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Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy

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Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy

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I. INTRODUCTION

While every nation in the world proscribes the bribery of domestic government officials,¹ very few of these nations have extended the prohibition to similarly condemn the bribery of foreign public officials.² In many countries, the practice of "transnational bribery"³ has become a routine aspect of conducting business in foreign lands. Whether bribes are given in response to official demands or in an attempt to derive a competitive advantage, businesses frequently view the practice as a prerequisite to securing lucrative contracts in foreign states.

Corruption involving public officials has reached new proportions in recent years. The end of the Cold War, the spread of democracy, and growing deregulation and privatization have fostered a climate conducive to the increasing incidence and magnitude of corrupt business practices.⁴ The transition to

1. See Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 318-21 (1997) (noting that corruption is universally proscribed by national laws and is likewise condemned by each of the major religious and moral schools of thought).

2. Making bribe payments to foreign officials is legally condoned in every country, except the United States and Sweden. See *id.* at 349.

3. This term will be used throughout this Note to refer to the practice of bribing foreign officials.

4. See Robert S. Leiken, *An End to Corruption*, THE WASH. POST, Apr. 16, 1996, at A15 (stating that "[b]ribery and corruption are no longer unmentionables

market economies in Eastern Europe and the former Soviet Union summarily removed all economic restraints, and corruption and bribery that were previously policed now often go unchecked.⁵ In addition, since the economies of countries such as China and Russia have opened up to international trade and foreign investment, corruption has taken on new dimensions.⁶

As bribery has become increasingly pervasive, the resultant economic and political costs have risen dramatically, particularly in developing countries undergoing political and economic reform.⁷ Transnational bribery leads to artificially inflated prices and rewards corruption and inefficiency. Government procurement decisions based on the desire for personal enrichment, rather than on considerations of value and quality, divert scarce resources from their optimal uses. As trade barriers are eliminated and global competition becomes increasingly intense, pervasive corruption threatens the economic growth of developing countries and discourages desperately needed foreign investment. Developing countries that have only recently adopted democratic institutions suffer from political instability, and public perceptions of increased corruption and declining standards of living may lead to a backlash against democracy and a return to prior forms of government.⁸

in international diplomacy); see also Robert S. Leiken, *Controlling the Global Corruption Epidemic*, FOREIGN POLY Winter 1996-1997, at 55, 61-65 (stating that corruption is one of the byproducts of the Cold War); Agnieszka Klich, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 121 (1996) (stating that a negative side-effect of the confusion and dislocation caused by the move to market-based economies in Eastern and Central Europe is the rise of corruption in business practices).

5. See *Eastern Europe Launches Purge on Ports Corruption*, LLOYD'S LIST INT'L, Nov. 6, 1997, at 5, available in 1997 WL 4466561; see also Beverly 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, 227 (1996), "With the collapse of communism, the great presence of the state has vanished in the East, leaving every little official who holds a portion of power tempted to exploit it for his own personal gain." (quoting Roberto Lamponi).

6. See John Mason et al., *Goodbye Mr. 10%: John Mason and Guy de Jonquie'res on the Hurdles Facing Efforts to Eliminate Bribery and Corruption in International Business*, FIN. TIMES (London), July 22, 1997, at 15, available in LEXIS News Library, FINTME File.

7. See 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, 4 (1995) ("[T]here is no disputing that today's global business market is riddled with corruption.").

8. See Ann Elizabeth Mayer, *Symposium: Law and Ethic in Emerging Market*, 18 U. PA. J. INT'L ECON. L. 1153, 1154 (1997).

The development prospects of many countries may be seriously compromised where their schemes for managing the multifarious legal

As the cost of business bribes becomes increasingly expensive, the world community has become less willing to accept bribery as an inherent element of "business as usual." International organizations, such as the World Trade Organization, the United Nations, and the OECD, have begun to institute reforms aimed at curbing the practice of transnational bribery. Regional organizations and multilateral lenders have also begun to address the problem. However, recent initiatives against transnational corruption have two common weaknesses—they lack enforceability and they do not address corruption on a global scale.⁹

Anti-corruption movements around the world have set the stage for a comprehensive attack on transnational bribery. The Organization of American States adopted the first convention to criminalize transnational bribery in 1996, and efforts by the OECD to address the issue culminated in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was signed by the representative Ministers in November 1997, and is expected to enter into force by 1999. While these developments are promising, they offer only a partial solution to a complex problem. Transnational bribery will persist until a comprehensive anti-corruption strategy, based on an understanding of the underlying causes of corruption, is implemented.

Part II of this Note will examine the prevalence of transnational bribery in the context of international trade. It then will discuss the negative impact of transnational bribery on national economies, political structures, and international trade. Part III will examine the debilitating impact of transnational bribery on developing countries. The threat to future economic growth, and the potential to create a backlash against democracy are highlighted. Part IV will provide an overview of recent efforts to control and proscribe transnational

dimensions of difficult transitions prove deficient. They face urgent needs to accomplish difficult tasks, including the following: revising laws to fit rules of international institutions such as the World Trade Organization ("WTO"), devising suitable corporate laws, dealing with the delicate problems of moving from state ownership to a regime of private ownership, establishing capital markets and a regime of protection for intellectual property, readjusting subsidies and social welfare policies, and also finding mechanisms to curb criminality and exploitative practices. As yawning gaps widen between the haves and the have-nots, strains on the social fabric may lead to destabilizing crises. Realistically, capital importing countries cannot expect to erect perfect frameworks overnight for comprehensive regulation of all aspects of their economies, but they should have ways to assign priorities and avoid dangerous pitfalls.

Id.

9. See *infra* section IV.

bribery. Specifically, the approaches of international organizations, multilateral development banks, and regional organizations are described and evaluated. In Part V, the causes endemic to corruption are reviewed, and effective approaches to controlling transnational bribery are proposed.

