statement on the Post-Soviet Organized Crime for Committee on Security and Cooperation in Europe 4 (June 10, 1994).

106. *Bombings Continue*, *MOSCOW TRIB.*, June 9, 1992, at 1, 6. Bombings have become the favored means for settling scores by the Russian Mafiya with businessmen. *Id.* Russian organized crime groups demonstrate little concern for innocent bystanders, evidenced by the fact that a number of innocent bystanders have been killed by bombs intended for businessmen. *Id.*

107. *COMRADE CRIMINAL*, *supra* note 10, at 238.

108. Sonny Efron, *Russian Farmer's Road to Market Runs Afoul of Chaotic Distribution and Organized Criminals*, *L.A. TIMES*, June 21, 1994, at 12. Tatyana Vasilyeva, President of the local Krasnodar branch of the Association of Russian Pheasant Farms and Agricultural Cooperatives ("AKKOR"), which represents 16,680 private farmers, commented that "[i]t is really scary, but despite the fact that the markets are empty, it's still impossible to sell your produce in Moscow, St. Petersburg and other large Russian cities." *Id.* She also noted that:

[H]ighway robbers, traffic police who demand payola in exchange for free passage and pay offs to local gangsters make a mockery of a free market . . .

[F]armers were stopped at the outskirts of the city, where racketeers together with corrupt traffic police insisted that the contents of the truck be handed over at rock-bottom prices.

Id. Much of this "criminal" problem is also due to the crushing Russian regulations and taxation that drives even legitimate businessmen underground. See *U.S. Business and the*

VII. AMERICAN BUSINESSES IN RUSSIA

A now standard remark among Americans in Moscow is that the United States won the Cold War. Evidence of this may be seen on virtually every block in the center of Moscow. Advertisements for U.S. soft drinks, candy, cigarettes, and other products decorate virtually every kiosk in the city. Panel vans roll by the Kremlin advertising U.S. air conditioning and heating, construction, and oil companies. The presence of U.S. business in Russia is undeniable. As one of the last great markets in the World slowly opens up, U.S. businesses and businessmen will continue to work and do business in Russia. Along with the sizable and lucrative opportunities that the Russian market represents, however, a business presence in Russia is accompanied by a number of risks and pitfalls.

It is estimated that twenty percent of all foreigners engaged in business in St. Petersburg currently pay protection money to the Russian Mafia.¹⁰⁹ In 1994, U.S. companies and individuals doing business in Russia became a target of Russian criminals.¹¹⁰ U.S. firms have been forced to pay protection money, expend large sums on security, or leave the Country altogether.¹¹¹ Such additional burdens of doing business in Russia may, in time, compel U.S. businesses to choose between leaving the Russian market or violating U.S. law if bribe-paying to Russian government officials continues to be an unavoidable consequence of doing business in the region.

Already, it is well-known that bribing government officials has become a method of doing business for some U.S. businesses operating in Russia,¹¹² despite the fact that such acts are illegal under both Russian and U.S. law. Indeed, many individuals and companies who pay bribes do so knowing full well that they risk payment of substantial fines or loss of personal freedom should their activities amount to criminal behavior under either legal regime.

Russian Mob, N.Y. TIMES, July 8, 1994, at C1. A U.S. lawyer who is working in Russia has said that "official corruption, an irrational system of levying taxes, and a lasting mistrust of profit still hurt American businesses far more than crime does." *Id.*

109. Matt Bivens, *Petersburg Mafia Targets Foreigners*, MOSCOW TIMES, Apr. 19, 1994, at 4.

110. *U.S. Business and the Russian Mob*, *supra* note 108, at C1.

