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The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption

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The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption

*Padideh Ala'i**

ABSTRACT

This Article examines the legacy of the rule of geographical morality—that is, the norm by which a citizen of a country in the North may engage in acts of corruption in any country in the South, including bribery and extortion, without the attachment of any moral condemnation to those acts. Part I of the Article begins by reviewing the impeachment trial of Warren Hastings, who served as the Governor of Bengal from 1772 until 1785, on charges of bribery and corruption. It was during that impeachment proceeding when the words “principle of geographical morality” were used to describe Hastings’ defense.

Part II of the Article then examines the revisionist approach of social scientists first developed in the 1960s. The revisionists embraced moral relativism and concentrated on external causes of corruption instead of individual moral shortcomings. This approach perpetuated the rule of geographical morality by

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allowing multinational corporations to hide behind “culture” as the reason for their participation in corrupt business transactions in Africa, Asia, and Latin America. Next, the Article evaluates the recent post-Cold War discourse on corruption and bribery, which rejects geographical morality by adhering to a universal standard of conduct.

In Part IV, the Author discusses regional and global legal initiatives against corruption from the 1970s to the present. These initiatives seek to eliminate the rule of geographical morality by requiring uniform standards of conduct by private and public officials, irrespective of geography. The Article concludes with a discussion of the legacy of geographical morality and its divisive impact on the current anti-corruption discourse.

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The servants of the nation are to render their services *without any taking of presents* To form your judgment and then abide by it is no easy task, and 'tis a man's surest course to give loyal obedience to the law which commands 'do no service for a present.' The disobedient shall, if convicted, die without ceremony. —Plato.¹

1. PLATO, THE LAWS 349 (A.E. Taylor trans., Aldine Press 1960).

In recent years, the international anti-corruption² campaign has achieved unprecedented momentum and rhetorical success.³ Under the legal definition of corruption, a bribe must result in a breach of some sort of a fiduciary duty or trust.⁴ Nonetheless, corruption is both a legal and a moral concept as it is possible for a corrupt act to be improper without being unlawful. Anti-corruption advocates argue that systemic corruption at all levels of government, particularly in the form of bribes, is a major impediment to economic development in the South⁵ as well as being a threat to democracy, democratic values, and the rule of law.⁶ This Article does not address the accuracy of such claims, nor does it question the laudable motives of those who engage in such discourse and pursue the current anti-corruption agenda.

2. This article uses the following definition of corruption: "The act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others; a fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others." BLACK'S LAW DICTIONARY 348 (7th ed. 1999).

3. Since 1996, the International Bank for Reconstruction and Development (World Bank), the International Monetary Fund (IMF), and the Asian Development Bank (ADB) all have adopted anti-corruption policies and established anti-corruption task forces. Specifically, in June 1996 the World Bank announced revisions to its procurement guidelines to guard against corruption in World Bank projects. At the end of March 1996 the Organization for American States (OAS) approved the Inter-American Convention against Corruption, which was subsequently ratified. *See infra* Part IV. In December 1997 the 29 members of the Organization for Economic Cooperation and Development (OECD), together with five non-members, signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. *See infra* Part IV. In March 1996 the International Chamber of Commerce (ICC) adopted a report that proposes strict rules of conduct for corporate self-regulation. In December 1996 the United Nations General Assembly approved a declaration against corruption. *See discussion infra* Part IV. In December 1996 the World Trade Organization (WTO) agreed at its first ministerial meeting in Singapore to undertake a study of transparency and due process in the award of government procurement contracts. Also, Transparency International (TI), a non-governmental organization based in Berlin, was established in 1993 to combat international corruption. Today it has national chapters throughout the world.

4. BLACK'S LAW DICTIONARY, *supra* note 2, at 348.

5. The author has struggled with the terms developing and developed, East and West, North and South. None of these terms is entirely satisfactory, but since today the gap between rich and poor nations in terms of economic development is most commonly referred to as the North-South divide, this Article has adopted those terms. The term "North" is used to refer to Western developed nations and the former colonial powers. The term "South" refers to the developing or least developed nations of Asia, Africa, and Latin America.

6. *See generally* GEORGE MOODY-STUART, GRAND CORRUPTION: HOW BUSINESS BRIBES DAMAGE DEVELOPING COUNTRIES (1997) (examining grand corruption and the manner in which it affects Third World development). *See also* ROBERT KLITGAARD, CONTROLLING CORRUPTION (1988); TRANSPARENCY INT'L & ECON. DEV. INST., WORLD BANK, NEW PERSPECTIVES ON COMBATING CORRUPTION (1998).

Instead, this Article argues that given the fact that anti-corruption rhetoric has played a significant role in the international economic and political relations between the developed North and the developing South, it is imperative that the current anti-corruption campaign appreciate why past multilateral attempts at combating corruption at the United Nations and elsewhere have been unsuccessful and have been viewed with skepticism by the peoples and governments of the developing South. Specifically, this Article argues that one legacy of colonialism—the “rule of geographical morality”—has infected the discussion of transnational corruption and bribery. The “rule of geographical morality”⁷ is defined as the norm by which a citizen of a country in the North may engage in acts of corruption in any country in the South, including bribery and extortion, without the attachment of any moral condemnation to those acts. It has been one of the bases by which the North has justified exploitation of the South. More importantly, the rule of geographical morality is based on a world view that non-Christian, non-Western, and non-white individuals are fundamentally immoral and corrupt when measured by European standards. This Article will explore how the rule of geographical morality and its attendant world view continue to haunt the anti-corruption discourse, making, from the perspective of the South, *any* discourse on the subject of corruption—even one aimed at discrediting geographical morality—inherently suspect.

This Article is divided into five parts. Part I reviews the facts, circumstances, and outcome of the impeachment trial of Warren Hastings, who served from 1772 until 1785 as the first Governor of Bengal, on charges of bribery and corruption. This example was chosen partly because the details of the proceedings are relatively accessible—thanks to the “Works” of Edmund Burke—and partly because it demonstrates the complex and multifaceted legacy of colonialism, which resists generalizations.⁸ This Article will show that the issues raised during that impeachment trial, centuries ago, continue to be relevant today to the discourse on corruption and bribery in international business. Part II reviews the evolution of the discourse on corruption and bribery from one

7. The term “geographical morality” was first coined by Edmund Burke to characterize the defense of Warren Hastings on charges of bribery and corruption in British India. Edmund Burke, *Speech in General Reply in the Impeachment of Warren Hastings*, in 9 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 447 (Boston, Little, Brown & Co. 1889). Specifically, Hastings argued that “actions in Asia,” including bribery, “do not bear the same moral qualities which the same actions would bear in Europe.” *Id.*

8. This example was not selected because British rule in India was, within the colonial context, particularly egregious, nor to suggest that Warren Hastings was the most corrupt colonial official.

based on “morality” to one intentionally divorced from morality. Specifically, this part reviews the moralist approach and the successor amoral “revisionist” approach developed by social scientists in the 1960s, which rejected *a priori* moral judgments, embraced cultural relativism, and concentrated on external causes of corruption instead of individual moral shortcomings. Part III explores the more recent, post-Cold War discourse on corruption and bribery, which rejects the revisionist thesis and cultural relativism. This modern approach emphasizes that globalization dictates rejecting geographical morality by adhering to a universal standard of conduct in international business that applies to both the North and South.⁹ This current discourse has inherited the universalism of the moralist discourse on corruption and combined it with the revisionist reliance on empirical and economic data. This approach to corruption also emphasizes the external (revisionist) explanations for corruption—for example, non-democratic institutions, economic underdevelopment, and weak judiciaries. But it has also begun to accept the internal (moralist) explanations for corruption, *i.e.*, lack of integrity and ethical standards among public officials. Part IV discusses the current multilateral initiatives against corruption and bribery undertaken by the United Nations, the Organization of American States (OAS), and the Organization for Economic Cooperation and Development (OECD). Importantly, these initiatives seek to eliminate the rule of geographical morality by requiring uniform standards of conduct by private and public officials, irrespective of geography. This section of the Article attributes the past failures of multilateral or transnational initiatives to the legacy of colonialism and geographical morality, which have sown the seeds of distrust between the North and the South. Part V concludes by looking at the unique challenge that the legacy of the rule of geographical morality and its attendant world view poses for the current anti-corruption campaign.

9. See generally Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257 (1999) (analyzing transnational bribery in the context of current global conditions and concluding that practical and moral considerations require prohibition of transnational bribery).

I. THE IMPEACHMENT OF WARREN HASTINGS AND THE RULE OF GEOGRAPHICAL MORALITY

Power corrupts and absolute power corrupts absolutely.
—Lord Acton

In 1787 the British House of Commons impeached Warren Hastings on charges of corruption and bribery during his tenure as the Governor-General of Bengal from 1772-85.¹⁰ Eight years later, in 1795, the British House of Lords acquitted Warren Hastings of all charges.¹¹ Regardless of the outcome, the record of the seven-year impeachment proceedings is a good starting point for our study of the discourse on corruption and bribery and the impact of colonialism on that discourse.

A. *The Prosecution's Case Against Warren Hastings*

Edmund Burke led the prosecution against Hastings¹² and was assisted by Richard Sheridan, among others.¹³ The prosecution not only argued that Hastings had engaged in simple acts of bribery, but also that he had created a system of government which was corrupt and whose sole purpose was to exercise "arbitrary power" to plunder India without restraint or respect for the rule of law.¹⁴ Burke described this corrupt system of government during his opening speech before the House of Lords as follows:

We wish your Lordships distinctly to consider that he did not only give and receive bribes accidentally, as it happened, without any system and design, merely as the opportunity or momentary temptation of profit urged him to it, but that he has formed plans and systems of government for the very purpose of accumulating bribes and presents to himself.¹⁵

10. RUSSELL KIRK, *EDMUND BURKE: A GENIUS RECONSIDERED* 116 (rev. ed. 1988).

11. *Id.* at 125.

12. The impeachment process occupied sixteen years of Burke's life, which he himself described as a time when "I laboured with the most assiduity and met with the least success." *Id.* at 104.

13. Richard Sheridan, a famous playwright, was recruited by Burke for his oratory skills. In fact, Sheridan made two of his most famous speeches during the impeachment trial of Warren Hastings. FINTAN O'TOOLE, *A TRAITOR'S KISS: THE LIFE OF RICHARD BRINSLEY SHERIDAN* 225-34 (1998).

14. KIRK, *supra* note 10, at 117.

15. Edmund Burke, *Speech in Opening*, in 10 *THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE* 7 (Boston, Little, Brown & Co. 1889).

Burke later described Hastings as “not only a public robber himself, but the head of a system of robbery, the captain-general of the gang”¹⁶

As part of this “systemic corruption,” Burke argued, Hastings had enlisted the help of both Englishmen and native Indians.¹⁷ Specifically, Hastings had enlisted Indians or “blacks,” as his agents for corrupt acts of bribery more often than “whites” because they were more vulnerable and less likely to challenge him.¹⁸ According to the prosecution, Hastings’ corrupt system of government had depended on the cooperation of “black tyrants” who were “scattered throughout the country,” but all of whom reported in the last instance to a European. Hastings and his “white” agents had controlled the “black natives” who took part in the first instance in the acts of corruption and bribery.¹⁹

Governors, we know very well, cannot with their own hands be continually receiving bribes As there are many offices, so he has had various officers for receiving and distributing his bribes; he has a great many, some white and some black agents. The white men are loose and licentious; they are apt to have resentments, and to be bold in revenging them. The black men are very secret and mysterious; they are not apt to have very quick resentments, they have not the same liberty and boldness of language which characterize Europeans; and they have fears, too, for themselves, which makes it more likely that they will conceal anything committed to them by Europeans. Therefore Mr. Hastings had his black agents, not one, two, three, but many, disseminated through the country: no two of them, hardly, appear to be in the secret of any one bribe. He has had likewise his white agents,—they were necessary,—a Mr. Larkins and a Mr. Croftes. Mr. Croftes was sub-treasurer, and Mr. Larkins accountant-general. These were the last persons of all others that should have had anything to do with bribes²⁰

In other words, as Governor-General, Hastings had set up a system whereby Indians of questionable character were recruited to extort payments and gifts from Indian princes and princesses and other nobility for the ultimate benefit of Hastings and his cronies. The amounts of these tributes, or bribes, had been

16. Edmund Burke, *Speech in Reply*, in 11 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 175 (Boston, Little, Brown & Co. 1889) (citing Burke’s impeachment speech of May 28, 1794).

17. Burke, *supra* note 15, at 14.

18. *Id.* at 18. Specifically, Hastings promoted “Calcutta banians” to whom he had given all the farm land in India that his government had confiscated. *Id.*

19. *Id.* at 14. “The whole formed a system together, through the succession of black tyrants scattered throughout the country, in which you at last find the European at the end So that the *zemindars* were dispossessed, the country racked and ruined, for the benefit of an European, under the name of a farmer” *Id.* at 18.

20. Burke, *supra* note 15, at 14.

subject to the arbitrary whim of the Governor-General and had depended, in a large part, on the condition of the treasury and the financial situation of the East India Company.²¹

Hastings not only received bribes but also gave bribes to his agents, both English and Indian, "white" and "black." It was the prosecution's claim that in safeguarding the corrupt system of government he had put into place in India, Hastings was very generous to his allies and shared with them the looting and plundering of India, while at the same time, he was cruel and repressive to those who criticized his actions and accused him of corruption, particularly if they were Indians.²²

The bribes Hastings received, Burke argued, were on such a large scale that they supported a very lavish lifestyle in India and allowed Hastings to accumulate a large personal fortune for his retirement.²³ The prosecution showed that during his tenure as the Governor-General of the Bengal, Hastings' salary was "1000 times the income of a man in genteel poverty and at least seven times as much as a major official in [Britain]."²⁴ Notwithstanding the enormous official remuneration that Hastings had received during this tenure in India, during his last two years of governorship alone, he had spent £10,000 more than his salary.²⁵ In addition, the prosecution introduced evidence that Hastings had remitted to England at least £218,527 during his tenure, which was considered an "extremely large" amount of money even by the standards of fortunes made in India.²⁶

Burke argued that the crime of bribery, when exercised by "a chief governor of a great empire" who is "receiving bribes from

21. JOHN T. NOONAN, JR., *BRIBES* 395 (1984) ("By the 1780s the Company was not in flourishing condition."). See also Burke, *supra* note 15, at 47 (stating that Hastings was extorting "all for the good of the dear East India Company"). See, e.g., 2 THOMAS MOORE, *MEMOIRS OF THE LIFE OF THE RT. HON. RICHARD BRINSLEY SHERIDAN* 7 (Greenwood Press 1968) (1858) (Hastings, "finding the treasury of the Company in a very exhausted state, resolved to sacrifice this unlucky Rajah to their replenishment; and having, as a preliminary step, imposed upon him a mullet of £500,000, set out immediately for his capital, Benares, to compel the payment of it.").

22. The prosecution brought forth witnesses to prove that Hastings had conspired with Sir Elijah Impey, M.P. and Chief Justice of the Supreme Court in Calcutta, India, in order to bring about the "judicial murder" of an opponent of Hastings in Bengal, Maharajah Nundcomar, who had accused Hastings of corruption. The Maharajah was hanged for forgery in August 1775. Burke, *supra* note 15, at 24-30; John Riddy, *Warren Hastings: Scotland's Benefactor?*, in *THE IMPEACHMENT OF WARREN HASTINGS: PAPERS FROM A BICENTENARY COMMEMORATION* 30, 31 (Geoffrey Carnell & Colin Nicholson eds., 1989).