II. THE GROWING COSTS ASSOCIATED WITH TRANSNATIONAL BRIBERY

A. *The Incidence and Magnitude of Transnational Bribery are on the Rise*

In a recent survey of businesspersons who frequently conduct business dealings in numerous countries, the results indicated that in twenty-six of the world's fifty-four largest trading countries, these people feel that they are more likely to encounter a corrupt transaction than an honest one.¹⁰ Former U.S. Commerce Secretary Mickey Kantor found that the use of illicit payments by foreign companies to win business is the preeminent complaint of U.S. business executives conducting business overseas.¹¹ A survey conducted by the World Bank, which included 3600 firms in sixty-nine countries, indicated that forty percent of businesses pay bribes.¹²

Although international business executives perceive corruption and bribery to be most troublesome in developing countries such as Nigeria, China, Bangladesh, Kenya, and Pakistan, much of the problem can be attributed to corrupt multinational corporations and lax laws in newly industrialized countries.¹³ For example, Fritz Heimann, General Electric's

10. See Nichols, *supra* note 1, at 331.

11. See Paul Blustein, *U.S. Roils Murky Waters of International Corruption*, STAR-LEDGER (Newark, NJ), July 21, 1996, available in 1996 WL 7950663. Former Commerce Secretary Kantor estimates that bribery and corruption cost U.S. firms \$64 billion in lost business during the 1996 calendar year. Patricia Digh, *Shades of Gray in the Global Marketplace*, 42 H.R. MAGAZINE, Apr. 1, 1997, at 91, 93.

12. While firms paying bribes in industrial countries represented about fifteen percent, the figure climbed to sixty percent in the former Soviet Union. See Thomas Omestad et al., *Bye-bye to Bribes*, U.S. NEWS & WORLD REP., Dec. 22, 1997, at 39, 42. In Germany it is estimated that more than \$5 billion is spent on foreign bribes every year. *Id.* at 43. In Venezuela the cost of corruption has been at least \$100 billion over the last two decades. *Id.* at 44.

13. Transparency International, a nongovernmental organization based in Berlin, publishes an annual Corruption Index. See Stephen Handelman, *Corruption Inc.: Powerful Officials around the World Are Milking the Multinationals for Every Cent They Can Get*, THE TORONTO STAR, July 13, 1996, at C1. The index is based on surveys of international business executives. See *id.* The 1996 survey found the worst offenders to be Nigeria, China, Bangladesh, Kenya, and Pakistan.

general counsel, estimates that several billion dollars are lost by General Electric each year due to bribery demands all over the world.¹⁴ Peter Eigen, chairman of Transparency International,¹⁵ asserts that an entrenched system of massive bribery and kickbacks, distributed by multinational corporations based in the West and competing for lucrative contracts in transitional economies, is the source of much corruption in the developing world.¹⁶

Bribery by transnational corporations has not only become more widespread in recent years, the going rates have also increased. Michael Wiehen of Transparency International explains the phenomenon of inflated bribery and kickback demands: "Mr. 10% has ballooned into Mr. 30% in many countries."¹⁷ Commentators generally agree that bribery demands are increasing, and the occurrence of corruption on a grand scale has become the rule, rather than the exception.¹⁸ In the last three years, the U.S. Commerce Department has learned of allegations

Id. New Zealand was judged to be the most corruption free country out of the 54 countries examined. *Id.* Canada was judged to be the fifth "cleanest country," and the U.S. was ranked fifteenth. *Id.*

14. See Neil King Jr., *Coming Clean: EU Firms Await Pact on Banning Bribery with Mixed Feelings*, WALL ST J. EUR., Sept. 23, 1997, at 1 (stating that General Electric has aggressively sought to have anti-corruption laws extended to other countries, claiming that its subsidiaries run into dirty practices all over the world).

15. Transparency International is an organization dedicated to eliminating corrupt practices in transnational business. See Handelman, *supra* note 13, at C1. See generally TRANSPARENCY INTERNATIONAL, NATIONAL INTEGRITY SYSTEMS: THE TI SOURCE BOOK <<http://www.transparecy.de>> [hereinafter TI SOURCE BOOK].

16. See *Eastern Europe Launches Purge on Ports Corruption*, *supra* note 5. (warning that large amounts of money generated by drug trafficking and other illicit activities have enabled organized crime to subvert governmental and policing bodies by bribing customs, police, and judicial officers, as well as politicians, tax authorities, and other public servants); see also *Two to Tango: Corruption Plays Bigger Role in Business Than Most of Us Would Like to Think*, INTELLIGENCER J. (Lancaster, PA), Aug. 27, 1997, at A8, available in 1997 WL 4310690 ("I urge the public to recognize that a large share of the corruption is the explicit product of multinational corporations, headquartered in leading industrialized countries, using massive bribery and kickbacks to buy contracts in the developing world and the countries in transition.") (quoting Peter Eigen) [hereinafter *Two to Tango*].