111. *Id.*

112. Shelley, *supra* note 105, at 4.

VIII. *THE FCPA*

The FCPA was enacted in reaction to Watergate and to the discovery of widespread bribery of foreign government officials by U.S. businessmen abroad.¹¹³ The FCPA, which prohibits such bribery,¹¹⁴ has had a checkered history.¹¹⁵ Because the FCPA is almost impossible to enforce without the cooperation of foreign governments, successful prosecutions under the statute have usually been accompanied by cooperation in the investigations by the foreign government involved.¹¹⁶

The FCPA has also come under severe criticism by U.S. business groups, which have complained that the act is too vague. Moreover, because the United States acted alone in attempting to curtail corrupt practices abroad, the Act placed U.S. businesses operating abroad at a severe competitive disadvantage.¹¹⁷ Nonetheless, in recent years, other industrialized nations have begun to realize that official corruption, whether it occurs at home or abroad, is against the national interest.¹¹⁸ In 1994, a committee of the Organization for Economic Cooperation and Development¹¹⁹ ("OECD") approved a policy aimed at stamping

113. See Pat Towell & Barry M. Hager, *Foreign Bribes: Stiff Penalties Proposed*, 35 CONG. Q. WKLY. REP. 929 (1977) (noting that during Watergate investigations, it was discovered that numerous U.S. corporations had slush funds for making illegal political payments that escaped notice by routine accounting audits and that these payments included bribes paid to foreign government officials).

114. 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78ff (1988) (Pub. L. No. 95-213, 91 Stat. 1494 (1977), amended by Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 5001-5003, 102 Stat. 1107, 1415-25).

115. See Sherry Sontag, *Bribery a Close Call: Is New Legislation Really Needed?*, NAT'L L.J., May 9, 1988 (noting that while there have been several prominent cases, number of cases brought and penalties imposed under Act have been minimal); 2 Foreign Corrupt Pracs. Act Rep. (Business Laws, Inc.) 635-99.005.

116. See JAMES STEWART, *THE PROSECUTORS* 18-86 (1987) (discussing investigation of alleged bribery of Pakistani officials by McDonnell Douglas Corporation and its employees in order to secure aircraft sales to Pakistani national airline).

117. See 126 Cong. Rec. S2550 (daily ed. May 28, 1980); *Hearings on S. 708, supra* note 28, at 1-2 (statement of Sen. D'Amato); see also Lanpher & Phillips, *Time Has Come for Overhaul of Foreign Bribery Act*, LEGAL TIMES, Mar. 30, 1981, at 29; Senator Heinz Reinroduces Proposal to Amend Foreign Corrupt Practices Act, [Jan.-June] Sec. Reg. & L. Rep. (BNA) No. 7, at 318 (Feb. 15, 1985).

118. *Code on Corruption Advanced*, WALL ST. J., May 2, 1994, at A13.

119. The OECD was created pursuant to treaty between its member countries. The OECD Treaty came into force on September 30, 1961. Its member countries include Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and

out corruption and bribery of government officials in international commercial transactions.¹²⁰ The new code “represents a commitment to effective measures based upon agreement that corruption is both harmful to fair competition and to the political process.”¹²¹ It is doubtful, however, if this code will be adopted by other industrial nations without strong leadership and persistent prodding from the United States.

In response to complaints from U.S. businesses along the lines discussed above, the U.S. Congress amended the FCPA in 1988.¹²² The amendments narrowed the “knowledge” requirement of illicit payments by third persons, set forth in the statute. U.S. businesses may now be liable under the FCPA for payments made by third persons to foreign government officials only if the business has a “firm belief” that the illegal payments will be made by the third person, or that such payments are likely to occur.¹²³ The amendments also permitted certain types of pay-

the United States. See Marlise Simons, *U.S. Enlists Rich Nations to End Business Bribes*, N.Y. TIMES, Apr. 12, 1996, at A10.

While all the OECD countries have laws against domestic corruption, most of these rules do not apply to what their businessmen do abroad. On the contrary, most industrialized countries allow businessmen to deduct payoffs and kickbacks, commonly described as “commissions” or “fees or promotional costs,” from their taxable income as a legitimate foreign business expense.

Id.

120. *Code on Corruption Advanced*, *supra* note 118, at A13.