23. NOONAN, *supra* note 21, at 396.

24. *Id.*

25. *Id.*

26. *Id.* at 396, 397. It was also reported that upon Hastings' return to England, the Prince of Wales applied to him for a £200,000 loan. *Id.* at 396.

poor, miserable, indigent people," is more than just a dirty and morally reprehensible act; it makes the "government itself base, contemptible, and odious in the eyes of mankind."²⁷ Therefore, Burke argued, as a representative of the British Empire, Hastings had tainted Britain's reputation for intolerance of political and judicial corruption:

This [corrupt] system of Mr. Hastings' government is such a one, I believe, as the British nation in particular will disown; for I will venture to say, that, if there is any one thing which distinguishes this nation eminently above another, it is, that in its offices at home, both judicial and in the state, there is less suspicion of pecuniary corruption attaching to them than to any similar offices . . . so that he who would set up a system of corruption, and attempt to justify it upon the principle of utility, *that man is staining not only the nature and character of office, but that which is the peculiar glory of the official and judicial character of this country; and therefore, in this House, which is eminently the guardian of the purity of all the offices of this kingdom, he ought to be called eminently and peculiarly to account.*²⁸

In addition to arguing that conviction of Hastings was necessary to safeguard the reputation of the British nation, Burke invoked the authority of the church and Christian values:

My Lords, you have here also the lights of our religion . . . You have the representatives of that religion which says that their God is love, that the very vital spirit of their institution is charity,—a religion which so much hates oppression, that, when the God whom we adore appeared in human form, He did not appear in a form of greatness and majesty, but in sympathy with the lowest of the people, and thereby made it a firm and ruling principle that their welfare was the object of all government, since the Person who was the Master of Nature chose to appear Himself in a subordinate situation.²⁹

Finally, Burke appealed to the self-interest of the Members of the House of Lords, warning that if they did not punish Hastings, the corruption then in India would come home to England and ruin British society. Burke suggested that many others like Warren Hastings were waiting for the chance to come back to England and corrupt the political system:

Our liberty is as much in danger as our honor and our national character . . . To-day the Commons of Great Britain prosecute the delinquents of India: to-morrow the delinquents of India may be the Commons of Great Britain. We know, I say, and feel the force of money; and we now call upon your Lordships for justice in this cause of money. We call upon you for the preservation of our manners, of our virtues. We call upon you for our national

27. Burke, *supra* note 15, at 7.

28. *Id.* (emphasis added).

29. *Id.* at 143-44.

character. We call upon you for our liberties; and hope that the freedom of the Commons will be preserved by the justice of the Lords.³⁰

B. *The Defense of Warren Hastings*

Hastings never denied receiving payments.³¹ In his defense, he first invoked what Burke called “geographical morality,” meaning “actions in Asia do not bear the same moral qualities which the same actions would bear in Europe.”³² It was true that he had exercised arbitrary power, Hastings said, but that type of power had been thrust upon him because despotism was the only form of government that existed in Asia.³³ Arbitrary power, Hastings argued, was in the “constitution of Asia.”³⁴ According to the defense, the peoples of Hindustan knew nothing but “arbitrary power,” and Hastings, as Governor-General, had been obliged to behave in ways that were disagreeable to him.³⁵ Hastings maintained that he had not created the corrupt system of government in India, as the prosecutors had charged, but merely inherited it:

Every part of Hindostan has been constantly exposed to these and similar disadvantages ever since the Mahomedan conquests. The Hindoos, who never incorporated with their conquerors, were kept in order only by the strong hand of power . . . [R]ebellion itself is the parent and promoter of despotism. Sovereignty in India implies nothing else The whole history of Asia is nothing more than precedents to prove the invariable exercise of arbitrary power.³⁶

Therefore, the defense argued, it would be unfair to judge Hastings’ actions in India by the moral standards applicable to public officials in Britain.³⁷ The implication of this assertion was that the peoples of India did not deserve the same kind of government as the people of Britain; indeed, that they were incapable of understanding anything other than despotism.

30. *Id.* at 450-51. Burke’s concern that the political system of England was in danger of contamination was also shared by Blackstone, although Blackstone attributed the source of this contamination to the peoples of the East. NOONAN, *supra* note 21, at 400. Burke, on the other hand, blamed the corruption on Europeans.

31. See KIRK, *supra* note 10, at 116 (stating that Hastings believed he possessed an “arbitrary power” to do as he thought best).

32. Burke, *supra* note 7, at 447.

33. See *id.* at 453-54.

34. *Id.*

35. *Id.* at 448.

36. *Id.* at 451.

37. *Id.* at 447.

Hastings' second line of defense was that the payments he had received from the Indian princes were used not for his own benefit, but for the benefit of the East India Company.³⁸ Hastings based his argument on the covenant he had entered into with the East India Company which prohibited servants of the Company from taking gifts in excess of £100 for their own private benefit.³⁹ The implication was that Hastings was not precluded from accepting presents, so long as they were used for the Company's benefit.

Hastings' third line of defense was that his extraordinary services and successes on behalf the British Empire clearly outweighed whatever questionable acts he may have engaged in, including the taking and giving of bribes.⁴⁰ Hastings had saved British India after the collapse of Tartar rule and had helped to consolidate the power of the East India Company. Given the enormous value of his services, his defense argued, it would be wrong to punish him for his slight transgressions.⁴¹

C. *Burke's Response to the Defense*

Burke rejected with great disdain what he called the "geographical morality" of Hastings and his defenders.⁴² It was morally repugnant to Burke that a British subject should argue that he was free from all moral restraints once in a non-Christian society. Burke addressed this early in his opening speech before the House of Commons:

[Y]our Lordships know that these gentlemen have formed a plan of *geographical morality*, by which the duties of men, in public and private situations, are not to be governed by their relation to the great Governor of the Universe, or by their relation to mankind, but by climates . . . latitudes: as if, when you crossed the equinoctial, all the virtues die . . . by which they unbaptize themselves of all that they learned in Europe . . . This geographical morality we do protest against; Mr. Hastings shall not screen himself under it . . .⁴³

Burke went on to invoke the universal application of laws of morality, contending that such values apply to all men, irrespective of geography:

38. Burke, *supra* note 15, at 43.

39. *Id.* But see NOONAN, *supra* note 21, at 399 (stating "By covenant with the Company in 1767, . . . Hastings had sworn to accept . . . no more than 400 pounds as reward or gift . . .").

40. See KIRK, *supra* note 10, at 107. See also Burke, *supra* note 15, at 46-47.

41. KIRK, *supra* note 10, at 107-14; NOONAN, *supra* note 21, at 409.

42. Burke, *supra* note 7, at 447.

43. *Id.* at 447-48.

But we think it necessary, in justification of ourselves, to declare that the laws of morality are the same everywhere, and that there is no action which would pass for an act of extortion, of peculation, of bribery, and of oppression in England, that is not an act of extortion, of peculation, of bribery, and oppression in Europe, Asia, Africa and all the world over. This I contend for not in the technical forms of it, but I contend for it in the substance.⁴⁴

Burke summarized Hastings' justification of his despotic behavior as follows: "To be robbed, violated, oppressed, is their privilege. Let the constitution of their country answer for it Slaves I found them, and as slaves I have treated them. I was a despotic prince."⁴⁵

Importantly, Burke rejected Hastings' argument that "despotism is the constitution of any country in Asia" by stating that this was "certainly not true of any Mahomedan constitution."⁴⁶ Not wanting to pursue that argument any further, however, Burke asked, even if it were true, "[D]o your Lordships really think that the nation would bear, that any human creature would bear, to hear an English governor defend himself on such principles?"⁴⁷ Burke concluded that corrupt practices of mankind, no matter how prevalent, cannot be made principles of government as Mr. Hastings attempted to do.⁴⁸

D. *The Acquittal of Warren Hastings*

In the end, Burke's high-minded appeal to principles of natural justice, universal morality, and Christian virtue were rejected. The House of Lords acquitted Warren Hastings of all charges in 1795.⁴⁹ The House of Lords held that Burke had not been able to prove "a *corrupt, habitual, evil intention*" as was required for the crime of bribery.⁵⁰ The payments Hastings had received from his Indian subjects may have been questionable, but they did not rise to the level of corruption.

Unfortunately, Burke's greatest mistake may have been his religious argument that there was a universal moral standard transcending geography and his claim that under principles of natural law⁵¹ all men, irrespective of complexion, deserved

44. *Id.* at 448.

45. *Id.* at 453.

46. *Id.* at 454.

47. *Id.*

48. *Id.* at 454-55.

49. NOONAN, *supra* note 21, at 393.

50. *Id.* at 413.

51. Peter Stanlis observed that Burke "certainly believed that the Natural Law applied equally in India and in England; he admitted that Hastings had

protection.⁵² For Burke, the "Indians without English complexions were his clients because they were made in the image of God."⁵³

The acquittal, however, should not have surprised Burke. Popular sentiment was against him from the very beginning. In fact, Burke was criticized widely for leading the impeachment of Hastings.⁵⁴ This is evident from Burke's letter to a Miss Palmer, who had written him to tell him of such criticism:

I have no party in this Business, my dear Miss Palmer, but among a set of people who have none of your Lilies and Roses in their faces, but who are images of the great Pattern as well as you and I. I know what I am doing; whether the white people like it or not.⁵⁵

Even Burke's relative, William Burke, who lived in India and had provided Burke with evidence of Hastings' acts of bribery and corruption, sided with Hastings during the impeachment, as evidenced in a letter he wrote to Edmund's son, Richard:

"The English here are a respectable, humane, friendly people, nor can I for the Soul of me feel as your father does for the Black Primates." Was it necessary to alienate Englishmen of high influence in order to bring justice to those who never had known equity among themselves—to these rascally black natives of Madras? "Do say for me to your father that the abstract right of things in the East has scarcely an existence; all is Usurpation and Force."⁵⁶

William Burke's view of Indians as "rascally black natives" and Eastern culture as "all Usurpation and Force" continues to suggest that Hastings' view of Asian societies as inherently despotic and corrupt was widely shared among his countrymen. Even if not surprised, Edmund Burke was outraged that the House of Lords acquitted Hastings, writing the following during the last year of his life:⁵⁷

brought disgrace upon Britain's honor by violating the law of nations in Asia." PETER J. STANLIS, *EDMUND BURKE AND THE NATURAL LAW* 88 (1958).

52. In Burke's Speech to the House of Lords on Feb. 16, 1788, he proclaimed: "We are all born in subjection, . . . all born equally, high and low, governours and governed, in subjection to one great, immutable, pre-existent law, prior to all our devices, and prior to all our contrivances, paramount to all our ideas, and all our sensations, antecedent to our very existence, by which we are knit and connected in the eternal frame of the Universe, out of which we cannot stir." KIRK, *supra* note 10, at 118.

53. NOONAN, *supra* note 21, at 422.

54. 1 MOORE, *supra* note 21, at 288.

55. NOONAN, *supra* note 21, at 422.

56. KIRK, *supra* note 10, at 113.

57. *Id.* at 115 ("Burke knew that he could not succeed in securing the conviction of the Governor-General.").

Let not this cruel, daring, unexampled act of publick corruption, guilt, and meanness, go down to a posterity, perhaps as careless as the present race, without its due animadversion, which will be best found in its own acts and monuments. Let my endeavours to save the Nation from that shame and guilt, be my monument; The only one I ever will have. Let every thing I have done, said, or written, be forgotten but this. I have struggled with the great and little on this point during the greater part of my active life; and I wish after death, to have my defiance of the judgments of those, who consider the dominion of the glorious Empire given by an incomprehensible dispensation of the Divine Providence into our hands, as nothing more than an opportunity for gratifying, for the lowest of their purposes, the lowest of their passions—and that for such poor rewards, and for the most part, indirect and silly bribes, as indicate even more the folly than the corruption of these infamous and contemptible wretches *Above all make out the cruelty of this pretended acquittal, but in reality this barbarous and inhuman condemnation of whole tribes and nations, and of all the classes they contain. If ever Europe recovers its civilization, that work will be useful. Remember! Remember! Remember!*⁵⁸

In prosecuting Hastings, Burke had subscribed to two fundamental principles. First, there is only one morality applicable to *all men*.⁵⁹ This morality dictates that bribery is a sin which must be punished and from which all men, as God's children, deserve to be protected, particularly if bribery is practiced in abuse of public office.⁶⁰ Second, "merit cannot extinguish crime,"⁶¹—that is, services Hastings may have rendered to, and on behalf of, the British nation, did not trump his crime of accepting bribes and betraying the public trust. The acquittal of Warren Hastings meant the defeat of both principles. It was a victory of "geographical morality" over "universal morality." The House of Lords' acquittal of Hastings—after he had admitted to many of the charges against him—meant that a different and much lower standard of conduct was permissible so long as corrupt acts by British citizens took place outside Britain and for the benefit of the Empire. Implicit in that was the acceptance of the view that Asian countries constitutionally required despotic rulers and subscribed to lower standards of morality, particularly with regard to the duties owed by a sovereign to his people. Moreover, the acquittal was a victory of

58. *Id.* at 126-127 (emphasis added). Burke requested a Dr. Laurence to formally document the proceedings since Burke was too far gone to do it himself. *Id.* at 126. See also Conor Cruise O'Brien, *Warren Hastings in Burke's Great Melody*, in *THE IMPEACHMENT OF WARREN HASTINGS: PAPERS FROM A BICENTENARY COMMEMORATION*, *supra* note 22, at 65 (stating that Burke acknowledged that he was motivated by what he called "sympathetic revenge").

59. Burke, *supra* note 7, at 447-48.

60. See generally Burke, *supra* note 15, at 143-44. See also *supra* text accompanying note 27.

61. KIRK, *supra* note 10, at 121.

“economic success” over qualms about “tyranny.” In other words, tyranny over non-Europeans would be tolerated if it was economically successful and if the European colonizing nation benefited from that economic success. Thomas Moore addressed this point in his relatively contemporary biography of Richard Brinsley Sheridan:

Success . . . was the dazzling talisman, which he [Hastings] waved in the eyes of his adversaries from the first, and which his friends have made use of to throw a splendor over his tyranny and injustice ever since. Too often in the moral logic of this world, it matters but little what the premises of conduct may be, so the conclusion but turns out showy and prosperous. There is also, it must be owned, among the English, (as perhaps, among all free people,) a strong taste for the arbitrary, when they themselves are not to be the victim of it, which invariably secures to such accomplished despotisms, as that of Lord Strafford in Ireland, and Hastings in India, even a larger share of their admiration than they are, themselves, always willing to allow.⁶²

E. *The Aftermath*

Even before the impeachment of Warren Hastings, the British government had decided to curb corruption among servants of the East India Company.⁶³ Specifically, Charles Cornwallis, who became the Governor-General of Bengal during the impeachment proceedings, was instructed to “cleanse the establishment from corruption, and to revise the system into which the corruption had grown.”⁶⁴ Integral to Cornwallis’ anti-corruption reform was the purging of Indians from all government posts and embarking on the “Europeanization of the [civil] services” in India.⁶⁵ Cornwallis reasoned that natives of Hindustan were incapable of not being corrupt.⁶⁶ For example, he is reported to have remarked: “[e]very native of India, I verily believe, is corrupt.”⁶⁷

Purging of Indians from positions of authority as part of the anti-corruption effort was singularly emphasized when it came to the reform of the judiciary and administration of criminal justice. This view is made clear in a letter written by Cornwallis on August 2, 1789 in which he states: “[A]ll regulations for the

62. 2 MOORE, *supra* note 21, at 36.

63. 5 THE CAMBRIDGE HISTORY OF INDIA 431-43 (H.H. Dodwell ed., First Indian Reprint 1958) (discussing the instructions to Cornwallis, the Governor-General of Bengal, to reform the abuses among the Company’s servants, including the close monitoring of the ways in which they grew rich).

64. *Id.* at 441.

65. 2 PERCIVAL SPEAR, A HISTORY OF INDIA 95 (1965).

66. *Id.* See also NOONAN, *supra* note 21, at 416.