17. Mason, et al., *supra* note 6, at 15.

18. See Nichols, *supra* note 1, at 331-32. ("[B]y 'general consensus, there has been a tremendous deterioration in the last ten years, with grand corruption becoming the general rule, rather than the exception in major government-influenced contracts . . . '"); see also Handelman, *supra* note 13, at C1 ("Corruption is rapidly taking on crisis proportions in the global economy.").

of bribery by foreign companies in approximately 180 commercial contracts valued at almost \$80 billion.¹⁹

B. *Transnational Bribery Creates Allocative Inefficiencies that Result in Less Productive National Economies*

Although many countries view bribery as a necessary measure to ensure that domestic companies are competitive contenders for foreign contracts, the practice of using such illicit payments raises prices and rewards corruption and inefficiency.²⁰ While transnational bribery is undoubtedly most detrimental to the economies of developing and transitional nations, businesspersons in Europe and the United States consider demands for bribes made by foreign public officials to be one of the greatest problems afflicting international trade.²¹ Corruption and transnational bribery pose a tremendous threat to the global economy by distorting economic markets and corroding the social structure of societies.²²

First, bribe requirements act as a non-tariff surcharge on goods and services. The payment of bribes is an additional cost to the multinational company imposed by the foreign official demanding the bribe.²³ When a company is required to pay a percentage of its expected profits to a government official, this illicit inducement acts like a tax on an investment or transaction.²⁴ Companies that pay the bribe will often pass the

19. See William Daley, *Comment & Analysis: Clamping Down on Commercial Bribery*, FIN. TIMES (London), Nov. 18, 1997, at 22.

20. See *Threat to U.S. Trade and Finance from Drug Trafficking and International Organized Crime: Hearing before the Senate Caucus on International Narcotics Control & the Senate Subcomm. on International Trade of the Comm. on Finance*, 104th Cong. 45-46 (1996) (testimony of Robert S. Leiken) [hereinafter *Drug Trafficking Hearing*]; see generally Ibrahim F. I. Shihata, *Fourteenth International Symposium on Economic Crime: Corruption- A General Review With an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 460-61 (1997) (noting that corruption can endanger the use of economic choices, increase the costs of transactions, reduce state revenue, increase public expenditures, penalize law abiders, and produce adverse distributional effect).

21. See Nichols, *supra* note 1, at 306.

22. See *id.* at 332 ("[O]nly the most narrow-minded of persons would not admit that bribery has become a pan-global phenomenon of enormous proportion.").

23. See *id.* at 333-34.

24. See Omestad et al., *supra* note 12, at 42. A study conducted by Harvard's Shang-Jin Wei concluded that worsening a government's corruption level from that of Singapore (which is relatively low) to that of Mexico (which is significantly higher) produces the same financial effect as a twenty-one percent tax hike on foreign investors. See *id.*

cost on to consumers in the form of increased prices.²⁵ The inevitable result of increased prices will be reduced sales levels of the product for which the bribe was demanded.²⁶ Ultimately, the bribe requirement reduces the foreign company's ability to market its products in a country.

The situation becomes increasingly problematic as the bribe demand rises in relation to the expected earnings of the goods or services to be produced. While a company may be able to absorb the cost of a ten percent commission paid to a foreign official, by raising the product's price and trimming its gross profit margin, the company must become more creative when a twenty percent commission is demanded.²⁷ To avoid losing the valuable foreign contract, the supplier may have to increase the product's price, accept a lower gross profit margin, and reduce the quality of his product to achieve cost savings.²⁸

Second, bribery enables the creation of *de facto* monopolies.²⁹ Often, a domestic company will make a bribe payment to secure a business opportunity and will then make an additional bribe payment to exclude foreign rivals from the market.³⁰ This practice discourages foreign suppliers from entering international markets. Furthermore, the existence of monopolistic product markets leads to inefficiency and artificially inflated prices.

Third, the payment of bribes causes economic waste and inefficiency.³¹ The payment of bribes distorts the fundamental underpinnings of a free market economy.³² In a free marketplace, buyers and sellers compete for business on the basis of value

25. A bribe requirement may be insurmountable in two instances: (1) the company does not know how to make bribes, or (2) the company is legally prohibited from making bribe payments. Under the Foreign Corrupt Practices Act, 17 I.L.M. 214 (1978), United States companies may be prosecuted criminally for bribe payments to foreign officials. In addition, several foreign companies have policies against making illicit payments to foreign officials.

26. See Nichols, *supra* note 1, at 334.

27. A twenty percent commission is not an unusual demand in the current global business climate. See *id.* at 335.

28. See *id.* For example, if a twenty percent commission on the original price is demanded, the supplier who is unwilling to walk away from the contract may be forced to increase his price by ten percent, reduce his gross margin by five percent and reduce the quality of his goods or services in such a way that he saves five percent. See *id.*

29. See *id.*

30. See *id.* at 336 (noting that examples of such practices abound).

31. See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 249 (1997); See also Nichols, *supra* note 1, at 339.

32. In addition, the payment of bribes has been linked with low economic growth, as measure by gross domestic product. See Salbu, *supra* note 31, at 249.

optimization.³³ Ideally, buyers will place a greater value on products with superior quality and competitive prices. The payment of bribes causes buyers to instead consider extraneous factors, such as the amount of side payments and the discrete nature of the seller.³⁴ When bribe payments are demanded by public officials, suppliers who might have won a contract based on value optimization are often rejected in favor of the corrupt official's opportunity for personal enrichment.³⁵

A system that condones the practice of bribery is consequently a system of inferior quality purchasing decisions resulting in the misallocation of scarce government resources.³⁶ In addition, corrupt officials frequently allow companies to underreport their taxes in exchange for illicit payments.³⁷ This practice is harmful to national economies in two respects. First, the unjust tax leniency depletes the treasuries funding the provision of public services.³⁸ Second, the relative tax burdens to individual citizens are not fairly allocated, and individual taxpayers may perceive that they are paying more than their fair share.³⁹ This undermines the legitimacy of the country's system of taxation.

Corrupt payments to foreign officials divert resources from their most efficient uses in several other ways. Resources are consumed in the effort to hide dishonest transactions and to maintain an atmosphere of secrecy.⁴⁰ Also, officials who refuse to allocate resources to their most efficient uses may themselves plunder such resources.⁴¹ Finally, corrupt officials often retain

33. See *id.* (stating that bribery "pollutes the purity of transactions in a free marketplace").

34. See *id.*

35. See *id.* at 250. The costs connected with bribery include a distortion of how officials decide to allocate the resources or public goods that they are charged with distributing.