121. *Id.*

122. The Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, Title V, § 5003(c), Aug. 23, 1988, 102 Stat. 1419.

123. 15 U.S.C. § 78dd (1994). The 1988 amendments replaced the reason to know standard with a knowing requirement in an attempt to make the law less vague. It is not clear that Congress was successful in its attempt. See Keith Burt, *Yeltsin Decree on Anti-Corruption, U.S. Law Put Investors in Difficult Dilemma*, RUSSIA & COMMONWEALTH BUS. L. REPT., Sept. 21, 1992; Dale Turza, *Corrupt Practices Act: How Far Have We Come?*, N.Y.L.J., Apr. 5, 1990, at 5-6. The 1988 Amendment states that:

(A) A person's state of mind is knowing with respect to conduct, a circumstance, or a result if -

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance does not exist.

15 U.S.C. § 78dd-1(f)(2), -2(h)(3) (1994). The 1988 Conference report made clear that behaving like an ostrich will not exempt a business from liability under the Act. H.R. REP. NO. 576, 100th Cong., 2d Sess. 920 (1988).

ments. "Grease" payments, or payments made to facilitate or expedite the performance of a routine government action, were exempted from prosecution under the FCPA.¹²⁴ One example of a grease payment would be paying a customs official to perform his or her routine duties in a timely fashion. In addition, a business may raise an affirmative defense if the payment made was legal under the laws of the official's country.¹²⁵ Moreover, reasonable incurred costs such as travel and lodging to demonstrate a product or perform a contract with a foreign government are permissible under the amendments.¹²⁶

Despite extensive, congressionally-mandated lobbying by the U.S. Government's foreign relations sections of foreign governments, no other governments currently prohibit bribery of foreign officials.¹²⁷ This situation may change, however, with the adoption of a foreign-corrupt-practices-type act by the OECD.¹²⁸ The OECD code would require that all industrialized nations prohibit bribery of foreign government officials.¹²⁹

124. 15 U.S.C. § 78dd-1(b)-2(b) (1994). "Routine governmental action" is defined as an action that is ordinarily and commonly performed by a foreign governmental official in:

- i) obtaining permits, licenses, or other official documents to qualify a person to do business in a country;
- ii) processing governmental papers, such as visas and work orders;
- iii) providing police protection, mail pick-up and delivery, or scheduling inspections related to the transit of goods across country;
- iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- v) actions of similar nature.

Id. § 78dd-1(f)(3)(A).

"Routine governmental action" is not:

[A]ny decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

Id. § 78dd-1(f)(3)(B).

125. *Id.* § 78dd-1(c)(1)-2(c)(1).

126. *Id.* § 78dd-1(c)(2).

127. *Id.* § 78dd-1 note. The 1988 amendments to the FCPA required that the executive seek to create an FCPA type agreement with the members of the Organization of Economic Cooperation and Development ("OECD").

128. *Code on Corruption Advanced*, *supra* note 118, at A13. A committee of the OECD approved a policy aimed at stamping out corruption and bribery of Government officials in international commercial transactions. *Id.* The new code "represents a commitment to effective measures based upon agreement that corruption is both harmful to fair competition and to the political process." *Id.*

129. *Id.* The full text of the OECD's Recommendation is as follows:

Thus, presently, while all industrialized nations prohibit bribery

RECOMMENDATION OF THE COUNCIL OF THE OECD

On Bribery in International Business Transactions

THE COUNCIL,

HAVING REGARD to Article 5 bb) of the Convention on the Organization for Economic Co-operation and Development of 14th December 1960;

HAVING REGARD to the OECD Guidelines for Multinational Enterprises which exhort enterprises to refrain from bribery of public servants and holders of public office in their operations;

CONSIDERING that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

RECOGNIZING that all OECD Member countries have legislation that makes the bribing of their public officials and taking of bribes by these officials a criminal offense while only a few Member countries have specific laws making the bribing of foreign officials a punishable offense;

CONVINCED that further action is needed on both the national and international level to dissuade both enterprises and public officials from resorting to bribery when negotiating international business transactions and that an OECD initiative in this area could act as a catalyst for global action;

CONSIDERING that such action should take fully into account the differences that exist in jurisdictional and other legal principles and practices in this area;

CONSIDERING that a review of the mechanisms would assist Member countries in implementing this recommendation and in evaluating the steps taken and the results achieved;

On the proposal of the Committee on International Investment and Multinational Enterprises;

GENERAL

I. RECOMMENDS that Member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II. CONSIDERS that, for the purposes of this Recommendation, bribery can involve the direct or indirect offer or provision of any undue pecuniary or other advantage to or for a foreign public official, in violation of the official's legal duties, in order to obtain or retain business [The notion of bribery in some countries also includes advantages to or for members of a law-making body, candidates for a law-making body or public office and officials of political parties.]