67. SPEAR, *supra* note 65, at 95.

reform of that [criminal justice] department would be useless and nugatory whilst the execution of them depends upon *any native whatever* We ought not, I think, to leave the future control of so important a branch of government to the sole discretion of *any Native*"⁶⁸ In other words, Cornwallis, just like Hastings before him, subscribed to the world view supporting the rule of geographical morality, the difference being that while Hastings used geographical morality to justify rampant corruption, Cornwallis used its attendant racist world view to justify purging Indian natives from positions of authority as part of the anti-corruption reforms. This is a vivid example of how anti-corruption reforms have been used to pursue racist, discriminatory practices that were integral to colonial rule.

The impact of "geographical morality" and the view of non-Christian cultures as morally inferior remained such an integral part of the discourse on corruption and bribery that, more than a hundred years later, Max Weber, one of the greatest minds of our time and the father of modern sociology, attempted to explain the rampant corruption in primitive non-Western cultures as follows:

The universal reign of absolute unscrupulousness in the pursuit of selfish interests by the making of money has been a specific characteristic of precisely those countries whose bourgeois-capitalistic development, measured according to Occidental standards, has remained backward Absolute and conscious ruthlessness in acquisition has often stood in the closest connection with the strictest conformity to tradition.⁶⁹

The next part of this Article shows that those who wrote about the problem of corruption in the newly independent states in the de-colonization period did not separate the discourse of corruption from the legacy of colonialism. To the contrary, they facilitated the rule of geographical morality and its worldview, in the name of culture.

68. 5 THE CAMBRIDGE HISTORY OF INDIA, *supra* note 63, at 445 (emphasis added).

69. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM, 57, 58 (Talcott Parsons trans., Routledge 1997) (1930). Although Weber did not directly address the fact that tolerance of bribery and corruption may be influenced by biology or race, he admitted that he was, as a general rule, "inclined to think the importance of biological heredity very great." *Id.* at 30. Weber analyzed that the capitalistic ideal—the pursuit of forever-renewed profit by means of continuous, rational, capitalistic enterprise as an end in itself and not as a means to enhance life—was unique to Western civilization and owed much to the Protestant, and particularly Calvinistic, work ethic although the impulse to acquire and pursue gain had existed at all times and in all countries of the earth.

II. THE MORALIST AND REVISIONIST APPROACHES TO CORRUPTION
AND THE CONTINUED ACCEPTANCE OF THE RULE OF
GEOGRAPHICAL MORALITY

A. *The Moralist Approach*

Prior to the 1960s all discussion of corruption and bribery was based on a moralist perspective. Corruption was viewed first as a moral failing and also, at times, as a violation of the dictates of positive law, such as penal legislation against bribery. It has specifically been argued that the concept of bribery is fundamentally informed by religion,⁷⁰ which created in the first instance the idea of a "transcendental Judge"⁷¹ immune from ordinary reciprocities.⁷² The moralist discourse on corruption has been used by both those who condemned bribery in the transnational context, such as Burke, and those who justified it, such as Hastings.

The moralist approach to corruption and bribery dominated the impeachment trial of Warren Hastings. In fact, throughout the trial, the discourse on corruption was intertwined with moral judgments. Burke felt compelled to press the impeachment of Warren Hastings because he had hoped that "men might learn to act under the compulsion of morality as well as positive law."⁷³ Burke advocated the universal application of moral principles, including standards of conduct against bribery. Hastings, on the other hand, admitted that his actions were morally reprehensible

70. Interestingly Noonan questions whether religion is, in fact, so clear when it comes to bribery. He suggests that the religious attitude towards bribery and reciprocity is more ambivalent than categorical. NOONAN, *supra* note 21, at xx-xxi.

71. In this regard, Noonan writes:

Reciprocity is so regularly the norm of human relations that the conception of a transcendental figure, a Judge beyond the reach of ordinary reciprocities, was of enormous importance for the idea that certain reciprocities with earthly officials were intolerable. That conception of a transcendental Judge was shaped in the ancient Near East. Communication of this image to the West was largely dependent on religion. Accepted as divine revelation, Scripture by commandment and paradigm inculcated a teaching on impartial judgment. The concept of the bribe was cast in a biblical mold.

Id. at 207.

72. See *id.* at xx-xxxi (exploring bribes in a religious context).

73. CARL B. CONE, BURKE AND THE NATURE OF POLITICS: THE AGE OF THE FRENCH REVOLUTION 207(1964).

but insisted he could not be moral in Asia, where notions of morality did not exist. In other words, Hastings espoused geographical limits on Christian morality.

Although Burke sided with the people of India by declaring the universality of morality and Christian virtue, he did not spend much time attacking Hastings' assertion that Asians were more corrupt. Instead, Burke argued, even if Asians were constitutionally corrupt and their government despotic, the British nation, a Christian nation, has a duty not to act in a morally reprehensible manner.⁷⁴ For Burke it was irrelevant that prior cultures were despotic; an Englishman and a Christian could not be.

In sum, the moralist approach lent itself to an *a priori* condemnation of all non-Western and non-Christian societies and cultures as morally inferior without any attempt to understand the culture or religious traditions of the East.⁷⁵ This condemnation in turn was used by people like Warren Hastings to justify despotic acts as being necessitated by the lower moral standards of non-Western and non-Christian societies.

The morality-based approach to, and discourse on, corruption and bribery was rejected by social scientists in the

74. Burke, *supra* note 15, at 454.

75. The lack of understanding of other cultures and peoples is reflected in the first speech that Edmund Burke made to the House of Commons on December 1, 1783, comparing the English invasion of India to Tartar rule:

The Tartar invasion was mischievous; but it is our protection that destroys India. It was their enmity, but it is our friendship. Our conquest there, after twenty years, is as crude as it was the first day. The natives scarcely know what it is to see the grey head of an Englishman. Young men (boys almost) govern there, without society, and without sympathy with the natives. They have no more social habits with the people, than if they still resided in England; nor indeed any species of intercourse but that which is necessary to making a sudden fortune, with a view to a remote settlement. Animated by all the avarice of age, and all the impetuosity of youth, they roll in one after another; wave after wave; and there is nothing before the eyes of the natives but an endless, hopeless prospect of new flights of birds of prey and passage, with appetites continually renewing for a food that is continually wasting. Every rupee of profit made by an Englishman is lost for ever to India. With us are no retributory superstitions, by which a foundation of charity compensates, through ages, to the poor, for the rapine and injustice of a day. With us no pride erects stately monuments which repair the mischiefs which pride has produced, and which adorn a country out of its own spoils.

KIRK, *supra* note 10, at 110. See also Burke, *supra* note 7, at 452-68 (explaining the blanket condemnation of all non-Christian and non-Western nations by the British).

1960s.⁷⁶ These social scientists argued that the moralist approach that dominated the discourse on corruption and bribery at the time was unacceptable because it lacked a working definition of corruption and relied on an *a priori* condemnation based on moral principles. The dissatisfaction of social scientists with the moralist approach, and the creation of the subsequent revisionist approach to corruption and bribery, has been described as follows:

For those interested in corruption as a social phenomenon, the traditional approach, which treated it in a moralistic manner, was inappropriate. Studies of corruption were vague as to definition, condemned it *a priori*, and looked for explanations in individual behavior. Social scientists demanded precise definitions, objectivity, and some relationship between the workings of society and the existence of corruption. Thus was born a "revisionist" approach⁷⁷

B. *The Revisionist Approach*

The revisionist school of thought on corruption and bribery developed during the decolonization period of the 1960s and 1970s. This approach is exemplified by the works of Samuel Huntington,⁷⁸ J.S. Nye,⁷⁹ A.J. Heidenheimer,⁸⁰ and Nathaniel H. Leff.⁸¹ The revisionists challenged the *ipso facto* condemnation of corruption as something evil men did.⁸² Contrary to the traditional moralist approach, revisionism emphasized the "unavoidable character of corruption at certain stages of development and the contributions of the practice to processes of modernization and development."⁸³ The revisionists' definition of corruption has been summarized as follows: "a 'revisionist'

76. See generally Gerald E. Caiden & Naomi J. Caiden, *Administrative Corruption*, 37 PUB. ADMIN. REV. 301 (1977) (exploring the revisionist theory in administrative corruption).

77. *Id.* at 301.

78. E.g., SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968) [hereinafter HUNTINGTON, *POLITICAL ORDER*]; Samuel P. Huntington, *Modernization and Corruption*, in *POLITICAL CORRUPTION: A HANDBOOK* 377 (Arnold J. Heidenheimer et al. eds., 1989) [hereinafter Huntington, *Modernization and Corruption*].

79. E.g., J. S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417 (1967).

80. E.g., *POLITICAL CORRUPTION: A HANDBOOK* (Arnold J. Heidenheimer et al. eds., 1989).

81. E.g., Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, AM. BEHAV. SCIENTIST, Nov. 1964, at 8.

82. Gabriel Ben-Dor, *Corruption, Institutionalization, and Political Development: The Revisionist Theses Revisited*, 62 COMP. POL. STUD. 63, 65 (1974).

83. *Id.*

approach . . . defined corruption in terms of divergence from a specific norm of accepted behavior, explained its existence by reference to social mores and deficiencies in economic and political systems, and enumerated conditions in which it might elicit approval rather than condemnation."⁸⁴ The most striking feature of the revisionist definition is that it is intended to be amoral. The revisionists used concepts from economics, sociology, anthropology, and other social sciences to make two arguments: (1) the definitions of corruption and bribery varied with societal values and inherited cultural and religious traditions, and (2) an increase in the incidence of corruption and bribery was a necessary and inevitable part of the modernization process.

Despite an overall unity of concepts which coalesce the revisionist thought, their discourse on corruption in the developing world has been divided into three different approaches:⁸⁵ (1) the functional-integrationist approach of sociology and anthropology, (2) the economic-market approach, and (3) the institutionalist approach, proposed by Samuel Huntington.⁸⁶

1. Functional-Integrationist Revisionists

The works of Merton,⁸⁷ Bayley,⁸⁸ Abueva,⁸⁹ and Scott⁹⁰ exemplify the functional-integrationist approach to political corruption that drew largely upon the U.S. experience with political machines in U.S. cities. The functional-integrationists believed that corruption may contribute positively to development when it allows the integration of various groups who otherwise would not be able to participate in the political process.⁹¹ They

84. Caiden & Caiden, *supra* note 76, at 301.

85. The three different approaches are set forth in Ben-Dor, *supra* note 82.

86. See generally HUNTINGTON, *POLITICAL ORDER*, *supra* note 78 (examining the consequences of rapid social change, the emergence of new political groups, and the slow development of political institutions).

87. *E.g.*, ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (3d ed. 1968).

88. *E.g.*, David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719 (1966).

89. *E.g.*, Jose Veloso Abueva, *The Contribution of Nepotism, Spoils and Graft to Political Development*, 3 E.-W. CENTER REV. 45 (1966).

90. *E.g.*, James C. Scott, *The Analysis of Corruption in Developing Nations*, 11 COMP. STUD. SOC. & HIST. 315 (1969) [hereinafter Scott, *Analysis of Corruption*]. See also James C. Scott, *Corruption, Machine Politics, and Political Change*, 63 AM. POL. SCI. REV. 1142 (1969) [hereinafter Scott, *Corruption, Machine Politics, and Political Change*].

91. The functional-integrationists believed that political machines in the United States had "satisf[ie]d otherwise unfulfilled needs of diverse groups in the

saw corruption not only as giving the rich access to top-level decision making, but also as giving ordinary citizens access to lower levels of government bureaucracy. According to this school, corruption at the "lower levels" of bureaucracy may have "an important humanizing element," enabling ordinary people to overcome their impotence in dealing with a "huge, impersonal governmental apparatus."⁹² It is interesting to note that the functional-integrationists believed that it may be better "that people in developing nations misuse modern agencies to their own ends than that they reject the new because they cannot work the handles."⁹³

In sum, the functional-integrationists believed that low-level corruption and bribery can play a useful and positive role in the development process if it allows groups otherwise unrepresented to participate.⁹⁴ They argued that low-level corruption can "humanize" a bureaucracy and thereby lessen the chances that the citizens of developing nations would challenge the new bureaucratic institutions crucial for their development.⁹⁵ They also recognized that in some societies, cultural practices that we may consider "corrupt," may be closer to their traditional way of doing things.⁹⁶ Therefore, by integrating traditional ways of interacting with governmental officials, *e.g.*, gift-giving, we may allow these new institutions to survive and gain acceptance.⁹⁷

population." MERTON, *supra* note 87, at 127. *See generally id.* at 124-36. *See also* James Q. Wilson, *Corruption Is Not Always Scandalous*, in THEFT OF THE CITY: READINGS ON CORRUPTION IN URBAN AMERICA 29 (John A. Gardiner & David J. Olson eds., 1974) (arguing the need to take into account the circumstances and consequences when evaluating the various forms of corruption).

92. Ben-Dor, *supra* note 82, at 72.

93. Bayley, *supra* note 88, at 729.

94. Ben-Dor, *supra* note 82, at 71-72.

95. *Id.* at 72.

96. *See id.* at 68-70.

97. Ben-Dor writes:

[C]orruption is said to contribute to integration by preventing the alienation of various groups from the regime, or indeed society itself, by enabling them to participate in the political process and by giving them a chance to influence the making of decisions affecting them through means they have always had and have learned to use well. This may be very important . . . for the ordinary citizen-voter who may be unfamiliar with the complicated workings of a modern bureaucracy, but may well find corruption on the lower levels of such a bureaucracy an important humanizing element enabling him to take advantage of its machinery *in a way he knows well* and which may help him overcome the feeling of helplessness in the face of the huge, impersonal governmental apparatus.

Id. at 71-72 (emphasis added).

2. Economic-Market Revisionists

The works of Leff,⁹⁸ Nye,⁹⁹ Bayley,¹⁰⁰ and Scott¹⁰¹ exemplify the economic-market revisionist school. The economic-market revisionists argued that corruption may introduce efficiency into a system where there is none.¹⁰² The underlying problem they saw was that, where government policies are imperfect, government bureaucracy and regulation become overly burdensome, inefficient, and replete with red tape. In addition, specific acts of corruption, such as bribery, can allow entrepreneurs to enter the market who otherwise would be excluded.¹⁰³

In his often-quoted article, *Corruption and Political Development: A Cost-Benefit Analysis*,¹⁰⁴ J.S. Nye not only attacked the moralist analysis of corruption,¹⁰⁵ but went on to outline the possible benefits and costs of corruption and bribery. The benefits of corruption that Nye identified were: (1) economic development, because some kinds of corruption may be an important source of capital formation,¹⁰⁶ (2) cutting of red-

98. *E.g.*, Leff, *supra* note 81.

99. *E.g.*, Nye, *supra* note 79.

100. *E.g.*, Bayley, *supra* note 88.

101. *E.g.*, Scott, *Analysis of Corruption*, *supra* note 90; Scott, *Corruption, Machine Politics, and Political Change*, *supra* note 90.

102. Ben-Dor, *supra* note 82, at 70.

103. Ben-Dor suggests that:

[G]overnmental policies may be so imperfect that corruption may systematically bring about better economic choices, that the private sector will probably perform better than the governmental one when it can utilize corruption to get around cumbersome regulations, that corruption may enable innovators to introduce their innovations, that corruption money is often diverted to investment rather than consumption, and that in fact the ability of entrepreneurs to outbribe their competitors may well be a good criterion of their efficiency

Id. (summarizing the assumptions on which Leff, Bayley, and Scott based their arguments).

104. Nye, *supra* note 79.

105. Nye concluded:

What we need to advance the study of the problem [of interrelationship of corruption and development] is to refute and replace *specific* a priori hypotheses with propositions based on such data rather than with the generalities of the moralists. Corruption in developing countries is too important a phenomenon to be left to moralists.

Id. at 427.

