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Cross-Border Corruption and International Legal Assistance

[Lima Declaration](#)

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The Cultivation of Corruption

Ladies and Gentlemen:

In many countries, corruption is part of the culture. There is something heretical to such a statement, you might say. Provocative as this assertion may be, let me tell you, Ladies and Gentlemen, that I have chosen this statement quite deliberately. In fact, it comes from a previous Transparency International publication. By quoting this statement, I intended to point out one of the major problems concerning corruption. As a matter of fact, in many societies corruption is regarded immoral and subject to punishment on the paper only. In reality, however, corruption has long since become an integral part of everyday life in these societies. It has become part of the culture, so to speak.

It is quite significant, though, that the quotation I began with has been uttered by international business people, the very people who as the proponents of global business are not only part of the action but, rather, are molding the culture of business. And they do it every single day.

Ladies and Gentlemen: Welcome to this year's International Anti- Corruption Conference in Lima. I am honored to be here and talk to you about

Cross-border Corruption and International Legal Assistance

I would also like to thank those people who have organized this conference. Thank you for your commitment, making this conference a success. I hope this event will meet with a wide response and further worldwide cooperation in the fight against corruption.

Indeed, I am a strong believer in cooperation, and I firmly believe that the world we live in is conditioned mainly by our very action. I am absolutely convinced, therefore, that we are able to check corruption. However, what is called for are appropriate steps, international cooperation, and -- above all -- rigorous action.

As Attorney General of Switzerland I am, among others, responsible for prosecuting federal officials guilty of corruption. As you know, corruption embraces elements of crime ranging from the abuse of authority, to offering a bribe and gift taking.

In terms of statistics, the number of people found guilty of corruption is insignificant in Switzerland. Statistics show no upward trend, either. And yet, according to noted experts corruption is on the rise. Also, there is always a vast number of unrecorded and therefore unquantifiable cases.

Unfortunately, corruption and the problems it causes do not stop at the national border. Thus, with international business growing steadily and the globalization of the markets, cross-border corruption is also becoming increasingly significant.

Also keep in mind that in economically underdeveloped countries corruption has a particularly vicious effect on the entire society. It engenders worthless investments, causing the national debt to increase. At the same time, the bribes pocketed by

those in power only serve to consolidate their position. Evidently, in such an environment democracy has a tough time.

Fortunately, the global community, more than ever, seems to be set to tackle corruption on an international scale now. Only in 1979 the project of a UN convention on corruption was doomed to fall because of irreconcilable disagreement within the UN. In the recent past, however, things seem to be improving. Many an international organization has actively become involved in schemes apt to fight corruption.

In 1994, for example, the European Union Conference of Ministers of Justice launched an extensive action program. It was prepared by the European Council and adopted by the Committee of Ministers. The competent advisory bodies of the European Council are now implementing this program. At the same time, they are about to draft both a basic agreement and a criminal law convention.

In the same year, the OECD submitted and passed a draft resolution on an extensive action program destined to fight practices used in international corruption. The panel set up to draft the resolution concluded that in order to fight corruption effectively it has to be tackled in four areas:

Accordingly,

1. **the bribing of foreign public officials** must become punishable as a crime;
2. **kickbacks must no longer be deductible for tax purposes;**

and regulations governing both the

3. **accounting duty** and
4. **public procurement** need to be tightened.

Eventually, on May 23, 1997, the OECD Council adopted recommendations and invited the member countries to take steps concerning these four areas.

Owing to lack of time, I am going to focus on two subjects only, which I would like to discuss as seen from a Swiss angle: Namely, the bribing of foreign public officials and tax deductibility of bribes.

There are numerous measures to detect and prosecute cross-border corruption. These measures are currently under discussion in Switzerland and abroad. One of the most fervently advocated measures in Switzerland is that the offering of a bribe to a foreign official be criminalized. Unfortunately, an examination of the instruments Swiss law has to fight cross-border bribery shows that only Swiss authorities and officials are subject to the relevant penal regulations.

As in most countries, bribing a foreign officeholder is not a crime in Switzerland. Still, Swiss law provides a number of instruments with which this gap in the law may be closed, at least in part. For example, in cases where a foreign official was bribed, Switzerland, based on the Federal Act on International Mutual Assistance in Criminal Matters, grants the requesting state full legal assistance.

Fortunately, and according to customary practice, the granting of legal assistance is sufficiently justified, if an offense is punishable under the laws of both the requesting and the requested state. Always in connection with such assistance, coercive measures like the freezing of accounts or the extradition of an alleged foreign criminal are, therefore, perfectly lawful.

Regarding cases where a foreign official was bribed, the scope of legal assistance Switzerland grants is further being enhanced by an amendment to the law on legal assistance. The amendment, which took effect on February 1, 1997, embraces, among others, far-reaching provisions concerning the delivery of property and assets. What is more, lengthy proceedings have often been considered a nuisance. Now, the legal requirements are fulfilled to speed up proceedings considerably.

Yet, if it comes to the offering of a bribe to foreign public official, there are still numerous legal shortcomings, especially if the prosecuting state cannot call the briber to account. If the briber is a Swiss national and resident in Switzerland, he or she may not be extradited against his or her will. You see, Ladies and Gentlemen: Much as I deplore this, cross-border bribery is still not covered by Swiss law. Just another gap in the law.

But now that the OECD has formulated recommendations, Switzerland is called upon to act too. By the same token, these recommendations warrant that the global community will make an effort to implement and enforce the required measures.

The Swiss Government has charged the Department of Justice with the responsibility to draft a bill providing stringent provisions concerning corruption. Among others, the bill, which is due by the end of this year, is to focus on the criminalization of bribery of foreign officials.

In cases where a foreign official was bribed, one should, however, stick to the principle that the affected state is responsible for prosecution. Yet the primary concern of other states must be to provide extensive legal assistance, thus guaranteeing proper prosecution.

Let me bring up another problem child: I am talking about tax deductibility of kick backs; a highly explosive political subject,

both in domestic and international affairs. Obviously, when it comes to deciding whether to bribe or not, tax considerations are of secondary importance to those individuals or business enterprises who seek unfair advantage in competition. And, Ladies and Gentlemen, do not be mistaken: all of the OECD member states, in one way or another, tolerate kickbacks to be deducted from tax.

The fact that kickbacks are tax deductible is rather questionable on ethical and legal grounds alike. In the final analysis, allowing to do so means nothing less than giving corruption the seal of official approval. Furthermore, such practice runs counter to established legal usage. After all, it is rather bizarre if what is frowned upon by criminal law looks quite acceptable under fiscal law. And, last but not least, tax deductibility of kickbacks greatly distorts international competition.

Even before the OECD formulated its recommendations, the appropriate Swiss parliamentary commission of the Federal Assembly has prepared a draft bill. This bill, which has been submitted to the Federal Council for an opinion, proposes a number of amendments regarding the fiscal laws in force. The most important alteration being that it will no longer be legal for kickbacks as defined by the law and paid to persons holding public office, to be deducted from tax.

Well, Ladies and Gentlemen, so much for the criminalization of bribery of foreign officials and the deductibility of bribes. You see, joint efforts are being made to avoid corruption from becoming a part of our society. However, in places where corruption has already achieved the status of normality, we must all the more keep on fighting it with all means available, making sure corruption is no longer considered a peccadillo.

Ladies and Gentlemen: Thank you very much for your committed stand against shady wheeling and dealing. Thank you for taking up the fight against corruption.

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