DOMESTIC ACTION

III. RECOMMENDS that each Member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal. These steps may include:

- i) criminal laws, or their application, in respect of the bribery of foreign public officials;
- ii) civil, commercial, administrative laws and regulations so that bribery would be illegal;
- iii) tax legislation, regulations and practices, insofar as they may indirectly favour bribery;
- iv) company and business accounting requirements and practices in order to secure adequate recording of relevant payments;
- v) banking, financial and other relevant provisions so that adequate records would be kept and made available for inspection or investigation; and
- vi) laws and regulations relating to public subsidies, licenses, government

of their own officials, only the United States prohibits the bribery of foreign government officials.¹³⁰

The FCPA prohibits the payment of bribes to foreign offi-

procurement contracts, or other public advantages so that advantages could be denied as a sanction for bribery in appropriate cases.

INTERNATIONAL COOPERATION

IV. RECOMMENDS that Member countries in order to combat bribery in international transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

- i) consult and otherwise cooperate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneous or "upon request"), provision of evidence, and extradition;
- ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;
- iii) ensure that their national laws afford an adequate basis for this cooperation.

REGULATIONS WITH NON-MEMBERS AND
INTERNATIONAL ORGANIZATIONS

V. APPEALS to non-Member countries to join the OECD in combating bribery in international business transactions and to take full account of the terms of this recommendation.

VI REQUESTS the Secretariat to consult with international organizations and international financial institutions on effective means to combat bribery as an aid to promote the policy of good governance.

VII. INVITES Member countries to promote anti-corruption policies within and beyond the OECD area and, in their dealings with non-Member countries, to encourage them to join in the effort to combat such bribery in accordance with this recommendation.

FOLLOW-UP PROCEDURES

VIII INSTRUCTS the Committee on International Investment and multinational Enterprises to monitor implementation and follow-up of this recommendation. For this purpose, the Committee is invited to establish a Working Group on Bribery in International Business Transactions and in particular:

- i) to carry out regular reviews of steps taken by Member countries to implement this Recommendation, and to make proposals appropriate to assist members in its implementation;
 - ii) to examine specific issues relating to bribery in international business transactions;
 - iii) to provide a forum for consultations;
 - iv) to explore the possibility of associating non-Members with this work;
- and
- v) in close cooperation with the Committee on Fiscal Affairs, to examine the fiscal treatment of bribery, including the issue of tax deductibility of bribes.

IX. INSTRUCTS the Committee to report to the Council after the first regular review and as appropriate thereafter, and to review this Recommendation within three years after its adoption. OECD Press Release SG/Press (94)(36). Attachment dated Paris, 27th May 1994.

130. *Code on Corruption Advanced*, *supra* note 118, at A13.

cial to secure business advantages, and requires U.S. companies to maintain stringent accounting standards so as to preclude the establishment of "slush funds" to provide funds for such illicit payments.¹³¹ The FCPA specifically prohibits the payment of bribes to foreign officials for the purpose of influencing any official decision, omission, or act by that official in violation of the official duty of that foreign official to enable a U.S. business to obtain or maintain business in that foreign land.¹³² Payments to a third party for the purposes of paying a bribe to a foreign official are also prohibited if the payor has knowledge of the illicit nature of the payment.¹³³ The FCPA pertains to all U.S. businesses¹³⁴ and to any employee, agent, director, official, or stockholder who acts on behalf of an issuer of securities or domestic concern in violation of the Act.¹³⁵

The U.S. DOJ and the Securities and Exchange Commission ("SEC") are jointly responsible for enforcing the FCPA. The SEC handles civil actions pertaining to the enforcement of accounting procedures and civil violations of the FCPA by issuers of securities.¹³⁶ The DOJ handles all criminal proceedings under the FCPA, as well as civil proceedings that do not pertain to issuers of securities.¹³⁷ The 1988 amendments to the Act empowered the U.S. Attorney General to provide guidelines to U.S. businesses on how to comply with the Act¹³⁸ and to provide opin-