106. *Id.* at 419-20. Nye recognizes, however, that the "real question is whether the accumulated capital is then put to uses which promote economic development or winds up in Swiss banks." *Id.* at 420.

tape,¹⁰⁷ (3) encouragement of entrepreneurship and incentives by allowing minority groups access to political decisions,¹⁰⁸ (4) national integration, particularly overcoming the divisions among the ruling elites,¹⁰⁹ as well as the integration of non-elites¹¹⁰ as the functional-integrationists argued, and (5) a preferable alternative to violence.¹¹¹

The costs of corruption that Nye identified were: (1) waste of resources, including capital outflow and investment distortions, (2) waste of skills and loss of foreign aid, and (3) political instability caused by destroying the legitimacy of political structures and by reducing the capacity of the government's "modern-oriented" civil servants.¹¹² Finally, Nye developed a "Corruption Cost-Benefit Matrix" for calculating the costs and benefits of corruption in countries at various levels of development¹¹³ and concluded that "it is probable that the costs of corruption in less developed countries will exceed its benefits *except for top level corruption involving modern inducements and marginal deviations and except for situations where corruption provides the only solution to an important obstacle to development.*"¹¹⁴ This is hardly a condemnation of corruption and bribery. In Nye's view, the "important obstacle to development" in newly independent states or former colonies is

107. *Id.*

108. Nye states that "[i]f Schumpeter is correct that the entrepreneur is a vital factor in economic growth and if there is an ideological bias against private incentives in a country, then corruption may provide one of the major means by which a developing country can make use of this factor." *Id.* For example, in East Africa, "corruption may be prolonging the effective life of an important economic asset—the Asian minority entrepreneur—beyond what political conditions would otherwise allow." *Id.*

109. For example, during the early nationalist periods in West Africa and Central America corruption may have allowed the groups to "assimilate each other." *Id.* In Central America, "corruption has been a major factor in the succession mechanism by integrating the leaders of new coup into the existing upper class." *Id.*

110. Nye draws heavily from the functionalist approach which argues that "a degree of low-level corruption can 'soften relations of officials and people' by 'humaniz[ing] government and mak[ing] it less awesome.'" *Id.* (citing M. McMullan, *A Theory of Corruption*, 9 SOC. REV. 181, 196 (1961)).

111. See *infra* Part II.B.3 for a discussion of the Institutional approach to corruption set forth by Huntington.

112. Nye, *supra* note 79, at 421-23.

113. *Id.* at 424 tbl. 1. In his matrix, Nye divided development problems into three categories: (1) economic development measured in three subsets: capital, bureaucracy and skills; (2) national integration divided into two subsets: elite and non-elite; and (3) governmental capacity, divided into two subsets: effectiveness and legitimacy. *Id.* at 419-21.

114. *Id.* at 427 (emphasis added). Although Nye also admits that "[a]t this point, however, not enough information is at hand to justify great confidence in the exact conclusions reached here." *Id.*

socialism and “association of profit with imperialism,” which has “led to a systematic bias against the market mechanism.”¹¹⁵ Nye writes that corruption can be positive if it is used to counteract such systematic bias.¹¹⁶ In other words, corruption is acceptable if it promotes the cause of capitalism.

3. Institutional Revisionists

Sharing with the other revisionists a distaste for the moralist *a priori* condemnation of corruption, the institutionalists attributed corruption to the absence of effective political institutionalization.¹¹⁷ Huntington argued that modernization and development create new sources of wealth and power that are outside the traditional norms of a developing society and that are regulated by more modern norms not yet accepted by that society’s majority.¹¹⁸ Modernization entails increased corruption because modernization or development “involves the expansion of the output side of the political system, and the multiplication of governmental activities multiplies the opportunities for corruption.”¹¹⁹ The institutionalists argued that corruption can play a useful role when it contributes to political development by “prevent[ing] the alienation of certain groups from society and the political system, . . . particularly if it contributes to the building of new and stronger institutions.”¹²⁰ Echoing the functional-integrationists, the institutionalist approach maintained that “[l]ike machine politics or clientalistic politics in general, corruption provides immediate, specific, and concrete benefits to groups which might otherwise be thoroughly alienated from society.”¹²¹

The institutionalists believed that corruption in certain developing countries may be positive because it is an acceptable alternative to violence in times of change when it facilitates elite integration and humanizes government for non-elites; that is, one who corrupts a system is more likely to identify with it than one who attacks a system.¹²² In addition, according to Huntington, institutionalization will ultimately reduce opportunities for

115. *Id.* at 420.

116. *Id.*

117. HUNTINGTON, *POLITICAL ORDER*, *supra* note 78, at 59. Huntington defines “institutionalization” as: “the process by which organizations and procedures acquire value and stability.” *Id.* at 12.

118. *Id.* at 61.

119. Ben-Dor, *supra* note 82, at 74 (summarizing Huntington’s arguments).

120. *Id.* at 75.

121. HUNTINGTON, *POLITICAL ORDER*, *supra* note 78, at 64.

122. *Id.*

corruption by strengthening political parties, *i.e.*, corruption will indirectly undermine itself.¹²³

4. The Revisionist Approach and the Principle of Geographical Morality

In the words of one commentator, the revisionist view amounted to the following:

[P]oor countries for cultural and historical reasons have a propensity toward corruption, seen as a violation of Western norms. To this propensity may be added a breakdown in the allocative mechanisms of society, or economic, political, and administrative reasons, so that corruption steps in to fulfill the missing functions. Corruption is thus legitimized in terms of its prevalence, and of its functionality: indeed, given the inappropriateness of Western norms and inadequacy of Western institutions, corruption does not really exist at all—it is simply a different way of doing business.¹²⁴

The removal of the moral aspect of corruption meant that Westerners could act corruptly without any moral misgivings. The revisionist discourse on political corruption provided the intellectual and moral justification for multinational corporations—the new colonial masters—to apply a different, lower standard of conduct to their actions in the South than they would apply to their actions in the North. This analysis is supported by the comment of Singapore's Minister of Foreign Affairs and Labour in 1968 on the revisionist discourse on corruption in Asia:

I think it is monstrous for these well-intentioned and largely misguided scholars to suggest corruption as a practical and efficient instrument for rapid development in Asia and Africa. Once upon a time, Westerners tried to subjugate Asia . . . by selling opium. *The current defense of Kleptocracy is a new kind of opium by some Western intellectuals, devised to perpetuate Asian backwardness and degradation.* I think the only people . . . pleased with the contribution of these scholars are the Asian Kleptocrats.¹²⁵

In other words, the revisionist discourse on corruption ironically perpetuated the rule of geographical morality, while denying the relevance of morality.

123. *Id.* at 69.

124. Caiden & Caiden, *supra* note 76, at 304.

125. KLITGAARD, *supra* note 6, at 29 (emphasis added) (citing the statements of Minister S. Rajaratnam in 1968).

III. THE POST-COLD WAR CRUSADE AGAINST TRANSNATIONAL BRIBERY AND CORRUPTION AND THE RULE OF GEOGRAPHICAL MORALITY

A. *Globalization and the End of the Cold War*

The end of the Cold War and the subsequent process of globalization gave rise to the current anti-corruption movement¹²⁶ and the rejection of the revisionist hypothesis that corruption is necessary and sometimes good for development.¹²⁷ The defeat of Communism contributed to the rejection of the revisionist discourse on corruption because it was no longer necessary to defend corruption as a weapon to combat socialism and its "systematic bias" against "the market mechanism."¹²⁸ The anti-corruption movement gained strength when Europe felt the effects of the explosion of corruption closer to home in the transitional economies of Eastern Europe and the former Soviet

126. Terry Atlas, *Trading Places: Business Now Top U.S. Global Priority*, CHI. TRIB., Feb. 20, 1994, at 1, available at 1994 WL 6523346 (citing Secretary of State Warren Christopher's cable to U.S. embassies acknowledging the greater importance placed on competitiveness and overseas exports rather than on the political and military concerns that had dominated U.S. priorities during the Cold War). See also Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L & COM. REG. 389, 399 (1997) (citing the shift to Western-style democracy and market economies as a cause of the increased priority placed on international economic policy). In addition, the authors note President Bill Clinton's statement that national security now encompasses "economic security." *Id.* at 399-400.

127. *E.g.*, STRATEGY & POLICY OFFICE, ASIAN DEVELOPMENT BANK, ANTI-CORRUPTION POLICY (1998); Ben-Dor, *supra* note 82, at 81. Specifically, the functionalist framework was discredited on the basis of the irrelevance of the American urban political machine to the realities of most developing countries and on the fact that cases of corruption rarely involve people of underprivileged groups. *Id.* at 72-74. The economic-market framework was attacked on many grounds, including: (1) corruption does not correlate with high periods of economic growth, in fact, just the opposite is true; (2) corruption does not wither away once the process of growth is underway; (3) money from corruption does not go into investment, but rather into Swiss Bank accounts and leaves the developing country where it is needed the most; and (4) corruption has negative effects on entrepreneurs who neither have connections nor pay bribes. *Id.* at 70-71. The institutionalist framework was criticized for holding that corruption withers away with institutionalization and for ignoring the dangers of over-institutionalization, which itself can contribute to corruption. *Id.* at 76-80. See generally *id.* for a more detailed criticism of each of the three revisionist schools.

128. Nye, *supra* note 79, at 420. See also *supra* text accompanying note 115.

Union.¹²⁹ Globalization also increased the opportunities for, and incidence of, corruption¹³⁰ as more and more businesses “went international.”¹³¹ This trend led both multinational corporations and peoples from the South to join the anti-corruption movement for the first time.

B. *The Current Anti-Corruption Discourse*

The current anti-corruption discourse has had three distinctive characteristics. The first characteristic is its rejection of “geographical morality,” including a rejection and minimization of the importance of cultural differences as to what constitutes “corrupt practices,” such as bribery. The second characteristic is its reliance on economic arguments: corruption has been opposed primarily on economic, not moral, grounds. The final characteristic, related to the second, is a heavy reliance on social science methodology and empirical data to prove the detrimental economic consequences of corruption in the South. The first of these characteristics is a reaction against the revisionist discourse on political corruption. The second and third are inherited from the revisionist approach in that they attempted to surgically remove any discussion of morality from the analysis of corruption in the South and relied instead on economic and empirical data. This modern, amoral, economically-based approach to corruption, however, categorically rejects the revisionist approach to corruption.

1. Rejection of Geographical Morality and Cultural Relativism

The discourse of the current anti-corruption movement dismisses the premise that what constitutes a “corrupt act” depends on the society and the culture in question. For example, Robert Klitgaard writes, “[T]he majority of people in nearly all cultures understand that most of the kinds of corruption . . .—bribery, extortion, tax *arreglos*, police corruption, and so forth—are neither lawful nor customary.”¹³² Daniel Kaufmann writes similarly, “Even in traditional settings, the cultural norms of gift-giving are

129. This was particularly true in the aftermath of East and West Germany’s unification when Germans felt the effects of political and business corruption in their own country.

130. MOODY-STUART, *supra* note 6, at 7 (citing the tremendous increase in grand corruption during the last decade).

131. Nichols, *supra* note 9, at 272-74 (noting that those working in international commerce with years of experience have observed the large-scale prevalence of transnational bribery only as a recent occurrence).

132. KLITGAARD, *supra* note 6, at 64. *See also* NOONAN, *supra* note 21, at 702-03 (noting that bribery is universally shameful in every country of the world).

distinguishable from what would be regarded as abusive corrupt practices anywhere."¹³³ Furthermore, the current movement maintains that the "cultural pluralism" argument has been abused to justify immoral conduct by the North. Klitgaard writes that although traditional practices such as gift-giving in certain societies raise cultural issues, many academics and social scientists abuse the notion of "cultural differences" as an explanation for corruption.¹³⁴ Others argue that cultural differences are being used to justify respecting only the practices of "the most corrupt level of a society."¹³⁵ In addition, scholars from the South, like Phongpaichit, Piriayangsan, and Ayittey, have written that it is an insult to suppose that a traditional culture of gift-giving supports large payoffs to political leaders.¹³⁶

The rejection of geographical morality is also passionately supported by Transparency International (TI), a non-governmental organization formed in 1993.¹³⁷ TI, with offices worldwide, is a symbol of and major force behind the current international anti-corruption campaign and has contributed significantly to the evolution of the current anti-corruption discourse.¹³⁸ TI's stated goals are to increase awareness of the problem of corruption and to promote a multilateral solution to the problem.¹³⁹

133. Daniel Kaufmann, *Corruption: The Facts*, FOREIGN POL'Y, Summer 1997, at 114, 116.

134. KLITGAARD, *supra* note 6, at 64. See also Susan Rose-Ackerman, *Corruption and the Global Economy*, in CORRUPTION & INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES 18, 23 (U.N. Development Programme ed., 1998).

135. Hudson P. Rogers et al., *Ethics and Transnational Corporations in Developing Countries: A Social Contract Perspective*, in ETHICAL ISSUES IN INTERNATIONAL MARKETING 11, 20 (Nejdet Delener ed., 1995).

136. E.g., GEORGE B. N. AYITTEY, AFRICA BETRAYED (1992); PASUK PHONGPAICHIT & SUNGSIDH PIRIYARANGSAN, CORRUPTION AND DEMOCRACY IN THAILAND (1994) (examining survey evidence that people in Thailand make quite sophisticated distinctions between appropriate and inappropriate gifts; they do not look with tolerance on major payoffs involving high level officials and major investors). See also Rose-Ackerman, *supra* note 134, at 23.

137. Transparency International, *Facts and Figures on Corruption: 11 Questions Most Frequently Asked by Journalists*, at http://www.transparency.de/contact/media_faq.html (last modified Feb. 9, 2000) (stating that "[t]here is no culture, anywhere and at any time in history, that anyone has been able to point to, where it has been accepted by society as a whole that their leaders are entitled as of right to make decisions in their own favour and against the group interest").

138. See generally NEW PERSPECTIVES ON COMBATING CORRUPTION (Transparency Int'l & Econ. Dev. Inst. of the World Bank eds., 1998).

139. TI has helped to build national chapters in countries worldwide in order to foster anti-corruption programs that follow TI's approaches and core values, which are outlined in its Standards of Conduct manual. TI has worked closely with the World Bank and a number of small countries to help them diagnose corruption problems, build consensus reforms, and introduce specific

2. Emphasis on the Economic Costs of Corruption

The current anti-corruption campaign has ignored the moral aspect of corruption completely and has emphasized instead its economic consequences.¹⁴⁰ The emphasis on the economic consequences is based on both practical and ideological reasons.¹⁴¹ An anti-corruption discourse based on morality is likely to raise charges of moral imperialism, as the U.S. experience with the Foreign Corrupt Practices Act (FCPA) of 1977 has demonstrated.¹⁴² Furthermore, as Klitgaard has written,

anti-corruption measures. TI has also conducted training for economic journalists and parliamentarians in "national integrity workshops." Miguel Schloss, *Combating Corruption for Development: The Role of Government, Business, and Civil Society*, in *NEW PERSPECTIVES ON COMBATING CORRUPTION*, *supra* note 138, at 1, 9-11.

140. See generally Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599 (1993) (examining why corruption is costly to development); *Bribonomics*, *ECONOMIST*, Mar. 19, 1994, at 86 (noting that ethics and economics may be working together for once); Cheryl W. Gray & Daniel Kaufmann, *Corruption in Development*, in *NEW PERSPECTIVES ON COMBATING CORRUPTION*, *supra* note 138, at 21, 23-24 (discussing the economic costs of corruption and refuting any positive effects).

141. E.g., Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 *DICK. J. INT'L L.* 207, 224 (1996) (noting that moral and ethical arguments have not persuaded other countries to adopt legislation similar to the FCPA).

