

Confronting Corruption

*Past Concerns, Present Challenges,
and Future Strategies*

FRITZ HEIMANN

MARK PIETH

Foreword by

JIMMY CARTER

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trademark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

© Oxford University Press 2018

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. Inquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above.

You must not circulate this work in any other form
and you must impose this same condition on any acquirer.

Library of Congress Cataloging-in-Publication Data

Names: Heimann, Fritz F., author. | Pieth, Mark, author.

Title: Confronting corruption : past concerns, present challenges, and future strategies /
Fritz Heimann, Mark Pieth ; foreword by Jimmy Carter.

Description: First edition. | New York, NY : Oxford University Press, 2018. |

Includes bibliographical references and index.

Identifiers: LCCN 2016039548 | ISBN 9780190458331 (hardback : alk. paper) |

ISBN 9780190458348 (paperback : alk. paper)

Subjects: LCSH: Corruption—Prevention—International cooperation. | Bribery—
Prevention—International cooperation. | Political corruption—Prevention—
International cooperation. | Corruption—Law and legislation.

Classification: LCC JF1525.C66 H45 2017 | DDC 364.1/323—dc23

LC record available at <https://lccn.loc.gov/2016039548>

9 8 7 6 5 4 3 2 1

Paperback printed by WebCom, Inc., Canada

Hardback printed by Bridgeport National Bindery, Inc., United States of America

Note to Readers

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is based upon sources believed to be accurate and reliable and is intended to be current as of the time it was written. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Also, to confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate.

(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

**You may order this or any other Oxford University Press publication
by visiting the Oxford University Press website at www.oup.com.**

CONTENTS

Foreword by President Jimmy Carter xiii

Acknowledgments xv

Abbreviations xvii

PART ONE Setting the Scene

1. Introduction 3

1. FIFA, a Criminal Organization? 3
2. The Malaysian Wealth Fund “1MDB” 4
3. Odebrecht, Petrobras, Lula da Silva, and Michel Temer 6
4. Panama Papers 7

2. Why the Growing Concern About Corruption? 9

1. Present at the Creation 9
2. Putting Corruption on the International Agenda 12
3. Need for Action 14
4. Reasons for Continuing Resistance 14
5. Growth of Anticorruption Capability 15
6. Expansion of Global Economy 15
7. Digital Communications 15

3. The Politics of Anticorruption 17

1. Transparency International and Its Politics 17
2. International Organizations 18
 - a. OECD 18
 - b. UNODC 19
 - c. G20 20
 - d. World Bank 20
 - e. International Chamber of Commerce (ICC) 22
 - f. FIFA 22

3. Governments 22
 - a. United States 22
 - b. UK 23
 - c. Nordic Countries 24
 - d. China 24
 - e. Bangladesh 25
4. Role of Media 25
5. Growth of Anticorruption Movement 25
6. Government Departments 25
7. Private Industry 26
8. NGOs 26
9. Professional Organizations 26
10. Universities 26
11. Illicit Activities 27
12. Major Political Influences 27
 - a. Tone at the Top 27
 - b. Power of the Legal Establishment 27
 - c. Role of Civil Society 27
 - d. People Power 27
 - e. Counteractions 28
4. What Is Corruption? 29
 1. A “Cancer” to Be Rooted out? 29
 2. Giving and Taking 30
 3. Legal Definitions 31
 4. Corruption Comes in Different Forms 32
 5. A Systemic Perspective 35
 6. What Is the Common Denominator? 36
 7. Are We Sure That Corruption Is Harmful? 38
 8. How Big Is the Problem? 39
 9. Why Have We Chosen to Fight Corruption Now? 42
 10. Are We Making a Difference? 43