36. See generally Jay M. Vogelson, *Corrupt Practices in the Conduct of International Business*, American Bar Association Section of International Law and Practice Reports to the House of Delegates (Spring, 1996), reprinted in 30 INT'L LAW 193, 198 (1996) (stating that corrupt practices in connection with international business create inefficiencies by distorting the allocation of resources).

37. See Salbu, *supra* note 31, at 251.

38. See *id.*

39. See *id.*

40. See Nichols, *supra* note 1, at 338; see also Earle, *supra* note 5, at 222 (stating that "there are distortions entailed by the necessary secrecy of corruption").

41. See Nichols, *supra* note 1, at 338.

large amounts of valuable resources in an attempt to increase the premium that bribe givers will be willing to pay.⁴²

C. *Transnational Bribery Leads to Political Instability and the Disruption of International Trade*

While threatening the economic health of countries, transnational bribery also leads to social corrosion and political instability.⁴³ When the occurrence of corruption is widespread, it decreases the credibility and the viability of a government.⁴⁴ Public officials may be perceived as self-interested and hypocritical when they engage in wrongful acts, yet demand legal obedience from private citizens.⁴⁵ Such a visible double standard may eventually lead to lawlessness by blurring the distinction between legal and illegal behavior.⁴⁶ Furthermore, when corruption within the government is pervasive, "moral" persons are less likely to pursue careers as public officials, and individuals more inclined to behave dishonestly become increasingly attracted to government employment.⁴⁷ This phenomenon plays a role in shaping the culture of the bureaucracy.

Ultimately, pervasive corruption within a government may so disgust the public that the government is ousted.⁴⁸ In countries such as France, India, Italy, Japan, and Venezuela political parties have been voted out at least partially due to popular contempt with corrupt practices.⁴⁹ In less severe cases, governments publicly perceived as corrupt have been substantially weakened or forced to resign.⁵⁰ Often when the

42. See *id.*

43. See Muffler, *supra* note 7, at 16-17; see also Nichols, *supra* note 1, at 342.

44. See Nichols, *supra* note 1, at 342.

45. See *id.* See also *Drug Trafficking Hearing*, *supra* note 20, at 46 (corruption "destroys the people's trust in their government, breeds mutual distrust among citizens, subverts the rule of law and undermines the worth [sic] ethic").

46. See Nichols, *supra* note 1, at 343. ("When the government tolerates and even engages in certain types of illegal behavior, it becomes difficult to determine what behavior is and is not acceptable.")

47. See *id.* See also *Drug Trafficking Hearing*, *supra* note 20, at 46. (noting that corruption perverts incentives: public office is seen as the road to riches, productive enterprise and hard work as risky).

48. See Nichols, *supra* note 1, at 343-44.

49. See *id.* at 344; see also Muffler, *supra* note 7, at 17 (noting that bribery by foreign businesses has also contributed to the fall of governments in Bolivia, Honduras, the Cook Islands, and the Netherlands).

50. See Nichols, *supra* note 1, at 344. The governments of Korea and Mexico have been weakened by widespread disgust with governmental corruption.

public reaction does not result in the demise of a government, it will instead lead to a process of public disengagement from the government.⁵¹ Citizens may turn to "mob justice" or refuse to comply with state laws.⁵²

In addition to destabilizing the political structure of a nation, corrupt business transactions weaken the global trading system and disrupt international trade relations.⁵³ National governments are increasingly less willing to condone attempts by foreign corporations to bribe their public officials. Malaysia recently banned the award of future government contracts to any British companies after discovering that a British firm⁵⁴ had paid a \$50,000 bribe to secure a contract.⁵⁵ This relatively small bribe resulted in the disruption of trade between the two former trading partners. When a bribery scandal was exposed in Singapore, five multinational corporations⁵⁶ were banned from bidding for future local power contracts.⁵⁷ Indeed, illicit payments by foreign business entities may create a "backlash" against the country of origin and international business generally.⁵⁸

III. THE IMPACT OF TRANSNATIONAL BRIBERY ON DEVELOPING NATIONS

The harmful effects caused by the practice of transnational bribery are particularly acute in developing countries.⁵⁹ The term

See id. In Ecuador, the vice president was forced to resign, and the presidents of Brazil and Venezuela were also forced to resign. *See id.*

51. *See id.*

52. *See id.* For example, Russian peasants reacted to corruption within the Tsarist and Bolshevik regimes by avoiding the official court system and instead seeking justice in their own *samosud*. *See id.* Similarly, Kenyans wary of corruption within their judicial system turned to mob justice, whereby private citizens empowered themselves to attack and kill suspected criminals. *See id.*

53. *See* Michael Kantor, *National Export Strategy, Toward the Next American Century: A U.S. Strategic Response to Foreign Competitive Practices*, BUSINESS AMERICA, Sept. 1996, at 112, 113.

54. George Wimpey International.

55. *See* Muffler, *supra* note 7, at 17; Michael Almond & Scott Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L LAW & COM. REG. 389, 435 (1997).

56. *See* Almond & Syfert, *supra* note 55, at 435. These corporations included BICC of Britain, Siemens of Germany, Pirelli of Italy, and Tomen and Marubeni, both of Japan. *See id.*

57. *See id.*

58. Muffler, *supra* note 7, at 18.

59. *See* Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 70.