142. For more than twenty years, the United States has attempted to get its European and Japanese allies to adopt laws like the FCPA as amended, which prohibits bribery of foreign public officials by U.S. persons. 15 U.S.C. §§ 78m, dd-2, ff (1997). Stephen Muffler, *Proposing a Treaty on the Prevention of International Corrupt Payments: Cloning the Foreign Corrupt Practices Act is Not the Answer*, 1 *ILSA J. INT'L & COMP. L.* 3, 13-14 (1995) (noting that Japan, Germany, and France, led by Great Britain, had blocked attempts by the United States in the past to secure a multinational agreement against transnational bribery since many English economists saw bribe offerings as "good business"). Throughout this time, the FCPA has been described as an overreaching and naïve attempt by the U.S. government to impose unrealistic moral standards on global business conduct. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 *MICH. J. INT'L L.* 419, 422 (1999) (arguing that in addition to cultural imperialism, a "political peril" arises from the FCPA that adds the risk of cross-national hostility to such an officious and "overreaching legislation across national borders"). Others labeled the United States attempt to convince other countries to adopt legislation similar to the FCPA as "American Imperialism" and doomed as a result. Muffler, *supra*, at 15. Many scholars have even argued that the United States should abandon the FCPA because of the threat of "moral imperialism" that is imposed by such a law's extraterritorial reach. David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 *NW. J. INT'L L. & BUS.* 457, 468 (1998) (arguing that it is more advisable to work with foreign nations "to adopt and vigorously enforce laws that criminalize bribery within their own borders," while avoiding multilateral agreements).

Western intellectuals are uncomfortable with moral issues.¹⁴³ As a result, the anti-corruption literature written over the last few years has concentrated on the economic costs of corruption. Beverley Earle explains this shift in discourse on corruption to discourse concentrating on economics and the influence of TI as follows:

Fighters of corruption, such as former President Jimmy Carter,¹⁴⁴ were often ridiculed as “do gooders” who ignored the realities of business. Conventional wisdom dictated that attempting to change business practices was the equivalent of Don Quixote tilting at windmills. However, a new development may alter the business landscape. Transparency International (TI), modeled on Amnesty International, is dedicated to ending the inefficient and costly system of bribery of foreign officials. This grass roots movement by a non-governmental organization (NGO) represents an important philosophical shift on this issue. This thrust is coming from those countries where bribery has been endemic and citizens can appreciate the costs to their society. These costs can be seen in poorly planned projects that serve to hide payoffs and in the large foreign bank accounts of public officials. This shift from a moral to an economic argument is a significant change that may presage a better result in the effort to eliminate corruption.¹⁴⁵

The proliferation of multilateral initiatives against corruption and bribery discussed in Part IV of this Article indicates that, at least so far, Earle’s prediction that the shift to an economic argument against corruption would be good for the anti-corruption campaign has in fact been accurate.¹⁴⁶

It must be noted, however, that even more recently, the anti-corruption movement has come to the recognition that the moral aspect of corruption must be addressed and that any anti-corruption campaign cannot succeed until it addresses the internal, or moral and ethical, causes of corruption as well as the

143. Klitgaard writes that:

The moral angle of corruption, the intertwining of ethical judgments with policy choices, makes scholars shy away. In Western academic culture it is taboo to be seen as passing ethical judgments on the poor or on poor nations, as “imposing Western values,” or as attributing underdevelopment to the behavior and policies of the underdeveloped countries. And besides, isn’t corruption, like sin, something we all decry but about which both social science and public policy are impotent?

KLITGAARD, *supra* note 6, at 190.

144. Jimmy Carter supported the passage of the FCPA and signed it into law in 1977. *See infra* note 154.

145. Earle, *supra* note 141, at 209.

146. Earle also points out another feature of the current anti-corruption campaign: it includes within its ranks not only interests from the North but also from the South. *Id.* The merit of this observation will be considered later in this article. *See infra* Parts IV.B, V.

external, or economic and political, causes of corruption. In recognition of the moral aspect of corruption, multilateral and international institutions, such as the OECD, the OAS, and the World Bank; aid agencies, such as the U.S. Agency for International Development (USAID); and non-governmental organizations such as TI have urged the development of codes of ethics for government officials. In addition, such organizations are conducting "ethics" and "integrity" workshops as part of their anti-corruption programs.¹⁴⁷

3. Reliance on Empirical Data

Any survey of the recent legal and non-legal literature on corruption will demonstrate that the vast majority of it relies on "empirical data" to prove its goal. Economists rely on empirical evidence to show that corruption "slows economic growth and serves as a heavy tax on investment."¹⁴⁸ Political scientists and development specialists rely on empirical evidence to prove that corruption undermines political development and impedes the development of democracy and its institutions, as well as the promotion of the rule of law.¹⁴⁹ Finally, even lawyers and legal scholars rely on empirical evidence to prove that international conventions that criminalize transnational corruption and bribery

147. *E.g.*, WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 29 (1997) (explaining the Bank's role in combating corruption in the projects that it finances); INT'L MONETARY FUND, GOOD GOVERNANCE: THE IMF'S ROLE 4 (1997) (acknowledging that "it is difficult to separate economic aspects of governance from political aspects"); Schloss, *supra* note 139, at 9 (outlining the work of Transparency International and its use of integrity workshops).

148. Michael Johnston, *Cross-Border Corruption: Points of Vulnerability and Challenges for Reform*, in CORRUPTION AND INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES, *supra* note 134, at 7. *See also* Paolo Mauro, *The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis*, in CORRUPTION AND THE GLOBAL ECONOMY 83-85 (Kimberly Ann Elliott ed., 1997) (noting that a renewed interest in corruption has led researchers to attempt to quantify corruption using modern methods of analysis and models, which had been severely limited in the past); Kevin M. Murphy et al., *Why is Rent-Seeking So Costly to Growth?* 83 AMER. ECON. REV. 413 (1993); Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra*, at 45-46; SHANG JIN-WEI, HOW TAXING IS CORRUPTION ON INTERNATIONAL INVESTORS? 22-23 (Nat'l Bureau of Econ. Research, Working Paper No. 6030, 1997) (noting that corruption discourages foreign direct investment and imposes a 20% "tax" on firms investing in countries with high corruption).

149. *E.g.*, Nichols, *supra* note 9, at 277 (warning that pervasive corruption drives out honest and effective public servants, "leaving only the dishonest and ineffective"); Agnieszka Klich, Note, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 130 (1996) (noting that democracy and human rights are undermined, thus lowering the performance of governments, when individuals and corporations influence public officials for pecuniary gain).

are “viable and desirable.”¹⁵⁰ Interestingly, even the rejection of the “revisionist hypothesis” is based on new empirical research; the Asian Development Bank (ADB) quotes an empirical study to rebut the hypothesis:

Graft and corruption has strongly affected development efforts negatively, belying the so-called “revisionist hypothesis” prevalent in the West which considers corruption as either a necessary step in the development process or a means of speeding it up. Instead [our research] found that corruption leads to favoring of inefficient producers, the unfair and inequitable distribution of scarce public resources, and the leakage of revenue from government coffers to private hands. Less directly, but no less perniciously, corruption leads to loss of confidence in government.¹⁵¹

The next part of this Article will look at some of the tangible results of this post-Cold War, amoral, economically- and empirically-driven, anti-corruption discourse in the form of new multilateral agreements against corruption.

IV. INTERNATIONAL AND MULTILATERAL INITIATIVES AGAINST CORRUPTION AND BRIBERY: OVERCOMING THE RULE OF GEOGRAPHICAL MORALITY?

A. *International and Multilateral Anti-Corruption Initiatives*

During the last three decades of the twentieth century, concern about the prevalence of corruption in international business resulted in the drafting and adoption of various legal initiatives to combat corruption and bribery.¹⁵² More importantly, these initiatives were aimed partly at discrediting the rule of geographical morality by prohibiting payment of bribes to foreign public officials. This prohibition of “active bribery”¹⁵³ was directed at multinational corporations from the North in their business dealings with the South. The anti-corruption initiatives

150. Nichols, *supra* note 9, at 259.

151. ASIAN DEV. BANK, ANTI-CORRUPTION POLICY 8 (1998) (citing LEDVINA V. CARINO & JOSIE H. DE LEON, FINAL REPORT FOR THE STUDY OF GRAFT AND CORRUPTION, RED TAPE AND INEFFICIENCY IN GOVERNMENT (1983)).

152. Throughout the 1980s, the United States continued its crusade to persuade other industrialized countries to adopt legislation similar to the FCPA, but those attempts failed. *See supra* note 142. Similarly, the United Nations’ negotiations on a Code of Conduct for Transnational Corporations (TNCs) continued until 1986, but these negotiations also resulted in no agreement.

153. Under some legal systems, the terms “active bribery” or “active corruption” are used to describe the act of giving a bribe and the term “passive bribery” is used to describe the action of the person, usually a public official, who receives or accepts a bribe. *See infra* note 238.

of the 1970s were largely unsuccessful and did not result in an international agreement against bribery. Throughout the 1980s, the United States was the only country to prohibit active bribery of foreign public officials, which was banned by the FCPA enacted under the Carter Administration.¹⁵⁴ The anti-corruption initiatives of the 1990s, however, have been the most successful because two multilateral conventions against corruption have been signed: the OAS Anti-Corruption Convention and the OECD Convention Against Bribery in International Business. To date these Conventions are the most forceful denunciations of the rule of geographical morality; but like their precursors, they have not been unqualified successes. To the extent that the modern anti-corruption initiatives have failed, their failures can be traced to the colonial period and the legacy of geographical morality.

1. The United Nations

(a) Draft International Agreement On Illicit Payments

On December 15, 1975, the Generally Assembly of the United Nations passed Resolution 3514, entitled "Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved."¹⁵⁵ Resolution 3514 condemned "all corrupt practices, including bribery, by transnational and other corporations, their

154. In the aftermath of the Watergate scandal and disclosures by more than four hundred large U.S. corporations in the form of illegal political contributions or payments to foreign officials bordering on bribery, the U.S. Congress passed the Foreign Corrupt Practices Act (FCPA). 15 U.S.C. §§ 78m, dd-1, dd-2, dd-3, ff (1997). The FCPA contains two substantive areas: anti-bribery provisions and accounting and record-keeping provisions. The accounting and record-keeping provisions were intended to prohibit the establishment of corporate slush funds to finance illegal payments. These provisions enforce the anti-bribery provisions by requiring that all amounts be recorded accurately on the company's books. 15 U.S.C. § 78m(b). The anti-bribery provisions of the FCPA, which are relevant to this article, criminalize the "corrupt" offer, payment or promise to pay money, gifts or "anything of value" by any "domestic concern" to any foreign official, foreign political party, candidate for political office or intermediary in order to obtain, retain or direct business. 15 U.S.C. § 78 dd-2(a), (h)(1).

155. G.A. Res. 3514, U.N. GAOR, 30th Sess., Supp. No. 34, at 69, U.N. Doc. A/10034 (1976). The General Assembly adopted Resolution 3514 by consensus. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, AD HOC INTERGOVERNMENTAL WORKING GROUP ON CORRUPT PRACTICES, CORRUPT PRACTICES, PARTICULARLY ILLICIT PAYMENTS IN INTERNATIONAL COMMERCIAL TRANSACTIONS: CONCEPTS AND ISSUES RELATED TO THE FORMULATION OF AN INTERNATIONAL AGREEMENT para. 1, at 4, U.N. Doc. E/AC.64/3 (1977) [hereinafter UNESCO, AD HOC INTERGOVERNMENTAL WORKING GROUP].

intermediaries and others involved, in violation of the laws and regulations of host countries.”¹⁵⁶ The resolution reaffirmed the rights of countries to enforce the countries’ laws prohibiting corrupt practices against such corporations.¹⁵⁷ The General Assembly also called upon both home and host countries to adopt legislation that would prevent such corrupt practices where they occurred.¹⁵⁸ In addition, the Resolution directed the U.N. Commission on Transnational Corporations to make further recommendations for eliminating corrupt practices, including bribery.¹⁵⁹ The U.N. Commission on Transnational Corporations responded by forming the Ad Hoc Intergovernmental Working Group on Corrupt Practices (Working Group) which met regularly between 1976 and 1980¹⁶⁰ and submitted reports of its discussions.¹⁶¹ The Working Group concluded that to

156. UNESCO, AD HOC INTERGOVERNMENTAL WORKING GROUP, *supra* note 155, para. 1, at 4.

157. *Id.*

158. See *Transnational Corporations: Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved*, U.N. Economic and Social Council, 61st Sess., Agenda Item 13, addendum, U.N. Doc. E/5838/Add.1 (1976) (containing a survey of aspects of national legislation on corrupt practices and an analysis of governments’ views and proposals to further deal with the problems of corrupt practices).

159. *Id.*

160. At its sixty-first session, the Economic and Social Council adopted Resolution 2041 of Aug. 5, 1976 in which it decided “to establish an *Ad Hoc* Intergovernmental Working Group on corrupt practices to conduct an examination of the problem of corrupt practices, in particular bribery” 1976 U.N.Y.B. 459, 460, U.N. Sales No. E.78.I.1. The Ad Hoc Intergovernmental Working Group held its first session during November 15-19, 1976. *Id.* at 461.

161. UNESCO, AD HOC INTERGOVERNMENTAL WORKING GROUP, *supra* note 155. The following conclusions of the Working Group are particularly noteworthy: First, the Working Group accepted a diversity of approaches to defining “corrupt practices” and stated that “[t]he scope of those practices that are considered to be corrupt varies from one country to another and from one society to another.” *Id.* para. 17, at 7. As a result, the Working Group limited the scope of any international agreement to “bribes” and “illicit payments” instead of corrupt practices. *Id.* paras. 18-20, at 7. Specifically, the Working Group excluded from the scope of any international agreement a broader category of improper activities, including “unfair competition” and “restrictive business practices such as . . . price discrimination.” *Id.* para. 18, at 7. Second, the Working Group distinguished between “illicit payments” and “bribes.” *Id.* paras. 21, 23 at 7, 8. Illicit payments were defined as a broader category of payments (financial or non-financial) “made with the intention to improperly influence a decision.” *Id.* para. 21, at 7. The word “bribery,” on the other hand, was the term “used in most penal legislations to describe the payment of anything of value made to a decision maker (or his agent) in order to influence his official decision-making.” *Id.* para. 23, at 8. Third, the Working Group distinguished among three types of illicit payments: (1) expediting payments, (2) payments to alter decision-making, and (3) payments to maintain a favorable climate. *Id.* para. 27, at 9. The Working Group concluded that payments to alter decision-making were a more serious problem than expediting payments because such payments affect the “use and distribution of

successfully combat corruption and bribery in international commercial transactions, "international action" was necessary.¹⁶² On the basis of this conclusion, the Working Group began work on the proposed text of an international agreement, which it completed in 1980. On the basis of the Working Group's proposal, the U.N. Committee on an International Agreement on Illicit Payments drafted an *International Agreement on Illicit Payments*¹⁶³ (Draft Convention). The Draft Convention sought to

resources," which in developing countries can be seen as "external interference with internal decision making processes." *Id.* para. 32, at 9-10. Expediting payments were defined as those that speed up the decision-making process; they are most common when a civil service is underpaid and understaffed. *Id.* para. 28, at 9. Such payments were considered less serious by the Working Group. It noted, however, that expediting payments were "by no means harmless," if such payments were made by multinational corporations with deep pockets and the willingness to pay more than local competitors could offer. *Id.* para. 30, at 9. The Working Group concluded that expediting payments can be detrimental because "[t]he ability to pay, to pay in more sophisticated ways, and to offer a better prospect for concealing the payment could give the corporation an unfair competitive advantage." *Id.* With regard to illicit payments for maintaining a favorable climate, the Working Group distinguished between political contributions made "to maintain or to secure a government policy favourable to the payer" and more complicated situations in which payment is made "with the intent to alter the system" (for example, when obtaining the removal, appointment, or election of particular officials, or changing the general orientation of the decision-makers even though no payment is made for any specific decision). *Id.* paras. 33, 34 at 10.