PART TWO Drivers of Change

5. Evolution of Transparency International 49
 1. Peter Eigen and the World Bank 49
 2. The Genesis of TI 50

3. Organizing TI 52
 - a. Meeting with Amnesty International 52
 - b. Organization Meeting at Dutch Foreign Ministry 53
 - c. Berlin Launch Conference 53
 - d. Ecuador Meeting 54
 - e. Jeremy Pope Becomes Managing Director 55
 - f. Growth of National Chapter Network 56
 - g. Publication of TI Index 57
 - Bribe Payers Index 58
 - Rapprochement with the World Bank 58
4. Conventions Advocacy 59
 - a. OECD Convention 59
 - b. TI Progress Reports on Enforcement 61
 - c. United Nations Convention against Corruption 62
 - d. Evolution of TI Management 64
 - e. The 2005 Election 66
6. The United States: Foreign Corrupt Practices Act and Campaign Financing 69
 1. Colonial Heritage 69
 2. Constitutional Debates 70
 3. Yazoo Controversy 70
 4. Construction of the Panama Canal 71
 5. Watergate 71
 6. Foreign Corrupt Practices Act 72
 7. Citizens United Case 73
7. Bribing Foreign Officials: The OECD Anticorruption Instruments 75
 1. Is Bribery a Necessary Evil? 75
 2. The US Foreign Corrupt Practices Act 77
 3. The Initiative and First Steps in the OECD 78
 4. The 1994 Recommendation and the Follow-Up 80
 5. Implementing the Convention 84
 6. The Crisis 87
 7. Overcoming the Crisis: The UK Bribery Act 2010 93
 8. Uneven Application 94
 9. Further Challenges 96
 10. A New Step Forward: The 2009 Recommendation 99
 11. A Final Positive Experience 100
 12. Conclusion 101

8. The UN Convention Against Corruption 103
 1. Global Significance 103
 2. The Politics of UNCAC 104
 3. The United Nations Convention against Corruption: Anticorruption's Expanding Frontier 105
 - a. Overview of the United Nations Convention against Corruption 106
 - b. Provisions Directly Affecting International Business 108
 - c. Strengthening National Integrity Systems 112
 - d. The Implementation Review Mechanism 115

PART THREE Pervasive Trouble Spots

9. Finance and the "Shadow Economy" 119
 1. Grand Corruption and Money Flows 119
 2. A New Topic Altogether 124
 3. Expansion 127
 4. Current Status of Rules against Corruption-Money Laundering 128
 5. Asset Recovery 132
 6. Is Asset Recovery Working? 135
 7. The Overarching Theme: Overcoming the "Shadow Economy" 136
 8. Conclusion 137
10. Extractive Industries 139
 1. The "Resource Curse" 139
 2. Publish What You Pay 140
 3. The Extractive Industries Transparency Initiative 140
 4. The Struggle for Regulation 141
 - a. United States: Section 1504 of the Dodd-Frank Act 141
 - b. EU: Revision of Its Transparency and Bookkeeping Directives 142
 5. Regulating Trading? 143
 6. Collective Action as a Way Forward? 144
11. Infrastructure and Construction 145
 1. The Risks 145
 2. What Needs to Be Done? 147
12. Aeronautics and Defense 149
 1. What Are the Particular Risks in Defense Procurement? 150
 2. The Key Role of Defense Offsets 150
 3. Specific Corruption Risk Related to Offsets 151
 4. How to Prevent Corruption in the Defense Industries? 153

13. The Art Market 157
 1. Challenges 157
 2. Self-Regulation? 159
 3. International Law? 161
14. The Pharmaceutical Industry 163
 1. Challenges 163
 2. What Needs to Be Done? 166
15. Sports Governing Bodies: The FIFA Experience 167
 1. Emotions and Big Business 167
 2. Multinational Enterprises and Quasi-intergovernmental Organizations 169
 3. Old Boys Suddenly Becoming Rich 170
 4. FIFA: A Company in Trouble or a Criminal Organization? 170
 5. The Responsibility of the Host Country 174
 6. What's Wrong with Self-Regulation? 174
 7. Example FIFA 177
 8. International Regulation 179
 9. What Is on the Current Reform List? 179
16. Development Assistance 181
 1. Its Logic 181
 2. Is Development Assistance Effective? 182
 3. Donor Interest 183
 4. Tolerating Embezzlement? 183
 5. Is There a Way out of the Dilemma? 185
 6. Oil-for-Food 186
 - a. The Official Programme 186
 - b. Planned Distribution of Oil Proceeds 186
 - c. What Went Wrong? 186
 - d. Oil Surcharges—Flow of Funds 187
 - e. Humanitarian Contract Kickbacks—Flow of Funds 189
 - f. Illicit Income Received by Iraq under the Programme 189
 7. The Contribution of the IFIs 193