Public opinion surveys published in 1995 by the U.S. Information Agency disclosed that majorities in Central and Eastern Europe believe that corruption has increased since the collapse of communism. In China,

“developing countries” will be used to refer to countries undergoing economic, political, or social transitions to facilitate increased interaction with the global marketplace.⁶⁰ Examples of “developing countries” include former socialist countries currently engaged in privatization, such as Russia and the Eastern European nations, as well as the formerly isolated economies of Southeast Asia and Africa. Also included in the category of “developing countries” are Latin American countries emerging from military dictatorships and adopting democratic governance.⁶¹

A. *Developing Countries are More Vulnerable to the Threat of Transnational Corruption*

During times of transition, new opportunities for corrupt practices and rent-seeking arise.⁶² The process of reform typically involves the privatization of state enterprises, deregulation, and the expansion of trade and financial markets. In many countries, the transition has been accompanied by a “shift of economic policy from central planning to free marketeering.”⁶³ Without strong political institutions and governmental oversight, the political system becomes particularly susceptible to manipulation

corruption arrests have risen sharply, and the scale of covert transactions has grown markedly. . . . In April 1996, China announced that it would prosecute 18 former government officials for allegedly embezzling . . . \$2.2 billion.

Id. at 61. See generally Nichols, *supra* note 1, at 345; Christopher F. Dugan & Vladimir Lechtman, *Current Development: The FCPA in Russia and Other Former Communist Countries*, 91 AM. J. INT'L L. 378 (1997); Kantor, *supra* note 53; Nadeem Ul Haque & Ratna Sahay, *Do Government Wage Cuts Close Budget Deficits? Costs of Corruption*, 43 INT'L MONETARY FUND STAFF PAPERS, NO. 4, 754, 760 (Dec. 1, 1996) (“The limited recorded evidence suggests that corruption is quite pervasive in developing countries and transition economies, and that it imposes significant economic costs.”).

60. For the sake of consistency, the author uses the term “developing countries” throughout this Note. Other authors have used the terms “emerging countries” and “transitional nations” to refer to the same concept.

61. Every country in Latin America now practices some form of democracy, except Cuba. See Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J. L. & TRADE AM. 179, 181 (1996).

62. See Karen Pennar et al., *The Destructive Costs of Greasing Palms*, BUS. W., Dec. 6, 1993, at 133, 138 (noting that countries in transition experience chaotic conditions, and weakened governments have permitted new corruption opportunities to arise in Russia and Eastern Europe).

63. Karl M. Meessen, *Fighting Corruption Across the Border*, 18 FORDHAM INT'L L.J. 1647, 1647 (1995) (noting that while Third World nations and Eastern Europe are examples of countries in transition, the industrialized world has also “entered a new phase of deregulation and privatization”).

and corruption.⁶⁴ Many politicians have taken advantage of the temporary political instability present during the transitional period to promote their own self-enrichment.⁶⁵

The prevalence of corruption and transnational bribery in developing countries is due, in part, to factors peculiar to transitional economies. First, bribery is less expensive in developing countries than in the First World.⁶⁶ Because of deflated currencies and lower standards of living, favors can be purchased in developing countries for prices that seem comparatively low to executives from industrialized nations.⁶⁷

Second, bureaucracies in developing nations are often only one evolutionary step removed from regimes in which corruption was thoroughly embedded in governmental institutions and traditional attitudes.⁶⁸ In many cases, the use of bribes throughout the hierarchy of government officials was previously an accepted practice, and therefore underpaid officials deem themselves entitled to such additional payments.⁶⁹

Third, because the standard of living often initially declines in a transitional economy, bureaucrats become increasingly aware that their position of authority provides them with substantial opportunities to make money in the new commercial world.⁷⁰ Often, government officials in developing countries possess unbridled discretion to decide the fate of lucrative deals and to determine whether to perform "rubber-stamping" activities.⁷¹ The

64. See Boswell, *supra* note 61, at 183. The very fact that these countries are undergoing such radical transitions magnifies the effects of corruption; as de Tocqueville noted, "a society is most vulnerable when it is undergoing change." Nichols, *supra* note 1, at 345.

65. See Boswell, *supra* note 61, at 182. The transitional period in Latin America, in which military dictatorships are being replaced by democratic governments, has been imbued with scandals and corruption. See *id.* at 181-83. Scandals have recently come to light involving the former heads of state in the Dominican Republic, Peru, Bolivia, and Panama. See *id.* at 182. Former Brazilian President Collor implemented his "Plano Collor" to reduce the inflation associated with a transitional economy. See *id.* at 181. During the process of its implementation, millions of dollars were siphoned from public coffers, and investigative efforts by the federal police and the judiciary were repeatedly obstructed. See *id.* at 181-82.

66. See Klich, *supra* note 4, at 132 ("[B]ribery and extortion are rampant because their price is still extraordinarily low. With runaway inflation, Russian bureaucrats have watched their standard of living decline. Russian bureaucrats are cheaper 'to buy' than bureaucrats in most other countries.").

67. See Dugan & Lechtman, *supra* note 59, at 378.

68. See Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 63-65.

69. See *id.* at 70-73.

70. See Dugan & Lechtman, *supra* note 59, at 378.

71. See *id.* This is especially true in Russia and Eastern Europe. See *id.*

disproportionately high value of hard currencies is an added incentive for officials to squeeze money out of foreign companies when the opportunity presents itself.⁷²

Fourth, the legal and political confusion inherent in periods of transition and overhaul results in a reduced level of enforcement activities.⁷³ Even when anti-corruption measures are enacted, because high-ranking officials are legally immune from such legislation in many developing countries, their behavior remains unaffected.⁷⁴ The conduct of foreign business executives exacerbates the problem. Businessmen from every industrialized nation, except the United States and Sweden, freely engage in the practice of bribing foreign officials in return for favorable treatment without fearing legal consequences.⁷⁵ The governments of many European nations actively encourage the payment of bribes to promote business transactions in foreign lands by allowing tax deductions for such illicit payments.⁷⁶