162. The Working Group Report stated that "[a]lthough national laws exist in most countries with respect to corrupt practices, they are not always effective against illicit payments in international commercial transactions because of the transnational ("across-the-frontier") element in the offence and its international implications." *Id.* para. 47, at 13. Furthermore, an international approach is necessary because national unilateral action may only have the effect of putting a country's firms at a "serious competitive disadvantage internationally." *Id.* para. 51, at 13.

163. Conclusions Reached by the Committee on an International Agreement on Illicit Payments During Its First Session Held at Headquarters From 29 Jan. to 9 Feb. 1979, U.N. Economic and Social Council, 2d Sess., U.N. Doc. E/AC.67/L.1 (1979). The Agreement was completed during the second negotiating session. International Agreement on Illicit Payments: Draft Final Clauses Prepared by the Secretariat, U.N. Economic and Social Council, 2d Sess., U.N. Doc. E/AC.67/L.2 (1979). The following countries were represented in either or both of the negotiating sessions: Argentina, Australia, Benin, Brazil, Belgium, Canada, Central African Empire, Colombia, Denmark, Dominican Republic, Egypt, Ethiopia, France, Gabon, West Germany, Greece, Holy See, India, Iran, Italy, Ivory Coast, Jamaica, Japan, Kenya, Madagascar, Mali, Mexico, Netherlands, Nigeria, Panama, Somalia, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Kingdom, United Republic of Cameroon, United States of America, Uruguay, Venezuela, Zaire and Zambia. For a summary of the negotiation sessions, see UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, REPORT OF THE COMMITTEE ON AN INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS ON ITS FIRST AND SECOND SESSIONS, U.N. Doc. E/1979/104 (1979) [hereinafter UNESCO, REPORT OF THE COMMITTEE]. The Draft Convention was

criminalize as “undue consideration” of public officials the “offering, promising, or giving” of illicit payments¹⁶⁴ in connection with international commercial transactions. In addition, the convention sought to criminalize the “soliciting, demanding, accepting or receiving, directly or indirectly, of any illicit payments” as “undue consideration”¹⁶⁵ in connection with an international commercial transaction.¹⁶⁶ The Draft Convention would have recognized that not all countries attribute criminal culpability to legal persons, such as corporations, and therefore would have imposed the requirement of “comparable deterrent effects.”¹⁶⁷ The Draft Convention also addressed mutual legal

broader in scope than the OECD Convention that was ratified more than two decades later.

164. The term “public official” was defined under Article 2(a) of the Draft Convention as:

any person, whether appointed or elected, whether permanently or temporarily who, at the national, regional or local level holds a legislative, administrative, judicial or military office, or who, performing a public function, is an employee of a Government or of a public governmental authority or agency or who otherwise performs a public function.

UNESCO, REPORT OF THE COMMITTEE, *supra* note 163, at 4.

165. It should be noted that there was some disagreement about the use of the word “undue,” as many felt that it could be interpreted to allow certain illicit payments if they were determined to be “due.” *Id.* at 9.

166. Article 1 of the Draft Convention provided that:

Each Contracting State undertakes to make the following acts punishable by appropriate criminal penalties under its national law:

(a) The offering, promising or giving of any payment, gift or other advantage by any natural person, on his own behalf or on behalf of any enterprise or any other person whether juridical or natural, to or for the benefit of a public official as undue consideration for performing or refraining from the performance of his duties in connexion [*sic*] with an international commercial transaction.

(b) The soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of his duties in connexion [*sic*] with an international commercial transaction.

Id. at 4.

167. Article 1(2) provided:

Each Contracting State likewise undertakes to make the [prohibited acts] punishable by appropriate criminal penalties under its national law when committed by a juridical person, or, in the case of a State which does not recognize criminal responsibility of juridical persons, to take appropriate measures, according to its national law, with the objective of *comparable deterrent effects*.

Id. (emphasis added).

assistance,¹⁶⁸ record keeping and accounting,¹⁶⁹ and extradition.¹⁷⁰ The Draft Convention contained two further provisions that remained controversial and were therefore bracketed to indicate a lack of consensus:¹⁷¹ Article 4, which dealt with jurisdiction,¹⁷² and Article 8, which dealt with voidability of contracts procured through illicit payments.¹⁷³ Article 4 of the Draft Convention incorporated a broad definition of jurisdiction that included recognition of nationality jurisdiction. This was unacceptable to many countries that did not recognize nationality jurisdiction.¹⁷⁴ Consensus, therefore, existed only with regard to the traditional territoriality principle of jurisdiction, *i.e.*, that illicit payments must have some contact with the territory of the nation asserting jurisdiction. Article 8 of the Draft Convention would have allowed the courts of signatory states to declare null and void any contract determined to be obtained as a result of an illicit payment.¹⁷⁵ The Draft Convention was adopted by the U.N. Economic and Social Council and forwarded to the United Nations General Assembly

168. Article 10 of the Draft Convention addressed the issue of mutual legal assistance with regards to both criminal investigations and proceedings. *Id.* at 7.

169. Article 6 of the Draft Convention, which briefly addressed the issue of record keeping and accounting, required that countries must ensure that enterprises within their jurisdiction maintain accurate books and records of payments made in international transactions. *Id.* at 6.

170. Article 11 of the Draft Convention stated that the agreement should be viewed as an extradition treaty. *Id.* at 8.

171. *Id.* at 5, 6.

172. *Id.* at 5.

173. *Id.* at 6.

174. “[D]elegations noted that their national legal systems did not accept the theory of jurisdiction based solely on nationality.” *Id.* at 12. Under the nationality theory of jurisdiction, countries assert jurisdiction solely based on the nationality of the actors, irrespective of any territorial contact even if all acts take place outside the territory of the country in question. The United States recognizes nationality jurisdiction and asserts jurisdiction over actions of U.S. persons, irrespective of where those acts take place. Many other nations do not recognize nationality jurisdiction and assert jurisdiction only based on the territoriality principle.

175. Notes to the Draft Convention provide:

Several delegations noted that article 8 would pose serious constitutional, legislative or juridical problems for them, especially since the article would affect the area of private law which was not otherwise within the scope of the agreement. Several other delegations expressed the view that the provisions contained in article 8 should pose no insurmountable problems, that the article provided a strong additional deterrent against corrupt practices, and that it should therefore be retained; those delegations were also of the opinion that the article should form an essential part of the agreement.

Id. at 13.

for consideration in 1980.¹⁷⁶ At that time India, on behalf of the "Group of 77" developing countries, introduced a draft decision entitled "Transnational Corporations."¹⁷⁷ The draft decision required the "United Nations Conference on an International Agreement on Illicit Payments to be convened *only after* the closure of the United Nations Conference on a Code of Conduct on Transnational Corporations."¹⁷⁸ This code of conduct, however, was strongly opposed by the North. As a result, neither the Draft Convention nor the Code of Conduct on Transnational Corporations was adopted.¹⁷⁹

(b) United Nations Declaration Against Corruption and Bribery in International Business and the International Code of Conduct for Public Officials

More than two decades after the passage of Resolution 3514 condemning "corrupt practices" and the submission of the Draft Convention,¹⁸⁰ the U.N. General Assembly adopted the *United Nations Declaration Against Corruption and Bribery in International Commercial Transactions*¹⁸¹ (hereinafter the Declaration) in 1996.

176. The draft was approved by the Economic and Social Council and forwarded to the General Assembly with the recommendation that a United Nations Conference be convened to adopt such an agreement in the last quarter of 1981. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, CONFERENCE TO CONCLUDE A CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS AND AN INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS at 3, 13, U.N. Doc. E/1980/96 (1980) [hereinafter UNESCO, CONFERENCE TO CONCLUDE A CODE OF CONDUCT]. The General Assembly took no action on the recommendation because a number of developing countries insisted that it be linked with the more general *Code of Conduct for Transnational Corporations* that was opposed by some Western states. *Id.* at 3. See also *Report of the Second Committee (Part I)*, U.N. Economic and Social Council, 35th Sess., Agenda Item 12, U.N. Doc. A/35/545 (1980) [hereinafter *Report of the Second Committee*]; 1 MULTINATIONAL CORPORATIONS LAW: THE U.N. & TRANSNATIONAL CORPORATIONS 48-49 (K.R. Simmonds ed., 1989).

177. UNESCO, CONFERENCE TO CONCLUDE A CODE OF CONDUCT, *supra* note 176, para. 14, at 3; *Transnational Corporations, India: Draft Decision*, U.N. Economic and Social Council, 2d Sess., Agenda Item 12, at 1, U.N. Doc. E/1980/C.1/L.22 (1980) [hereinafter *Transnational Corporations, India: Draft Decision*].

178. *Transnational Corporations, India: Draft Decision*, *supra* note 172, at 1. See also U.N. ESCOR, 6th Sess., Supp. No. 10, U.N. Doc. E/1980/40 (1980) (emphasis added).

179. Both documents were transmitted to the General Assembly for further consideration during its thirty-fifth session. Nonetheless, the General Assembly took no action on either document. *Report of the Second Committee*, *supra* note 176, para. 4(h), at 2.

180. See G.A. Res. 3514, *supra* note 155.

181. G.A. Res. 51/191, U.N. GAOR 2d Comm., 51st Sess., 86th plen. mtg., pmb., U.N. Doc. A/RES/51/191 (1997). In addition, in 1997, the Economic and Social Council of the United Nations recommended to the General Assembly the

The Declaration followed close on the heels of Resolution 51/59 (Action Against Corruption) which had annexed thereto the *International Code of Conduct for Public Officials* (the Code of Conduct).¹⁸² Both documents are non-binding, but they are reflections of the success of the current anti-corruption campaign and the post-Cold War anti-corruption discourse.¹⁸³

The Declaration addresses both passive and active bribery. The Declaration calls on Member States to "take effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions."¹⁸⁴ In particular, the Declaration calls for "effective enforcement of existing laws prohibiting bribery."¹⁸⁵ The Declaration urges Member States to criminalize bribery of foreign public officials "in an effective and coordinated manner"¹⁸⁶ and recommends many of the provisions found in the recently-adopted OAS and OECD Conventions (discussed *infra*). For example, it exhorts Member States to deny tax deductibility of bribes;¹⁸⁷ develop and maintain accounting standards and transparency;¹⁸⁸ develop and maintain business codes and

adoption of a draft resolution entitled *International Cooperation Against Corruption and Bribery in International Commercial Transactions*, E.S.C. Res. 1997/25, U.N. ESCOR, 36th pln. mtg., U.N. Doc. E/CN.15/1997.3 (1997); G.A. Res. 52/87, U.N. GAOR, 52d Sess., 70th pln. mtg., U.N. Doc. A/RES/52/87 (1998). Most recently, the Economic and Social Council of the United Nations has urged the Secretary-General to ask the Secretariat of the United Nations to update the United Nations manual on practice measures against corruption by incorporating recent developments and the "impact of recent multilateral initiatives." *Action Against Corruption*, E.S.C. Res. 1998/16, U.N. ESCOR, 44th plen. mtg., para. 1, U.N. Doc. E/INF/1998/INF/3/add.2 (1998).

182. G.A. Res. 51/59, U.N. GAOR 3d Comm., 51st Sess., 82d plen. mtg., annex, U.N. Doc. A/RES/51/59 (1997). In addition, the General Assembly adopted Resolution 50/225 on Public Administration and Development which primarily recognized the importance of effective public institutions to development and "[r]ecogniz[ed] that Governments in all countries should make their procedures transparent in order to avoid and combat all acts of corruption" G.A. Res. 50/225, U.N. GAOR, 50th Sess., 112th, plen. mtg., pmb., U.N. Doc. A/Res/50/225 (1996).

183. This success can be seen in the proliferation of multilateral agreements against corruption such as the *Inter-American Convention Against Corruption*, adopted by the Organization of American States on March 29, 1996; *Organization for Economic Cooperation and Development (OECD) on Combating Bribery of Foreign Public Officials in International Business Transactions* signed on December 17, 1997; the Convention on the fight against corruption involving officials of the European Communities; and the ongoing work of the Council of Europe on a convention against corruption.

184. G.A. Res. 51/191, *supra* note 181, annex, para. 1.

185. *Id.*

186. *Id.* annex, para. 2.

187. *Id.* annex, para. 4.

188. *Id.* annex, para. 5.

standards,¹⁸⁹ mutual legal assistance and cooperation,¹⁹⁰ and prohibit and punish illicit enrichment by public officials.¹⁹¹ At the same time, the Declaration recognizes the jurisdictional issues raised by the extraterritorial reach of anti-bribery laws applicable to foreign public officials, as well as the discomfort that such initiatives cause for countries sensitive to any international effort impinging on their sovereign rights.¹⁹²

To the extent that any Member State adopts it, the *Code of Conduct for Public Officials* (Code of Conduct) prohibits certain acts on the part of public officials; however, Member States are not required to adopt the Code of Conduct. The U.N. resolution to which it is annexed merely “recommends” the Code of Conduct to the Member States “as a tool to guide their efforts against corruption.”¹⁹³ The Code of Conduct adopts the principle that a public office is a position of trust, which implies a duty to act in the public interest, and that “the ultimate loyalty of public officials should be to the public interests of their country as expressed through the democratic institutions of government.”¹⁹⁴ In addition, the Code of Conduct requires public officials to be “attentive, fair and impartial” and not to provide “undue preferential treatment to any group or individual or improperly discriminate against any group or individual”¹⁹⁵ Furthermore, public officials may not use their official capacities for improper advancement of their own family or their family’s personal or financial interests, nor may they improperly use

189. *Id.* annex, para. 6.

190. *Id.* annex, para. 8.

191. *Id.* annex, para. 7.

192. This tension is seen in the last two paragraphs of the Declaration:

Actions taken in furtherance of the present Declaration shall respect fully the national sovereignty and territorial jurisdiction of Member States, as well as the rights and obligations of Member States under existing treaties and international law, and shall be consistent with human rights and fundamental freedoms;

Member States agree that actions taken by them to establish jurisdiction over acts of bribery of foreign public officials in international commercial transactions shall be consistent with the principles of international law regarding the extraterritorial application of a State’s laws.

Id. annex, paras. 11-12.

193. G.A. Res. 51/59, *supra* note 182, para. 2.

194. G.A. Res. 51/59, *supra* note 182, annex, para. 1. The wording of this paragraph of the Code of Conduct raises a whole host of issues: What is a public official as defined under national laws? Who determines what is in the public interest? What happens in countries where the government is not governed by democratic principles?

195. *Id.* annex, para. 3.

public monies, services or property.¹⁹⁶ The Code of Conduct targets the taking of bribes, directing public officials not to “solicit or receive directly or indirectly any gift or other favour that may influence the exercise of their functions, the performance of their duties, or their judgement [sic].”¹⁹⁷ The Code also recommends that other acts be prohibited to the extent consistent with domestic laws.¹⁹⁸

It must be noted that the non-binding Declaration and the Code of Conduct are not adequate substitutes for the Draft Convention. The continuing lack of a binding international anti-corruption convention at the level of the United Nations is a reflection of the North-South divide on the topic. This division itself is a continuing legacy of geographical morality and its attendant world view.

2. The Inter-American Convention Against Corruption (OAS Convention)

In 1996, the thirty-four members of the Organization of American States approved the *Inter-American Convention Against Corruption* (OAS Convention),¹⁹⁹ which aimed at eliminating bribery and corruption of government officials. Twenty-one of the thirty-four OAS member states signed the Convention on March 29, 1996 in Caracas, Venezuela.²⁰⁰ Later that year, the United States signed the Convention.²⁰¹ The OAS Convention was the first international legal framework to come into effect that criminalized transnational bribery, *i.e.*, active bribery of foreign public officials.²⁰² The OAS Convention is important, too, in that

196. *Id.* annex, paras. 4, 6.

197. *Id.* annex, para. 9.