PART FOUR Criminal Law and other Forms of Regulation

17. Strengths and Limitations of Criminal Law 199
 1. Is Criminal Law Really That Essential to Combating Bribery? 199
 2. Who Is a “Foreign Public Official”? 200
 3. What about the Perpetual “Facilitation Payments”? 202

4. Individuals versus Corporate Liability 204
 5. Watch Your Agents! 205
 6. The Proof Is in the Pudding 207
 7. Are Prosecutors and Courts out of Their Depths? 209
 8. Do We Need a Supranational Criminal Court for Large-Scale Corruption? 211
18. Beyond Criminal Law: Administrative Sanctions and Preventive Measures 213
 1. Regulatory Sanctions 213
 2. Debarment by MDBs 214
 3. Automatic Debarment? 215
 4. Is Debarment Always the Best Solution? 215
 5. Dealing with Corruption in Arbitration Procedures 216
 6. Prevention 217

PART FIVE Private Sector Responses

19. Private Sector Response to Corruption 221
 1. Major Trends 221
 2. Evolution of Compliance 222
 - a. Role of NGOs 224
 - b. UN Global Compact 225
 - c. Industry Sector Initiatives: Wolfsberg 225
 - d. Other Industry Sector Initiatives 226
 - Extractive Industries Transparency Initiative (EITI) 226
 - Construction Sector Transparency (CoST) 227
 - Aerospace and Defense (IFBEC) 227
 3. Common Problem Areas 227
 - a. Gifts, Entertainment, and Travel Expenses 227
 - b. Lobbyists and Sales Representatives 228
 - c. Political Contributions 228
 - d. Avoiding Extortion 229
 - e. Private-to-Private Bribery 229
 - f. Facilitation Payments 230
 - g. Foreign Subsidiaries and Joint Ventures 230
 4. Psychology of Corrupt Conduct 230
 - a. Type A 231
 - b. Type B 231
 - c. Type C 231

5. Factors Needed to Influence Corporate Culture 231
 - a. Tone at the Top Is Important 232
 - b. Transparent Rules 232
 - c. Leadership Selection 232
6. Moving Anticorruption to the Next Level 233
20. Collective Action 235
 1. Why Collective Action? 235
 2. From an Academic Think Piece to a Practical Solution 236
 3. What Is Collective Action? 238
 4. Is Collective Action Really Necessary? 239

PART SIX Moving Forward

21. What Have We Achieved? 243
 1. Achievements and Challenges 243
 2. Accomplishments 243
 3. Challenges 245
22. Globalization and Digital Revolution 247
 1. Globalization 247
 - a. Globalization of Corruption 248
 - b. Impact of Globalization on Law Enforcement 248
 2. Digital Revolution 249
 - a. Cyber Forensics 250
 - b. Digital Initiatives 251
 - c. The Political Impact 253
 - d. Awareness Raising 253
23. Different Strategies for Different Countries 255
 1. Countries with Strong Democratic Institutions 256
 2. Countries with Weaker Democratic Institutions 257
 3. Countries with Autocratic Governments 258
 - a. Working with China 259
 - b. Working with Russia 263
 - c. The Arab Spring and Its Implications for the Middle East and North Africa 263
 4. Failed States 265
 5. Long-Term Strategy Perspective 266

Bibliography 269

Index 281

Introduction

MARK PIETH ■

The last two years have brought unprecedented movement into the world of anticorruption. The growing concern about corruption has come to a head in particular with a series of huge scandals:

1. FIFA, A CRIMINAL ORGANIZATION?

At dawn on May 27, 2015, Swiss police officers raided the prominent luxury hotel Baur au Lac where a regular room costs over \$1,000 a night. They arrested seven top soccer officials, especially from the United States, the Caribbean, and Latin America, who had come to Zurich to attend a crucial meeting of the Executive Committee of the world soccer regulator FIFA (International Federation of Association Football). The same day US attorney general Loretta Lynch and Swiss attorney general Michael Lauber hosted press conferences in the United States and in Switzerland explaining that the officials had been arrested based on extradition requests from the United States. The US authorities presented indictments against them and called the hemispheric soccer Confederations (CONMEBOL for South America and CONCACAF for Central and Northern America) criminal organizations under the RICO Act (Racketeer Influenced and Corrupt Organizations Act). The arrested were accused of participating in a conspiracy involving fraud, bribery, and money laundering of over \$200 million to gain preferential access to marketing contracts.¹

1. Department of Justice, News Release, May 27 2015: "Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption"; *United States of America*

Shortly afterward the Swiss authorities stepped up enforcement. They raided FIFA offices in Zurich and opened criminal investigations against the president of FIFA, Sepp Blatter, as well as the president of the European Confederation (UEFA), Michel Platini, for misuse of corporate funds, based on allegations that Platini had received CHF2 million, supposedly for his services for FIFA nine years back. The payment was executed exactly when Blatter needed the European votes most for his re-election in 2011. There was no written contract, the work product still remains unclear, and, as far as we know, there were no traces of the debts on the books of FIFA between the supposed services in 2001 and the payment in 2011. Based on the announcement by the Swiss Attorney General's office the internal FIFA Ethics Committee suspended both FIFA president Blatter and then Candidate Platini from all official activities in soccer on a provisory basis. The drama has since further unfolded. The suspensions have been upheld by appeal courts with only minor reductions of sanctions. Furthermore, to date, close to forty FIFA officials have been suspended and debarred from soccer-related activities based on their unethical behavior. It is a story of one of the richest organizations in the world run like an old boys' club. Officials full of themselves, seemingly above the law, freely distributed the proceeds of sponsoring for FIFA programs privately amongst themselves. What has evolved into one of the most blatant abuses of power, led to major law enforcement activities; suddenly the officials were called to account for their behavior (see details below in Chapter 15).

2. THE MALAYSIAN WEALTH FUND "1MDB"

In 2015 another major corruption and money laundering scandal came to public notice. The new prime minister of Malaysia, Najib Razah, had turned the fund created by the oil-rich state Terengganu into a sovereign wealth fund under the name of 1MDB (for 1 Malaysia Development Berhad). Its goal was to promote the economic development of the country.² In September 2009, it set up a \$2.5 billion joint venture with Petrosaudi International, a startup managed from Geneva and formally incorporated in London. According to *The Guardian*, Petrosaudi's business was "access capitalism: opening doors with the help of

v. Jeffrey Webb et al. 15 CR 0252 (District Ct of New York) filed May 20, 2015; Department of Justice News Release, December 3 2015: "Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption."

2. Bloomberg, 2 February 2016: "Timeline: Malaysia's spiraling 1MDB state fund controversy."

friends in high places.”³ A former companion of the founders of Petrosaudi felt cheated by his colleagues and—after leaving the company—attempted to raise farewell payments by blackmail.⁴ He actually handed over to journalists ninety gigabytes of data, including 227,000 emails from his former employer. Upon publication, law enforcement agencies, primarily in the United States, Singapore, and Switzerland, began to work on the case. It appears that around \$1 billion of 1MDB’s investment in the joint venture ended up in a web of bank accounts held by shell corporations based in offshore resorts.⁵ According to an indictment of the US Department of Justice, published in July 2015, overall \$3.5 billion were stolen from 1MDB. US attorney general Loretta Lynch called the 1MDB-scandal “the largest kleptocracy case in US history.”⁶