131. 26 U.S.C. § 162(c)(1) (1994). The tax deductibility of a payment made to an official or employee of a foreign government is governed by § 162(c)(1) of the Internal Revenue Code. *Id.* Under current U.S. law, no tax deduction is permitted if the payment in question is "unlawful under the Foreign Corrupt Practices Act of 1977." *Id.*

132. 15 U.S.C. § 78dd-1(a), -2(a) (amended in 1988).

133. *Id.* § 78dd-1(a)(3)-2(a)(3) (1977) (amended in 1988).

134. *Id.* § 78c(a)(8) (1977) (amended in 1988). This section maintains jurisdiction of the act over "issuers of securities" who are any person(s) who issues or intends to issue any security. *Id.* 15 U.S.C. § 78dd-2(h)(1) (1988) defines a domestic concern as:

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

Id.

135. *Id.* § 78dd-1(a)-2(a) (1988).

136. S. REP. NO. 114, 95th Cong., 1st Sess. 3-4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101.

137. *Id.*

138. 15 U.S.C. § 78dd-1(d)-2(e) (1994).

ions on the legality of contemplated payments by U.S. businesses to foreign officials.¹³⁹ An opinion issued by the Attorney General creates a rebuttable presumption that the payment made was legal under the Act.¹⁴⁰

The joint responsibility of the DOJ and SEC has created a bureaucratic rivalry that has adversely impacted enforcement of the Act. Thus far, the two agencies have demonstrated an unwillingness to cooperate in FCPA investigations.¹⁴¹ In addition, a plea agreement obtained by the DOJ does not necessarily preclude an action by the SEC.¹⁴²

In the 1988 amendments to the FCPA, Congress increased the penalties for violating the Act, imposing a maximum US\$10,000 civil fine for violations;¹⁴³ a maximum criminal penalty for individuals of US\$100,000;¹⁴⁴ and a maximum criminal fine for U.S. corporations of US\$2 million.¹⁴⁵

The FCPA does not provide for a private right of action.¹⁴⁶ Under the Act, U.S. businesses harmed by bribery abroad must, therefore, seek a remedy by addressing their complaints directly to the U.S. Government.¹⁴⁷

IX. *THE FCPA AND RUSSIA*

To date, no FCPA case involving U.S. businesses in Russia has arisen. U.S. businesses should not, however, be lulled into a false sense of security. Crime has become the number one political issue in Russia and the U.S. Government is seeking ways to assist Russia in its fight against crime.¹⁴⁸ The FBI has opened an

139. *Id.* § 78dd-1(e)-2(f) (1994).

140. *Id.* § 78dd-1(e)-2(f) (1994).

141. 2 Foreign Corrupt Prac. Act Rep. (Business Laws, Inc.) 609-99.005.

142. *Id.*

143. 15 U.S.C. §§ 78dd-2(g)(1)(B), 78ff(c)(1)(B) (1994).

144. *Id.* §§ 78dd-2(g)(2)(A), 78ff(c)(2)(A). Previously, the maximum fine was US\$10,000.

145. *Id.* §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A). The previous fine was US\$1 million.

146. *Citicorp Int'l Trading Co. v. Western Oil & Ref. Co.*, 771 F. Supp. 600, 606-07 (S.D.N.Y. 1991); *Sheilds ex rel. Sundstrand Corp. v. Erickson*, 710 F. Supp. 686, 688 (N.D. Ill. 1989); *Lewis ex rel. National Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316, 1328-34 (N.D. Cal. 1985).

147. *Citicorp Int'l Trading Co.*, 771 F. Supp. at 606-07; *Sheilds ex rel. Sundstrand Corp.*, 710 F. Supp. at 688; *Lewis ex rel. National Semiconductor Corp.*, 612 F. Supp. at 1328-34.