198. The Code of Conduct encourages countries to adopt certain legislation and policies on duties of public officials, such as recognizing and avoiding conflict of interest situations, immediately declaring any “possible or perceived” conflict of interest, *id.* annex, para. 5; avoiding taking “improper advantage” of a public office after departure from that office, *id.* annex, para. 7; voluntary disclosure of personal assets as well as those of spouses and dependents, *id.* annex, para. 8; and refraining from political and other activity that would “impair public confidence in the impartial performance” of a public official’s functions, *id.* annex, para. 11.

199. Organization of American States, *Inter-American Convention Against Corruption*, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter OAS, *Inter-American Convention*].

200. *Id.*

201. Department of Legal Cooperation and Information, Organization of American States, *Inter-American Convention Against Corruption*, at <http://www.oas.org/juridico/english/sigs/b-58.html> (last visited Oct. 18, 2000) (displaying dates on which all countries signed the treaty).

202. As mentioned previously, until this time only the United States, under the FCPA, prohibited bribery of foreign public officials. *See supra* note 142.

it is the only anti-corruption convention adopted to date that is a North-South instrument and that covers both passive and active bribery.

The OAS Convention is a reflection of the current anti-corruption discourse that emphasizes the correlation between the rule of law, the promotion of democracy, and the suppression of corruption.²⁰³ As a general rule, the convention directs signatory states to develop and strengthen legal mechanisms to “prevent, detect, punish and eradicate” official corruption.²⁰⁴ In fact, the OAS Convention is “not grounded principally on trade or economic development concerns, but on morality and the need to preserve and protect democratic institutions.”²⁰⁵ Interestingly, this means that the OAS Convention explicitly recognizes the moral dimension of corruption. This is a departure from the current trend which emphasizes the economic dimension of the issue. The OAS Convention prohibits the following “Acts of Corruption”: the solicitation or acceptance of any article of monetary value or other benefit, such as a gift, by a government official; the offering or granting of any such article or benefit; any act or omission by a government official in the discharge of his official duties for the purpose of illicitly obtaining benefits for himself or for a third party; the fraudulent use or concealment of property derived from any of the Acts of Corruption; and participating in or conspiring to commit any of the Acts of Corruption.²⁰⁶ The OAS Convention also allows countries to recognize their own additional Acts of Corruption if these are agreed to among two or more signatory states.²⁰⁷ The OAS Convention requires states to adopt “the necessary legislative or other measures to establish as criminal offenses” the solicitation or acceptance, directly or indirectly, of bribes by government officials.²⁰⁸ Countries are required to enact the necessary laws to facilitate cooperation among themselves under the OAS

203. The preamble to the OAS Convention states: “CONSIDERING that representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance.” OAS, Inter-American Convention, *supra* note 199, pmbl., at 727.

204. *Id.*

205. Gantz, *supra* note 142, at 477.

206. OAS, Inter-American Convention, *supra* note 199, art. VI(1)(a)-(e), at 729.

207. *Id.* art. VI (2), at 729.

208. *Id.* art. VII, at 730. Although the Convention does not use the word “bribe” we will use it in this article for sake of brevity to apply to “any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity” *Id.* art. VI(1)(a), at 729.

Convention²⁰⁹ and to establish jurisdiction over the offenses it lists. Specifically, the OAS Convention requires countries to recognize both territoriality²¹⁰ and nationality²¹¹ as bases for jurisdiction over these offenses.²¹² Signatory states also are required to consider the offenses listed under the OAS Convention to be “extraditable offenses”²¹³ and to consider the OAS Convention an “extradition treaty.”²¹⁴

Under the OAS Convention, a signatory state is required to prohibit “Transnational Bribery”²¹⁵ and “Illicit Enrichment”²¹⁶ “[s]ubject to its Constitution and the fundamental principles of its legal system.”²¹⁷ Should a state decide to establish both transnational bribery and illicit enrichment as offenses under its domestic laws, then these offenses would be deemed “Acts of Corruption” under the OAS Convention.²¹⁸ If, however, a state declines to adopt either or both provisions because of constitutional or other legal constraints, then the OAS Convention requires the state to provide assistance and

209. *Id.* art. VII, at 730.

210. Article V(1) states that: “Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense in question is committed in its territory.” *Id.* art V(1), at 729.

211. Article V(2) states that: “Each State Party may adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense is committed by one of its nationals or by a person who habitually resides in its territory.” *Id.* art. V(2), at 729.

212. The OAS Convention requires countries to establish jurisdiction over an offense when the offense in question is (a) committed in its territory; (b) committed by one of its nationals or by a person who habitually resides in its territory; (c) over an alleged criminal when that person is not extradited on the ground of nationality. *Id.* art. V(1)-(3), at 729. The OAS Convention also allows any other jurisdictional basis recognized under domestic law. *Id.* art. V(4), at 729.

213. *Id.* art. XIII(2), at 731.

214. Extradition, however, is subject to the laws of the Requested State or by applicable extradition treaties, including the grounds on which the Requested State may refuse extradition. *Id.* art. XIII(3)-(6), at 731.

215. Article VIII requires each State, “[s]ubject to its Constitution and the fundamental principles of its legal system” to prohibit and punish the “offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory and business domiciled there” of any article of monetary value, or other benefit, gift, favor, etc. to a foreign government official. *Id.* art. VIII, at 730.

216. The OAS Convention recognizes the principle of “Illicit Enrichment” and requires a state to “take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that [he] cannot reasonably explain in relation to his lawful earnings during the performance of his functions.” *Id.* art. IX, at 730.

217. *Id.* arts. VIII, IX, at 730.

218. *Id.* art. VI, at 729.

cooperation to other signatory states in their prosecution of the offense insofar as its laws permit.²¹⁹

In addition, the OAS Convention contains provisions that are not mandatory but merely are recommended to signatory states; some commentators have termed these “aspirational.”²²⁰ Examples include Article XI (Progressive Development), which recommends that states “consider” establishing additional offenses as “Acts of Corruption” under the Convention by establishing them as offenses under their domestic laws,²²¹ and Article III (Preventive Measures), which requires States to “consider the applicability of measures” to strengthen their own domestic institutions.²²²

The OAS Convention, like the OECD Convention, *infra*, is not self-executing; it is subject to ratification and implementation. Unlike the OECD Convention, the OAS Convention has not been ratified to date by the United States, nor has it been implemented by any of the states that have ratified it. One of the problems with implementing the OAS Convention is that its scope is so broad that it may necessitate changes in many different areas of the law. Another drawback of the OAS Convention is that, unlike the OECD Convention, it contains no deadline for implementation.

In sum, the OAS Convention is much more ambitious than the OECD Convention, and its scope is much broader because it covers both active and passive bribery. In addition, it has many more “aspirational” provisions than the OECD Convention and there is less reliance on the domestic laws of the signatory states; rather, the focus is on reforming the laws of the signatory states. This is, of course, partly because the signatories of the OECD Convention are mostly developed industrialized states, while the OAS Convention includes many more developing nations that, as

219. *Id.* arts. XIV-XVI, at 732.

220. Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 247 (1998). See generally Conference, *The Experts Roundtable: A Hemispheric Approach to Combating Corruption*, 15 AM. U. INT'L L. REV. 759 (2000).

221. OAS, Inter-American Convention, *supra* note 199, art. XI(1), at 730. These additional Acts of Corruption cover the same types of actions by government officials that are addressed in the U.N. Code of Conduct for Public Officials. G.A. Res. 51/59, *supra* note 182. In addition, the OAS Convention recommends establishing as an Act of Corruption “[a]ny act or omission by any person who . . . seeks to obtain a decision from a public authority whereby he illicitly obtains for himself or for another person any benefit or gain, whether or not such act or omission harms State property.” OAS, Inter-American Convention, *supra* note 199, art. XI(1)(c), at 731.

222. OAS, Inter-American Convention, *supra* note 199, art. III, pmb., at 728.

we have discussed in this Article, suffer from the “stigma” of corruption.

3. Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD’s involvement in the anti-corruption campaign dates back to 1976, when its members adopted the Declaration on International Investment and Multinational Enterprises²²³ and the OECD Guidelines against bribery annexed to the Declaration.²²⁴ The OECD Guidelines stated that enterprises should “not render—and they should not be solicited or expected to render—any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office.”²²⁵ For the two decades that followed, OECD members could not reach consensus on a convention criminalizing bribery of foreign government officials.

In 1994, the OECD adopted a Recommendation on Bribery in International Business Transactions (the Recommendation).²²⁶ The Recommendation called upon member countries to take “effective measures to deter, prevent and combat bribery of foreign public officials in connection with international business transactions” and instructed the OECD Committee on International and Multilateral Enterprises (CIME) and its Working Group on Bribery in International Business Transactions (the Working Group) to monitor the implementation of the Recommendation.²²⁷ Pursuant to its mandate, CIME proposed, and the OECD adopted, a Revised Recommendation on May 23,

223. Declaration on International Investment and Multinational Enterprises, June 21, 1976, 15 I.L.M. 967.

224. *Id.* “Observance of the guidelines is voluntary and not legally enforceable. However, they should help to ensure that the operations of these enterprises are in harmony with national policies of the countries where they operate and to strengthen the basis of mutual confidence between enterprises and states.” *Id.* at 970.

225. *Id.* at 972.

226. *Recommendation of the Council of the OECD on Bribery in International Business Transactions*, OECD Doc. SG/PRESS (94)36 (1994).

227. *Id.* The OECD Working Group on Bribery in International Business Transactions held a special meeting in November 1996 with private sector and non-governmental organizations, including the ICC and TI, in order to obtain their views and reactions to the OECD anti-corruption activities in advance of the review of the 1994 Recommendation. A number of international organizations including the Council of Europe, the OAS, the IMF, and the World Bank also participated as observers.

1997.²²⁸ The CIME report encouraged adoption of anti-bribery laws similar to the United States' FCPA.²²⁹ The Revised Recommendation also urged "that Member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements"²³⁰

Eventually, on December 17, 1997, the twenty-nine members²³¹ of the OECD, along with five non-members,²³² signed the OECD Convention.²³³ The Convention came into effect on February 15, 1999, following Canada's deposit of the instrument of ratification.²³⁴ The OECD Convention is not self-

228. Revised Recommendation of the Council on Combating Bribery in International Business Transactions, May 23, 1997, 36 I.L.M. 1016 [hereinafter Revised Recommendation]. Prior to this, the OECD had adopted a recommendation regarding the tax deductibility of bribes in 1996. *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials*, OECD Doc. DAF/IME/BR(97)20 (1998).

The Revised Recommendation preserved the general undertaking of the 1994 text to combat bribery of foreign public officials but, in addition, elaborated on specific commitments to the criminalization of bribery of foreign public officials, accounting, and public procurement based on the conclusions of the Working Group. Revised Recommendation, *supra*, art. II(i), (iii), (v), at 1019. The most important contribution of the Revised Recommendations, however, was the inclusion of an annex entitled *Agreed Common Elements of Criminal Legislation and Related Action*. *Id.* annex, at 1023. These Agreed Common Elements included a definition of bribery and foreign public official, as well as the ancillary elements and offenses that should be included in a model law. *Id.*

229. The CIME report noted that the FCPA addresses precisely the type of bribery that the Revised Recommendation addresses. *OECD Actions to Fight Corruption*, § I, para. 5, OECD Doc. C/Min(97)17 (May 26-27, 1997).

230. Revised Recommendation, *supra* note 228, art. III, at 1019.

231. Austria, Australia, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, [South] Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. OECD, *Membership*, at <http://www.oecd.org/about/general/member-countries.htm> (last visited Oct. 1, 2000).

232. Argentina, Brazil, Bulgaria, Chile and the Slovak Republic. OECD, *Welcome to the OECD Anti-Corruption Unit*, at <http://www.oecd.org/daf/nocorruption/index.htm> (last visited Sept. 29, 2000).

233. *Id.* See also *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD Doc. DAF/IME/BR(97)16/FINAL (1997) [hereinafter *Convention on Combating Bribery*].

234. Under the ratification provision of the OECD Convention, the Convention "enter[ed] into force on the sixtieth day following the date upon which five of the 10 countries with the largest share of OECD exports, representing at least 60% of the combined total exports of those 10 countries, have deposited their instruments of acceptance, approval, or ratification." OECD, *Welcome to the OECD Anti-Corruption Unit*, *supra* note 232. Canada deposited its instrument on December 17, 1998, thereby becoming the fifth country in this category to do so. *Id.* Other countries that had already deposited instruments of ratification of the

executing, and it does not include a model law. Rather, it provides only rough guidelines for its implementing legislation. The aim is that the signatories, by national implementation, will provide clear and detailed rules that are functionally equivalent to one another in punishing and deterring bribery in international business.²³⁵ In fact, the Commentaries to the OECD Convention provide that “[t]his Convention seeks to assure a *functional equivalence* among the measures taken by the Parties to sanction bribery of foreign public officials, *without requiring uniformity or changes in fundamental principles of a Party’s legal system.*”²³⁶ In view of the functional equivalency approach, there is little the OECD Convention requires Member States to do in their implementing legislation other than criminalize bribery of foreign public officials.²³⁷

There are only five provisions that such implementing legislation must contain in order to comply with the terms of the OECD Convention. First, such legislation must criminalize “active bribery”²³⁸ of foreign public officials for a business purpose. Specifically, Article 1 requires signatory states to:

[T]ake such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether

OECD Convention included Iceland, Japan, Germany, Hungary, the United States, Finland, and the United Kingdom. *Id.*

235. *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, cmt. 2, OECD Doc. DAFFE/IME/BR(97)20 (1998) [hereinafter *Commentaries on the Convention on Combating Bribery*].

236. *Id.* (emphasis added).

237. Even with regard to this requirement, however, the OECD Convention allows for diversity of implementation by nationals and does not necessarily require duplication of the FCPA by other signatory nations. In fact, under the OECD Convention, “a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official” and a statute like the FCPA that is specifically limited to the bribery of foreign public officials both could be in compliance with the Convention. *Id.* cmt. 3.

238. The *Commentaries on the Convention on Combating Bribery* provide:

This Convention deals with what, in the law of some countries, is called “active corruption” or “active bribery,” meaning the offence committed by the person who promises or gives the bribe, as contrasted with “passive bribery,” the offence committed by the official who receives the bribe. The Convention does not utilise the term “active bribery” simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

Id. cmt. 1.

directly or through intermediaries, to a foreign public official,²³⁹ for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage²⁴⁰ in the conduct of international business²⁴¹

Second, the OECD Convention *requires* signatories to ensure that their implementing legislation makes the amount of the bribe, as well as any proceeds or property resulting from the bribe, subject to seizure or sanctions of comparable effect.²⁴² Third, the implementing legislation must establish jurisdiction over the bribery of foreign public officials when the offense is committed in whole or in part in that nation's territory.²⁴³ If the country's legislation recognizes nationality jurisdiction at all, nationality jurisdiction must also be recognized with regard to bribery of foreign public officials.²⁴⁴ Fourth, the country must assure extradition or prosecution of its nationals for the bribery of a foreign public official, if not otherwise available.²⁴⁵ Fifth, signatories must provide a range of penalties for bribery of foreign public officials "comparable to that applicable to . . . bribery" of domestic public officials.²⁴⁶ In those countries where criminal

239. The OECD Convention defines a "foreign public official" as "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation." *Convention on Combating Bribery, supra* note 233, art. I (4)(a). Unlike the FCPA, political party officials; persons considered for election, appointment, or in opposition; and individuals and entities in the private sector are excluded from the definition of "foreign public official." *Compare id. with* 15 U.S.C. § 78dd-1(a) (1997). The term "public enterprises" as used in the OECD Convention includes "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise dominant influence." *Commentaries on the Convention on Combating Bribery, supra* note 235, cmt. 14. A dominant influence over government is *de facto* established "when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board." *Id.* Under the OECD Convention, so long as a "public enterprise," as defined, receives some sort of governmental assistance such as preferential subsidies, the officials of that public enterprise are deemed to perform a public office. *Id.* cmt. 15.