The whistleblower was convinced by his former buddies to plead guilty against a promise to help him out of prison in Thailand, where he had been incarcerated for blackmail. After ‘eighteen months in prison he has now been pardoned by the new Thai king.⁷

Four national investigations into the losses of 1MDB have all been stopped or have led to no visible result in Malaysia. In the meantime, financial supervisors in Singapore and in Switzerland have closed banks⁸ and sanctioned bankers⁹ for the blatant lack of compliance. Whereas this case demonstrates how political power, graft, money laundering, and whistleblowers play hand in hand, the following example, a Brazilian mega-case, starts off as a traditional corruption case in the area of public procurement, but rapidly takes on systemic dimensions when the corruption becomes crucial for the survival of political parties and governments.

3. The Guardian, 28 July 2016: “The inside story of the world’s Biggest Financial Scandal,” 4.

4. *Ibid.*, 8.

5. *Ibid.*, 5 et seq.

6. *Ibid.*, 2.

7. Neue Zürcher Zeitung, 21 December 2016, 28: “Kronzeuge auf dem Weg in die Schweiz, 1MDB—Ermittlungen gehen weiter.”

8. In particular the Swiss bank Banca della Svizzera Italiana, see FINMA Press Release, 24 May 2016: “BSI in serious breach of money laundering regulations”; Reuters, 5 October 2016: “Swiss prosecutors probe suspected \$800 million misappropriation from Malaysia’s 1MDB.”

9. South China Morning Post, 21 December 2016: “Ex-BSI banker found guilty in Singapore of charges linked to 1MDB probe.”

3. ODEBRECHT, PETROBRAS, LULA DA SILVA, AND MICHEL TEMER

On December 21, 2016, the US Department of Justice announced in a news release that two companies, Odebrecht S.A. (the biggest construction company in Latin America based in Brazil) and the Brazilian petrochemical company Braskem S.A. had pleaded guilty to corruption charges and agreed to pay penalties of at least \$3.5 billion (maybe up to \$4.5 billion, depending upon an “inability to pay analysis”) to resolve charges with authorities in the United States, Brazil, and Switzerland.¹⁰

According to the plea agreement Odebrecht maintained an internal “Division of Structured Operations,” termed a “Department of Bribery” by Deputy Assistant Attorney General Suh.¹¹ It used a separate computer system and a shadow budget as well as a complex web of offshore companies to process the bribe payments of the company.¹² The statement of facts in the plea agreement lists recipients in Brazil, in particular executives of the state-owned oil company Petrobras, and politicians, as well as foreign officials (in Angola, Argentina, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela).¹³ Braskem used the bribery structure created by Odebrecht and participated in the scheme. Odebrecht was sanctioned to fines and forfeiture of ill-gotten gains. It agreed to be supervised by a compliance monitor. The US DOJ in turn was ready to credit the sanctions agreed on with Brazilian and Swiss enforcement agencies.

The Odebrecht and Braskem case needs to be understood as a component of an even larger scandal: The entire state of Brazil seems to have been captured by a corruption network, whereby politicians of all parties participated.¹⁴ The impeachment of Dilma Rousseff¹⁵ and the court case against Lula da Silva for

10. Department of Justice, News Release, December 21 2016: “Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History”; *United States of America against Odebrecht S.A.*, 16-643 (RJD) (Eastern District Ct of New York) [Plea Agreement]; *United States of America against Braskem S.A.*, 16-664 (RJD) (Eastern District Ct of New York) [Plea Agreement].

11. Department of Justice, News Release, 21 December 2016: “Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History.”

12. Annex B to Odebrecht’s Plea Agreement, B-7 et seq.

13. *Ibid.*, B-12 et seq.

14. Financial Times, 28 December 2016: “A Brazilian bribery machine.”

15. Sputnik Brazil, 31 December 2016: “Retrospectiva 2016: Impeachment da presidenta Dilma Rousseff.”

contempt of court (allegedly for influencing witnesses)¹⁶ are only one side of the coin: the main allegations are that the “Partido dos Trabalhadores” (PT), the worker’s party of Lula and Rousseff, had systematically taken bribes in exchange for favors. However, the reputation of the current president, Michel Temer, is no better, even if he and his cronies have not (yet) had to defend themselves in court.¹⁷ Overall the Brazilian situation contains all the components of a global corruption scandal.