148. *See Ministry, FBI Sign Deal on Cooperation*, *MOSCOW TIMES*, July 6, 1994, at 3. FBI Director Freeh said Russian Mafiya gangs were involved in the United States in drug-trafficking, tax and bank frauds, kidnapping, and murders. *Id.* According to Rus-

office in the U.S. Embassy in Moscow and the DOJ has two full-time prosecutors working in Moscow.¹⁴⁹

Those instances of successful prosecution under the FCPA have arisen when foreign governments have cooperated in the investigation of acts of corruption in their own countries.¹⁵⁰ The current administration in Russia has expressed its desire to root out corruption in government, although some legislators and ex-members of the Yeltsin Administration have claimed this is not the case.¹⁵¹ Nevertheless, a change in leadership in Russia in the next few years could pave the way for vigorous enforcement of the FCPA.¹⁵² If a new Russian administration were to make combating official corruption a priority, cooperation with the United

sian Interior Ministry statistics, there are 150 Russian Mafiya gangs operating all over the world, 24 of them in the United States. *Id.*

149. The DOJ prosecutors are in Moscow as part of the DOJ/ABA-CEELI Organized Crime Project in Russia.

150. STEWART, *supra* note 116, at 27. The author notes that:

[I]n Pakistan, President Bhutto had been swept out of office and power had been seized by General Muhammad Zia. Zia was in no way threatened by an investigation of events that occurred during the regime of his predecessor, indeed, Lubin [federal prosecutor] hoped that he might persuade the present Pakistani government that it was in its own interest to investigate and publicize corruption in the previous regime.

Id. The cooperation of a succeeding, rival government can be a tremendous help to a bribery investigation. *Id.* at 18-86 (also discussing investigation of alleged bribery of Pakistani officials by McDonnell Douglas Corporation and its employees in order to secure aircraft sales to Pakistani national airline).

151. *Senators Take Alternative Path to Opposition*, MOSCOW TRIB., Oct. 29, 1994, at 2. Russian Senator Yuri Boldyrev of Saint Petersburg is a co-founder of the Yabloko faction in the Russian parliament. *Id.* The article notes that "two years ago, [Mr. Boldyrev] headed the control department of the Kremlin when his anti-corruption investigations got too close for comfort to high-ranking officials. President Yeltsin, Boldyrev says, asked him orally to halt an investigation of Moscow. When he refused, Yeltsin dismissed him." *Id.*

152. Leonid Bershidsky, *Reformers Face Crisis in 1995*, MOSCOW TIMES, Dec. 31, 1994, at 1. This scenario would be most likely in the event of Yeltsin's not being re-elected in June of 1996, when presidential elections are currently scheduled. *Id.* In recent polls, Grigory Yavlinsky, leader of the Yabloko faction, which includes respected economists, diplomats, and corruption fighters who "have not been treated well" by the Yeltsin Administration, is the leader among possible presidential candidates. *Id.* If Mr. Yavlinsky were elected he would be a prime candidate for moving strongly against corruption in the Russian Government, and could be a potential partner with the United States in such a fight. Mr. Yavlinsky has expressed his conviction that Russia will become a criminalized society if corrupt influences are not weeded out of government. *See Russia's Choice Is Reform or Crime*, *supra* note 58, at 10. Recent events in Korea, where the former president has been jailed for taking bribes, is a recent example of political opponents punishing their former rivals for corruption. *See also Mary Jordan, Indictments of Ex-President, Business Chiefs Rock S. Korea*, WASH. POST, Dec. 6, 1995, at A1.

States on FCPA investigations would be an effective means of striking at, and severely curtailing, sources of bribe money.¹⁵³

Clearly, by working together, the Russian and U.S. governments could apply the FCPA to root out and punish corrupt Russian government officials and U.S. businessmen who are making illicit payments to facilitate business deals. The two governments may already be working on such a cooperative effort.¹⁵⁴ Thus, U.S. businesses should beware. U.S. businesses should exert all possible efforts to ensure compliance with the FCPA to prevent future legal problems.