B. *The Destabilizing Effect of Transnational Corruption is Particularly Debilitating to Developing Countries*

In developing countries, "corruption threatens to swallow whole nations, destroying all faith in democracy and making saps of anyone who behaves honestly."⁷⁷ Bribery and corruption discourage investment in developing countries and increase the gap between the wealthy elite and the impoverished masses.⁷⁸ Allocative inefficiencies caused by transnational bribery divert precious resources that could instead be used to promote

72. See *id.*

73. See *id.*

74. For example, civil servants in Russia are forbidden from exploiting their authority to engage in entrepreneurial activities, but many high-ranking officials are legally immune from the law's mandates by virtue of their status as deputies of legislative bodies, employees of the state prosecution service, or judges. See *Corruption is Rife in Russia, Police Chiefs Say*, UPI, June 9, 1992, available in LEXIS, NEWS Library, UPI File.

75. See Dugan & Lechtman, *supra* note 59, at 379; Nichols, *supra* note 1, at 349.

76. See generally Rosie Waterhouse, *The Sleazy State: Britain 'Resisting Moves to Halt Bribes to Officials'*, INDEPENDENT (London), Mar. 16, 1994, at 3 (mentioning several nations that want to continue tax deductibility for bribes); Pascal Krop, *L'Argent Noir de la France*, L'EVENEMENT, Sept. 29, 1988, at 50 cited in John E. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 INT'L LAW. 1009, 1010 n.8 (Winter 1990) (discussing the reputed official French system of bribery in less-developed countries).

77. *The Greased Palm Issue*, WASH. POST, June 1, 1996, at A14.

78. See *Drug Trafficking Hearing*, *supra* note 20, at 45-46.

economic growth.⁷⁹ In addition, corruption creates mutual distrust among citizens and the government while skewing public policy and undermining the work ethic.⁸⁰

1. Transnational Bribery Acts as an Obstacle to Economic Growth

The future of developing countries depends on economic growth. Yet, corruption has considerable adverse effects on economic performance.⁸¹ When bribe payments are required, the cost of goods is artificially increased. Operating costs to the supplier are higher as well, making the contract less attractive to foreign investors. For example, Hong Kong's Independent Commission Against Corruption found that bribes and "grease payments" average three to five percent of operating costs, or three to five billion dollars a year.⁸² A Russian study demonstrated that when food vendors were protected from demands for bribes and kickbacks, sales prices were reduced by fifteen to twenty percent.⁸³ Such increases in the cost of consumer goods contribute to higher overall rates of inflation.⁸⁴

In addition, the practice of transnational bribery tends to reduce national revenue and has been tied to a low gross national product, stunting the progress of developing countries' economies.⁸⁵ A study conducted by the International Monetary

79. See Pennar et al., *supra* note 62, at 133 (giving the example of government officials who buy expensive, unnecessary equipment and receive a kickback from the seller, thereby taking away resources that could be more usefully spent).

80. See Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 70.

81. This is corroborated by a study conducted by Paolo Mauro of the International Monetary Fund. See Blustein, *supra* note 11.

82. Almond & Syfert, *supra* note 55, at 434.

83. See *id.*

84. See Mark J. Murphy, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOK. J. INT'L L. 385, 391 (1995); see also Salbu, *supra* note 31, at 252 (stating that the proliferation of bribery in poor countries has resulted in inflated contract prices and the discouragement of foreign investment); Handelman, *supra* note 13, at C1 (noting that corruption raises the cost of living. For example, in Vietnam, widespread graft has increased the cost of goods to consumers by an estimated ten to twenty percent).

85. See Shihata, *supra* note 20, at 458-61 (noting that while corruption may increase the wealth of those practicing it, it reduces the revenue of the state and the welfare of society as a whole); Nichols, *supra* note 1, at 347 (noting that there is a negative correlation between perceived levels of corruption and gross national product and stating that "corruption does not seem to be a means of attaining high gross national product."); see also Robert H. Sutton, *Controlling Corruption through Collective Means: Advocating the Inter-American Convention*

Fund revealed that in countries most troubled by corruption and bribery, the proportion of the economy devoted to business spending on plant and equipment tends to be significantly lower than in "cleaner" countries.⁸⁶ This ultimately slows economic growth in "corrupt" countries relative to the rest of the world.

The pervasive presence of transnational bribery in developing countries deters foreign investment by increasing the costs of transactions and threatening the reputations of investing companies.⁸⁷ Transaction costs are increased by an amount exceeding that of the bribe itself. The time and expense required to negotiate the actual amount of the inducement payment with corrupt officials is an added cost realized by the investing company.⁸⁸ In addition, the uncertainty inherent in the corrupt transaction and the potential effect of the corrupt payment on a given transaction act as additional barriers to investment in a developing country.⁸⁹

The loss of trade and investment opportunities caused by the practice of demanding bribes from foreign businesses threatens the sustained growth of developing countries.⁹⁰ A study conducted by the Harvard University School of Government found that "the difference in corruption levels from that of Singapore to that of Mexico is equivalent to raising the marginal tax rate by more than twenty percent."⁹¹ A one percentage point increase in the tax rate typically reduces foreign investment by approximately five percent.⁹²

Empirical evidence strongly suggests that as corruption becomes increasingly widespread within a country, investments from outside sources decrease both in frequency and in amount.⁹³ Statistical evidence confirms the tie between

against Corruption, 20 FORDHAM INT'L L.J. 1427,1430-31 (1997); Salbu, *supra* note 31, at 249 (stating that the payment of bribes has also been linked to low economic growth, as measured by gross domestic product). Bribery tends to decrease tax revenue collection since corrupt officials condone the underreporting of taxes in return for illicit payments. Salbu, *supra* note 31, at 251.