4. PANAMA PAPERS

The last five years could be called the “Era of the Whistleblower”: to some extent the US legislation providing for remuneration for whistleblowers has encouraged employees to come forward with information about corporate misbehavior.¹⁸ Independently from these incentives, disgruntled employees have increasingly used whistleblower platforms such as “WikiLeaks” to expose their (former) employer (cf. “offshore leaks,” “LuxLeaks,” “Swiss leaks”).¹⁹ In early 2015, an unknown person started offering data from the fourth biggest offshore law firm *Mossack Fonseca* to the paper *Süddeutsche Zeitung*.²⁰ The volume rapidly grew to dimensions that required the involvement of other investigative journalists. A worldwide network of around 400 journalists in over 80 countries emerged, largely organized around the “international consortium of investigative journalists” (ICIJ). Over twelve months they analyzed—under extreme secrecy—11.5 million files (2.6 terabytes of information) containing data on close to 215,000 offshore entities.²¹

The data makes it possible to identify the money laundering trails of serious organized criminals, like a Mexican drug cartel,²² or potentially even a child

16. Neue Zürcher Zeitung, 31 July 2016: “Ex-Präsident Lula unter Anklage.”

17. NZZ, 13 December 2016: “Ein Schatten auf Präsident Temer”; Foreign Affairs, 2 October 2016: “Timid Temer.”

18. Dodd–Frank Act of 2010, § 922(a) Sec. 21F(b)(1).

19. With the decision of August 19, 2016, Rudolf Elmer, a former employee of Bank Baer Cayman Islands was freed from the accusation of breach of banking secrecy, but sanctioned by the Zurich appeals court for illegal cohesion.

20. Obermayer/Obermaier 2016; cf. also www.panamapapers.sueddeutsche.de. (13 March 2017).

21. The Guardian, 5 April 2016: “What are the Panama Papers? A guide to history’s biggest data leak.”

22. Center for Public Integrity, 25 April 2016: “Cartel-linked suspects arrested after Panama Papers revelations.”

prostitution ring.²³ They offer examples of how oligarchs took control over state owned enterprises (SOEs) of former Eastern Europe, and they show how kleptocrats hid their funds with the help of the offshore industry.²⁴ Apart from straightforward tax evasion and fraud, the Panama Papers contain multiple proofs of harmful tax practices: companies using offshore constructions to shift their earnings to places with minimal or zero tax rates (applying techniques of transfer pricing or by transferring intellectual property rights to offshore companies).²⁵

Overall the Panama Papers are a treasure trove of information on all sorts of illegal activities, including fraud, organized crime, corruption, kleptocracy, tax evasion, and sanctions busting. There is nothing fundamentally new in the methods detected: opaque structures are built using offshore instruments (shell companies, trusts, etc.) together with bank accounts in places with strong banking secrecy legislation and little likelihood of providing international cooperation in administrative or criminal matters, all held together by the professional privilege of lawyer and fiduciaries. Stooges act as nominee directors and bearer shares are widely used. However, it makes a big difference to actually see what one always assumed in its concrete detail. Furthermore, the Panama Papers have sparked off or invigorated many investigations and trials (including arbitration procedures).

The “shadow economy”²⁶ using offshore instruments is a key component of the world of so-called “grand corruption”²⁷ (see below Chapter 9).

23. Obermayer/Obermaier 2016, 217 et seq.

24. For current and former heads of state named in the papers: Wikipedia, Panama Papers, 15 et seq.

25. Joseph E. Stiglitz/Mark Pieth, *Overcoming the Shadow Economy*, November 2016, 6.

26. Cf. Stiglitz/Pieth 2016.

27. Georg Moody-Stuart, *Grand Corruption*, Oxford 1997.