X. U.S. FOREIGN POLICY INTERESTS

Whatever harm the FCPA may inflict upon U.S. business competitiveness in Russia, the Act is a method by which the Government may restrain U.S. businesses from undermining U.S. foreign policy interests.¹⁵⁵ In the case of Russia, the United States has spent billions of dollars in foreign aid to promote the development of democracy and a market economy in Russia. If U.S. businesses were permitted to bribe Russian officials and become part of the corrupting influences on the nascent Russian democratic Government, this would be, at the least, harmful and possibly fatal, to the goals of U.S. foreign policy.¹⁵⁶

If the U.S. Government is serious about the establishment of democracy in Russia, it should take full and vigorous measures to prevent the bribery of Russian officials by U.S. citizens. One such measure should be the creation of a reporting mechanism between the U.S. and Russian governments that would enable U.S. businesses to report requests for bribes by Russian government officials.¹⁵⁷ There should also be increased cooperation between U.S. and Russian law enforcement officials on criminal matters, specifically with respect to bribery.

153. Bershidsky, *supra* note 152, at 1.

154. Pyotr Yudin, *Ministry, FBI Sign Deal on Cooperation*, *MOSCOW TIMES*, July 6, 1994, at 3. The United States and Russia have already agreed to exchange information in their fight against organized crime and corruption. *Id.*

155. The FCPA was primarily designed to protect the integrity of U.S. foreign policy interests. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, (6th Cir. 1990); *cert. denied* 498 U.S. 1086; see Bader and Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 *INT'L L. & POL.* 627 (1983) (noting that "corporate bribery may be said to be 'destructive to the best interests of our foreign policy'") (citing 123 Cong. Rec. 1517 (Jan. 18, 1977)).

156. See *Lamb*, 915 F.2d at 1028.

157. There is precedent for this type of cooperation. See Yudin, *supra* note 154, at 3.

XI. ADVICE TO U.S. BUSINESSES

Discussions with U.S. businesses indicate that many U.S. businesses have a cavalier attitude about doing business in Russia. In large part, this attitude is the result of the fact that such businessmen view bribery of Russian government officials as a necessary evil, and not at all out of the ordinary. Many young MBA¹⁵⁸ graduates working in Russia have never heard of the FCPA,¹⁵⁹ a fact that may spell disaster for the future of some U.S. corporations doing business in the region.

As mentioned above, those instances of successful prosecutions under the FCPA have occurred when a foreign government has proved willing to cooperate in anti-corruption measures. Russia is increasingly showing signs of such a willingness to cooperate.¹⁶⁰

Crime and corruption is the predominant political issue in Russia. A government such as Russia's, which has a relatively good relationship with the U.S. Government, is an ideal partner for the United States in carrying out FCPA investigations and prosecutions.¹⁶¹ U.S. businesses should, therefore, ensure that their operations in Russia are in full compliance with the FCPA.

To protect their interests in Russia, the U.S. business community should: 1) ensure that they exercise adequate controls over the activities of their representatives in Russia; 2) pressure the U.S. Government to create, through diplomatic channels, a mechanism by which requests for bribes by Russian officials and dishonest activity by government officials may be submitted to the Russian Government for prosecution; 3) pressure the Russian Government to enact more effective anti-bribery legislation; and 4) pressure Congress to grant a private right of action under the FCPA, in order to make the anti-bribery laws more "self-policing" within the business community.

158. Masters in Business Administration.

159. The Author has conducted an admittedly unscientific survey of young and not-so-young U.S. businessmen doing business in Russia. Only a few have indicted any knowledge of the existence of the FCPA and these few were not resident in Russia. Those resident in Russia were completely ignorant of U.S. anti-bribery laws.

160. See *Crime Fighter Lauds Cooperation*, MOSCOW TRIB., Aug. 6, 1994, at 5; Steve Liesman & Paul Podolsky, *U.S., Russia Cooperate to Catch Tax Cheats*, MOSCOW TIMES, June 2, 1994, at 1; *Mafia Seized at Gunpoint in Hotel*, MOSCOW TIMES, June 4, 1994, at 1-2.

161. *Crime Fighter Lauds Cooperation*, *supra* note 160, at 5 (noting that United States and Russia are already cooperating in law and tax enforcement); see Liesman & Podolsky, *supra* note 160, at 1.