86. See *id.* See Nichols, *supra* note 1, at 347-48.

87. See Shihata, *supra* note 20, at 460-62. See also Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 75 ("Studies show that corrupt procurement practices can not only double the price developing countries pay for goods and services but can also scare off foreign investors.").

88. See Sutton, *supra* note 85, at 1439.

89. See *id.*

90. See Yojana Sharma, *Development: World Bank Talks Tough on Corruption*, Inter-Press Service (Hong Kong), Sept. 22, 1997 ("The biggest inhibitor to economic development and to the inflow of funds or domestic investment of funds is corruption.") (quoting World Bank President, James Wolfensohn).

91. *Two to Tango*, *supra* note 16, at A8.

92. See *id.*

93. See Sutton, *supra* note 85, at 1437. In addition, while the prevalence of corruption and bribery within a government tends to decline as the country

corruption and low investment rates.⁹⁴ Fundamental principles of economics suggest that reduced rates of private investment should correlate with declining rates of economic growth.⁹⁵ In addition, because of the growing social stigma associated with bribery, many businesses prefer investing in countries where the hassles of corruption are less likely to be present, and clean company reputations are more likely to survive intact.⁹⁶ A recent survey commissioned by the World Bank indicated that international businessmen view corruption as the primary obstacle to conducting business in Latin America, the Caribbean, and sub-Saharan Africa.⁹⁷ The perception of corruption has dampened public support for development assistance and has prompted private investors and lenders to redirect funds away from needy countries.⁹⁸ By misdirecting and discouraging investment, corruption acts as a barrier to national development.⁹⁹

Governments in developing countries plagued by wide-scale corruption spend a comparatively small proportion of their national budgets on education, an expense that is directly related to sustaining long-term economic growth.¹⁰⁰ This is because corrupt public officials prefer to channel taxpayer money into areas more amenable to extracting bribe payments, such as

experiences socioeconomic development, corruption does not necessarily cease to exist at any given level of development. *See id. See, e.g.,* Steven Erlanger, *A Corrupt Tide in Russia from State-Business Ties: Problem Called Biggest Threat to the Economy*, N.Y. TIMES, July 3, 1995, at 1 ("Russia is now a state so webbed by official corruption that foreign businessmen, economists and Russian analysts regard it as the largest impediment to the growth of investment and the market economy—worse than the criminal 'mafias' that get most of the attention.").

94. *See* Erlanger, *supra* note 93, at 1; *see also* Boswell, *supra* note 61, at 184 ("At a time when many countries in the region are desperately seeking foreign investment, it is important to recognize that high levels of corruption are associated with lower levels of investment.").

95. *See* Nichols, *supra* note 1, at 348.

96. For example, several American companies have backed out of potentially profitable contracts in Russia due to fear of widespread corruption. *See* Klich, *supra* note 4, at 132. One of the indirect costs associated with widespread bribery is reduced investor confidence in the "corrupt" country. *See* John Hogarth, *Bribery of Officials in Pursuit of Corporate Aims*, 6 CRIM. L.F. 557, 559 (1995).

97. *See* Mason et al., *supra* note 6, at 15.

98. *See* Sharma, *supra* note 90. The abuse of official authority for private gain retards "development and economic growth, hurts the poor the most and compromises the effectiveness of aid programs." *Id.*

99. *See* Nichols, *supra* note 1, at 348-49. *See generally*, Pennar et al., *supra* note 62, at 133 ("The real cost of corruption lies in the demoralization, cynicism, and enervation of entrepreneurial activity throughout the Third World.") (quoting Robert Klitgard, a University of Natal economist).

100. *See* *Bribonomics*, *The Economist*, Mar. 19, 1999, at 86.

public works contracts.¹⁰¹ In contrast, collecting bribe payments in connection with education expenses and teachers' salaries has proven to be more cumbersome and less profitable. Analogously, investments in human and physical capital, critical prerequisites to sustained economic growth, tend to be comparatively low in countries where bribery and corruption are pernicious.¹⁰²

The misallocation of resources that results from an economy driven by transnational bribery has the greatest impact on the countries least able to afford it.¹⁰³ Corrupt payments that induce government officials to invest in projects that are unnecessary, or that convince officials to award contracts based on factors other than the overall quality of a bid's value, "waste assets in developing countries that can ill afford to have them squandered."¹⁰⁴ The scarcity of national resources in developing countries magnifies the harm caused by wasting or misdirecting funds.¹⁰⁵ Misallocated funds originally intended for schools, hospitals, and institutions assisting the underprivileged are often diverted by corrupt officials into projects that provide neither social nor economic benefits.¹⁰⁶ For example, in Shenzhen and Zhuhai, China, funds earmarked for infrastructure and other beneficial projects were instead invested into speculative real estate deals that were favored by officials who anticipated deriving bribes and facilitating payments in connection with the transaction.¹⁰⁷

Allocative inefficiencies in developing countries reduce national income and lead to the accumulation of unnecessary long-term debt.¹⁰⁸ When a country's debt is increased, its future

101. See *id.* (noting that it is easier to collect bribes on some expenditure items than on others).

102. See *Drug Trafficking Hearing*, *supra* note 20, at 96.

103. See Kantor, *supra* note 53, at 112.

104. Salbu, *supra* note 31, at 252.

105. See *id.* at 251-52.

106. See Skip Kaltenheuser, *Corruption's Heavy Price*, *ASIAN WALL ST. J.*, Sept. 4, 1997, at 8, available in 1997 WL-WSJA 11015534. In addition, coerced transactions eventually lead to "reduced productivity and living standards for all." Murray N. Rothbard, *Free Market*, in *THE FORTUNE ENCYCLOPEDIA OF ECONOMICS* 636, 638 (David R. Henderson ed., 1993).