240. The Commentaries provide that "other improper advantage" refers to "something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements." *Commentaries on the Convention on Combating Bribery, supra* note 235, cmt. 5.

241. *Convention on Combating Bribery, supra* note 233, art. I, para. 1.

242. *Id.* art. 3.

243. *Id.* art. 4, para. 1.

244. *Id.* art. 4, para. 2.

245. *Id.* art. 10, para. 3.

246. *Id.* art. 3, para. 1.

liability is not applicable to legal persons, the implementing legislation must ensure that such legal persons are subject to "effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions . . ." ²⁴⁷ Beyond the foregoing, the OECD Convention contains only non-mandatory provisions, that is, provisions that should be implemented only to the extent allowed under domestic laws. ²⁴⁸ As of June 2000 twenty-three countries had passed national legislation adopting the OECD Convention and had deposited these laws with the OECD Secretariat. ²⁴⁹

The OECD Convention secures the role of the OECD in implementing and monitoring the Convention by requiring the notification of the Secretary General of the OECD in cases of conflict of jurisdiction, mutual legal assistance, and extradition, as well as making the office of the Secretary-General a "channel of communication for these matters" among countries. ²⁵⁰ In addition, the OECD Convention requires signatory states to cooperate in monitoring its full implementation through the OECD Committee on International Investment and Multinational Enterprises (CIME) Working Group on Bribery in International Business Transactions. ²⁵¹

CIME has dedicated itself to monitoring the ratification and implementation of the Convention in two distinct phases, the first of which "assesses [the] conformity of implementing legislation

247. *Id.* art. 3, para. 2.

248. For example, Article 1 requires signatories to make attempt and conspiracy to bribe a foreign public official a criminal offense "to the same extent as attempt and conspiracy to bribe" a domestic public official is a crime under the national laws of the signatory. *Id.* art. 1, para. 2. Article 2 provides that "[e]ach Party shall take such measures as may be necessary, *in accordance with its legal principles*, to establish the liability of legal persons for the bribery of a foreign public official." *Id.* art. 2 (emphasis added). Commentaries to Article 2 further elaborate this tolerance for diversity in legal systems: "In the *event* that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility." *Commentaries on the Convention on Combating Bribery*, *supra* note 235, cmt. 20 (emphasis added).

249. Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Japan, Korea, Mexico, Norway, Slovak Republic, Spain, Sweden, Switzerland, United Kingdom and the United States. See Anti-Corruption Unit, Organization for Economic Co-operation and Development, *Steps Taken and Planned Future Actions by Each Participating Country to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, at <http://www.oecd.org/daf/nocorruption/annex2.htm> (last modified Oct. 13, 2000). The United States implemented the OECD Convention through the International Anti-Bribery and Fair Competition Act of 1998, which amended the Foreign Corrupt Practices Act. H.R. 4353, 105th Cong. (1998).

250. *Convention on Combating Bribery*, *supra* note 233, art. 11.

251. *Id.* art. 12.

with the Convention.”²⁵² As part of phase one, the Working Group has composed reports and evaluations²⁵³ on each of the countries that have ratified the Convention and “have legislation to implement the Convention in national law.”²⁵⁴ Summarizing the results of these reports, the Working Group has concluded that “[i]n general, countries have made laudable efforts to ensure that national implementing legislation satisfies the obligations of the Convention” and that “there is overall compliance with the Convention’s obligations in the great majority of countries.”²⁵⁵

The second phase of the OECD monitoring process will “focus on application of laws in practice,”²⁵⁶ as well as the correction of certain deficiencies in the implementation process defined during the first phase.²⁵⁷ It is the intention of the Working Group to “soon launch Phase 2 monitoring to study the structures in place to enforce the laws and rules implementing the Convention and to assess their application in practice.”²⁵⁸ This is especially important given the diversity of implementing legislation allowed under the “functional equivalency” principle.²⁵⁹

252. *Report by the CIME: Implementation of the Convention on Bribery in International Business Transactions and the 1997 Revised Recommendation*, para. 2, at 3, OECD Doc. C/MIN(2000)8 (June 21, 2000) [hereinafter *Report by the CIME*].

253. Anti-Corruption Unit, Organization for Economic Cooperation and Development, *Country Reports* (June 27, 2000), available at <http://www.oecd.org/daf/nocorruption/report.htm> (last modified Oct. 5, 2000). The *Report by the CIME* provides:

The principal objective of Phase 1 of the monitoring procedure is to evaluate whether the legal texts through which participants implement the Convention meet the standards set by the Convention. Phase 1 includes: (i) preparation of the consultation in the Working Group, including a reply to a questionnaire by the examined country and preparation of a provisional report on the country’s performance; (ii) consultation in the Working Group[;] (iii) adoption by the Working Group of a report, including an evaluation, on the examined country’s performance.

Report by the CIME, supra note 252, para. 9, at 7.

254. *Report by the CIME*, supra note 252, para. 5, at 6. See also *id.* para. 10, at 4 (“[T]his year, in response to a growing number of inquiries from non-members, the Working Group adopted procedures for participation in the Working Group and the Convention.”).

255. *Id.* para. 3, at 3.

256. *Id.* para. 2, at 3.

257. *Id.* para. 3, at 3.

258. *Id.* para. 4, at 3.

259. See *id.* para. 16, at 9 (mentioning that potential problems include “exceptions to the scope of application of the offence of bribery of foreign public officials which were not foreseen by the Convention and defences which go beyond general defences in penal codes and which could be used to circumvent liability by a defendant.”).

B. *Strengths and Weaknesses of the Anti-Corruption Initiatives*

The ratifications of the OAS and OECD Conventions are a tribute to the success of the current anti-corruption discourse, which has rejected, at long last, the rule of geographical morality. The governments of the North, by criminalizing the payment of bribes by their own nationals, including multinational corporations, have finally acknowledged that their nationals are also corrupt and responsible in part for corruption in the South. The OAS Convention is significant in that it successfully incorporates voices from the South into the current anti-corruption discourse. This is significant given the failure of main North-South anti-corruption initiatives, such as the Draft Convention. The failure of that Draft Convention can legitimately be attributed primarily to the legacy of the rule of geographical morality, including the distrust it engendered between the North and South.²⁶⁰ The ratification of the OAS Convention indicates that the current discourse has been able to achieve a North-South consensus, at least in the Americas.

One should not overestimate the success, however, of the OECD and OAS Conventions in overcoming the legacy of the rule of geographical morality. Both conventions are regional initiatives, not global ones.²⁶¹ The United Nations, which is representative of the nations around the world, has been able to issue only a declaration against corruption and a Code of Conduct for Public Officials, neither of which is binding. In addition, there are real concerns about whether the OECD and OAS Conventions can be successfully implemented. The ability of the OECD Convention to overcome the rule of geographical morality will depend on the successful implementation of the principle of "functional equivalency," a difficult task. More important, to date, the OAS Convention has not been implemented by any of its signatories. Of particular concern is the U.S. refusal to ratify it, which may diminish the motivation of other signatories to implement its provisions. This refusal threatens the viability of the OAS Convention as the only North-South convention against corruption.²⁶²

260. The Group of 77 pushed for the adoption of a Code of Conduct for transnational corporations because for centuries they had been victims of the rule of geographical morality.

261. It should be noted, however, that both Conventions are open to adoption and ratification by non-members.

262. Unfortunately, the opposition to the OAS Convention in the U.S. Congress threatens this important North-South agreement. To date, the OAS Convention has not been ratified by the United States. Senator Jesse Helms,

It should also be mentioned that the OAS Convention is a reflection of a North-South consensus in the Americas. Remarks by government officials from other regions of the South, however, indicate that the legacy of the rule of geographical morality is alive and well in the form of distrust that such a legacy engenders. For example, in 1996 the Indonesian Trade and Industry Minister stated that any attempts to introduce corruption into the agenda of the WTO [World Trade Organization] "would be detrimental to the functioning of the WTO"263 Also that year, the Malaysian Prime Minister, Dr. Mahathir Mohamad, requested that the WTO Ministerial meeting in Singapore exclude corruption and other non-trade issues from the Ministerial agenda.²⁶⁴ This sentiment is echoed by Cesar Bautista, the Philippine Undersecretary for Trade and Industry that same year, who stated that the problem of corruption can be adequately addressed by a "simple code of conduct" among the United States, the European Union and Japan—the "top three international investors."²⁶⁵ Mr. Bautista objected to the current anti-corruption discourse by stating that "globalization has created a global economy[;] [h]owever, it has not removed the nation states separated by unique cultures and traditions which must be respected by individual governments."²⁶⁶

C. *Overcoming the Legacy of Geographical Morality?*

The current anti-corruption discourse cannot escape the legacy of "geographical morality" that was the hallmark of colonial rule. The principle of geographical morality was used by the moralists during the colonial era to justify acts of corruption in the colonies. During the colonial period, Europeans, such as Warren Hastings, who habitually engaged in corrupt acts, including bribery and extortion, argued that they were compelled to act corruptly because of the low and immoral standards of

Chair of the Committee on Foreign Relations, has stated that he cannot support the OAS Convention because "the OAS Convention does not rise to the same level of protection found in U.S. law or required by the OECD treaty." Letter from Jesse Helms, Chairman, United States Senate Committee on Foreign Relations, to Michael Hughes (Aug. 11, 1999) (on file with author).

263. Richard T. DeGeorge, *Ethics, Corruption, and Doing Business in Asia*, ASIA PACIFIC J. ECON. & BUS., June 1997, at 39.

264. Chua Yew Kay, PM: *Don't Use WTO Meeting to Discuss Other Issues*, THE STAR ONLINE, Nov. 13, 1996, at <http://st-www.cs.uiuc.edu/~chai/berita/961103-961203/0050.html> (last visited Oct. 19, 2000).

265. Gary G. Yerkey, *Philippines Rejects U.S. Proposal for WTO Accord on Bribery, Corruption*, BNA INT'L TRADE DAILY, May 22, 1996, available at LEXIS, Secondary Legal Library, BNAITD File.

266. *Id.*

conduct in the colonies.²⁶⁷ On the other hand, during the post-colonial period, relying on the revisionist discourse on corruption, the private interests in the North that engaged in bribery in the South defended their acts, if at all, in the name of development and tolerance for local cultures and values. As a result, from the colonial period to the present, the corruption discourse has been used primarily to justify exploitation of the South by the North, first by colonial administrations and then by multinational corporations.

This conclusion is supported by observations of George Moody-Stuart, an international businessman with thirty years of experience in the area, who recently wrote:

Grand corruption²⁶⁸ tends to be seen by people in the North, who are involved in overseas development, as something with which they have to live in the South. *Men whose worst crimes in their own countries may be speeding on a motorway or carrying an extra bottle through customs find themselves tacitly (or even actively) conniving in dishonest acts involving, in some cases, millions of dollars. Not surprisingly, they see the countries of the South as being responsible for this nastiness . . .*²⁶⁹

This comment is strikingly reminiscent of the observation Burke made in 1788 about Warren Hastings and others like him, which inspired Burke's formulation of "geographical morality."²⁷⁰

Similarly, the rule of geographical morality was supported as recently as 1994 by Lord Young, the former Secretary of State for Trade and Industry of the United Kingdom and, at the time, Chairman of Cable & Wireless PLC:

The moral problem for me is simply jobs. Now when you're talking about kick-backs, you're talking about something that's illegal in this country, and that, of course, you wouldn't dream of doing. I haven't even heard of one case in all my business life of anybody in this country doing things like that. But there are parts of the world I've been to where we all know it happens. And if you want to be in business you have to do—not something that is morally wrong, because in some parts of the world . . . that's not immoral or corrupt. It is very different from our practice and would be totally wrong in our environment but wasn't wrong in their environment; and what we must be very careful of is not to insist that our practices are followed everywhere in the world.²⁷¹

267. See *supra* notes 31-41 and accompanying text.

268. George Moody-Stuart defines "grand corruption" as "large-scale bribery of ministers and officials" usually at the highest level of government. MOODY-STUART, *supra* note 6, at v.

269. *Id.* at 53-54 (emphasis added).

270. Burke, *supra* note 7, at 447.

271. MOODY-STUART, *supra* note 6, app.3, at 93 (citing *Talking Politics* (BBC radio broadcast, Apr. 1994)) (emphasis added).

As the words of Lord Young indicate, centuries after the trial of Warren Hastings, a British politician can still invoke the principle of "geographical morality," justified this time by unwillingness to impose "Western values" on the rest of the world and by respect for other cultures and value systems.

Viewed in a historical context, then, it is understandable that the South should approach the current crusade against transnational corruption and bribery with skepticism and ask the following questions: How is the current anti-corruption discourse different from the old moralist and revisionist discourses on corruption? Will the current anti-corruption discourse, once again, help the North exploit the South? Is the current anti-corruption campaign really aimed at solving the problem of corruption in the South, or is it another attempt by the North to gain an economic advantage?

Those involved in the anti-corruption campaign must be ready to answer such questions. The current anti-corruption discourse can distinguish itself from the past by arguing that it has rejected the principle of geographical morality and its attendant worldview. A tangible expression of rejection of that principle is the ratification of the OECD Convention, which would require companies and legal persons in the North to apply the same standard of behavior to their dealings in the South as they do at home.

V. CONCLUDING REMARKS

The impeachment and acquittal of Warren Hastings and its aftermath serve as a concrete manifestation of the historical link between the corruption discourse and colonial rule. Warren Hastings, who had invoked the principle of geographical morality to justify acts of corruption including bribery, was acquitted of all charges. He continued to live a respectable life in England and was even awarded an honorary doctorate from Oxford University in 1813.²⁷² The Indians who had served under him, however, were not as fortunate. They were systematically purged from positions of authority within the Company and in the colonial administration as part of the anti-corruption reform movement. While many Englishmen who had served under Hastings were also removed from their positions of authority on charges of corruption, this did not preclude other Europeans, including

272. NOONAN, *supra* note 21, at 393. The only tangible punishment that Hastings may have suffered, it has been argued, was that he "never received the peerage his position as governor-general led him to expect." *Id.* at 416.

other Englishmen, from serving in the same positions.²⁷³ This was mainly a result of the view that an Englishman's corrupt acts were not seen as integral to his racial, ethnic or cultural make up.²⁷⁴ In other words, by adhering to a racist world view the post-Hastings anti-corruption reforms perpetuated the rule of geographical morality instead of condemning it.

The revisionists attempted to overcome the legacy of geographical morality by rejecting the moral angle of corruption, even arguing that what we call corruption is nothing more than "violation[s] of Western norms."²⁷⁵ Unfortunately, this approach failed to separate the anti-corruption discourse from its colonial heritage. The amorality of the revisionist approach to corruption allowed transnational corporations and others to hide behind cultural relativism in order to justify their involvement in corrupt acts, including bribery of public officials in the former colonies.

Current scholarship has rejected the revisionist hypothesis discussed in Part II. As stated in Part IV, recent multilateral initiatives against corruption reject cultural relativism. These initiatives and other assertions of universality, however, cannot overcome the deep-rooted distrust that has been created and sustained by the historical link between the topic of corruption—including anti-corruption discourse—and the continued exploitation of the South by the North. In order for the current anti-corruption movement to succeed, it must not perpetuate the legacy of the rule of geographical morality by adhering to its divisive and racist world view. The first step toward that goal is developing an awareness of the historical context within which the current anti-corruption activists must operate, an awareness that this Article has hoped to promote.

273. 2 SPEAR, *supra* note 65, at 95 (Cornwallis was of the view that his own countrymen could also be corrupt, but he saw a cure for the English whereas he could not see one for the Indians.)

274. *Id.* See generally 5 THE CAMBRIDGE HISTORY OF INDIA, *supra* note 63, at 433-61.

275. Caiden & Caiden, *supra* note 76, at 304.