Because of the handicap imposed on U.S. businesses by U.S. laws such as the FCPA, the U.S. Government must be ready and willing to support and assist U.S. businesses abroad in their efforts to penetrate developing markets such as Russia.

XII. *RECOMMENDATIONS ON GOVERNMENT ACTION*

The FCPA should be amended to provide for a private right of action.¹⁶² Furthermore, jurisdiction in such private actions should be extended to foreign nationals, partnerships, corporations, and organizations who do business in the United States and who engage in bribery or other prohibited acts under the FCPA that adversely affects the business interests of U.S. citizens, partnerships, or corporations doing business abroad or of non-U.S. citizens, partnerships, or corporations doing business in the United States. Such an extension of U.S. jurisdiction would almost certainly raise protests from abroad.¹⁶³

If the United States is serious about ending bribery of foreign government officials, however, it must take stronger action to persuade other industrialized countries to provide a means by which their citizens may take similar action. Permitting a private right of action and extended jurisdiction will certainly send this message to governments around the World. The U.S. economy and U.S. businesses have become increasingly international and the U.S. Government must take a leading role in any effort to eradicate official corruption and bribery whose sole aim is pecuniary gain.

One of the main criticisms of the FCPA is that it places U.S. businesses at a competitive disadvantage. The institution of a private right of action under the FCPA should do much to diminish this perceived disadvantage. A private right of action

162. See Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 216 (1994). The Author argues that the FCPA should be amended to allow a private right of action among competing U.S. businesses. *Id.* This Essay argues that the Act should apply to all competing businesses, both U.S. and foreign, over which the court may have jurisdiction. The courts have been willing to apply the terms of the FCPA to foreigners and to apply the Act extraterritorially. See *Dooley v. United Technologies Corp.*, 803 F. Supp. 428 (D.D.C. 1992).

163. Nonetheless, at the least, OECD Member Nations realize that the domestic laws of each Member Nation should emphasize combatting bribery of foreign government officials. Such action by the United States may be the catalyst required to induce other nations to prohibit bribery of foreign government officials by nationals, as well as favorable tax treatment in exchange for bribes under existing domestic laws.

would provide leverage in U.S. and OECD efforts to achieve agreement among the World's established democracies to combat bribery of government officials and high-level corruption in the governments of their trading partners. Making businesses and businessmen in Germany, Japan, and elsewhere liable under U.S. law for illicit payments to foreign government officials will, at a minimum, create a dialogue on bribery and corruption among the World's democratic trading nations. As noted above, virtually every nation prohibits bribery of domestic government officials. Moreover, no nation condones bribery as a concept, and the United States must take the leadership role in unifying world public opinion in opposition to bribery of foreign government officials as well.

CONCLUSION

Change has been a constant in virtually all phases of Russian life in the past ten years. Chances are that this atmosphere will continue for another decade.¹⁶⁴

U.S. businesses and businessmen should expect and, indeed, hope that the Russian legal system becomes more predictable and efficient. U.S. businesses should also expect continued cooperation between the U.S. and Russian governments. Ultimately, such cooperation, accompanied by more effective enforcement of U.S. laws, could force U.S. businesses to incur substantial fines as a result of corporate liability under U.S. law if they do not take precautions to ensure full compliance with the FCPA when conducting business in Russia.¹⁶⁵

164. See DANIEL YERGIN & THANE GUSTAFSON, *RUSSIA 2010 AND WHAT IT MEANS FOR THE WORLD* 119-31 (1993).

165. *Lockheed Pleads Guilty to Bribery Conspiracy*, WASH. POST, Jan. 28, 1995, at C1. The Lockheed Corporation agreed to pay a US\$24.8 million fine after pleading guilty to conspiring to bribe an Egyptian politician and to falsifying its financial records. The article pointed out that:

Federal Prosecutors said that if the criminal case had gone to trial, they would have shown that Lockheed conspired to violate the Foreign Corrupt Practices Act by paying an Egyptian legislator \$1 million for her help in securing an Egyptian government contract for three C-130H cargo jets worth \$79 million.

Id.