107. See Pennar et al., *supra* note 62, at 136. Corrupt public officials in rural China have similarly re-channeled state funds intended for grain payments into speculative ventures. See *id.*

108. See Nichols, *supra* note 1, at 347 (noting that allocative inefficiencies will reduce current output, which will in turn reduce national income); Boswell, *supra* note 61, at 184 (stating that developmental decisions not subject to oversight leads to the misallocation of resources and the accumulation of excessive long-term debt); see also Salbu, *supra* note 31, at 252 (noting that pervasive bribery leads to a substantial escalation of the debt of developing countries).

economic growth is compromised since the country will be burdened by recurring debt-servicing costs in the future.¹⁰⁹ Funds that could be used to improve living conditions and public welfare are instead committed to paying off high levels of debt.¹¹⁰ A study by the Luigi Einaudi Research Center found that the Italian government's debt was inflated by an estimated fifteen percent, or about \$200 million, due to corruption and systematic bribery.¹¹¹ In developing countries with less stable economies, such bribery may undermine any attempt to build an economic system capable of competing in the international community.¹¹²

In addition, government decision-making based on inducement payments rather than value optimization often results in inferior quality goods and unsafe or unnecessary infrastructure.¹¹³ Half-built schools and roads strewn throughout the developing world illustrate the costs that result from awarding infrastructure projects to contractors based solely on their willingness to make bribe payments, rather than on their competence and efficiency.¹¹⁴ Often, greedy public officials motivated by the potential for bribe payments use government funds to purchase goods that are simply not needed.¹¹⁵ For example, Bolivian public officials seeking personal gain spent \$170 million to purchase a smelter from a German-Belgian multinational company despite protests that it was not needed.¹¹⁶ It was later revealed that the officials making the purchase decision had accepted bribe payments from the foreign supplier.¹¹⁷ Since the costly purchase, the smelter has never become operational.¹¹⁸

109. See TI SOURCE BOOK, *supra* note 15, ch. 1.

110. See *id.* Dieter Frisch, former Director-General of Development at the European Commission notes that "when a country increases its indebtedness to carry out projects which are not economically viable, the additional debt does not only include the ten to twenty percent extra cost due to corruption; rather, the entire investment . . . is attributable to dishonest decisions to proceed with unproductive and unnecessary projects." *Id.*

111. See Murphy, *supra* note 84, at 391.

112. See *id.* at 397.

113. See Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 70 ("Corruption begets unsafe buildings, bridges, water, and air and the negligent, cynical government of inept officials."). The European Union Court of Auditors reported that member states wasted \$1.2 billion on fraudulent infrastructure projects during 1996. See Almond & Syfert, *supra* note 55, at 435.

114. See Omestad et al., *supra* note 12, at 43.

115. This type of transaction is widely referred to as a "white elephant" project.

116. See Boswell, *supra* note 61, at 184.

117. See *id.* As in most cases, the gain derived through individual profits was greatly outweighed by the aggregate costs of the corrupt transaction. See *id.*

118. See *id.*

Corruption magnifies social inequities by increasing the gap between the wealthy and the underprivileged. While corrupt officials benefit financially by channeling state funds into projects that have neither social nor economic value, the general public carries the burden of increased national debt but is privy to none of the corresponding benefits.¹¹⁹ In Nigeria, considered by businessmen to be among the most corrupt nations in the world, oil revenues have enriched corrupt officials while the country's farmers continue to work long hours without basic tools and supplies.¹²⁰ Since the Nigerian oil boom, the country's per capita income has declined significantly.¹²¹ Commentators have attributed this decline to a government which "takes the form of a prodigious dispensation of corruption funded patronage."¹²²

2. Transnational Bribery Leads to Social Corrosion

As public officials become accustomed to receiving "tips" for the performance of routine functions, basic entitlements eventually become unavailable to a disenfranchised poor.¹²³ In this way, the practice of bribery distorts how officials allocate the resources and public goods they are responsible for distributing.¹²⁴ As bribery and corruption become increasingly prevalent, state resources will be directed towards unproductive areas, such as the police and the military, as the wealthy and the elite become more concerned with the protection of their positions and their material wealth.¹²⁵ Thus, resources desperately needed for socioeconomic development will instead be channeled into security expenditures.¹²⁶

In addition, as barriers to trade and investment are reduced in developing countries, increased competition and the advent of technological advancements often lead to massive lay-offs of workers by companies concerned with reducing costs and

119. See Kaltenheuser, *supra* note 106, at 8. See also Shihata, *supra* note 20, at 462. In short, corruption, in spite of some returns for its beneficiaries, retards the overall development of societies and their systems of governance.

120. See *Drug Trafficking Hearing*, *supra* note 20, at 46. Although oil currently contributes about eighty percent of Nigeria's revenue, Nigerians themselves stand in mile-long fuel lines for gas due to unfinished pipe lines, financed by loans from multilateral development banks pocketed by government officials. See *id.* Rather than feeding the Nigerian citizenry, oil earnings line the pockets of corrupt officials who promptly transfer their revenue to foreign banks. See *id.*

121. Per capita GNP declined from \$770 in 1983 to \$320 in 1992. See *id.*

122. *Id.*

123. See Salbu, *supra* note 31, at 250.

124. See *id.* at 251.

125. See TI SOURCE BOOK, *supra* note 15, ch. 1.

126. See *id.*

increasing efficiency.¹²⁷ As the elite reap the profits of an increasingly global marketplace, the general citizenry is left behind. Robert Leiken aptly states that “[a] climate that provides hard times for some amid boom times for others has opened not only a wage but also a credibility gap.”¹²⁸ By widening the gap between the rich and the poor, corruption “sows the seeds for social and political tensions, threatens the very fabric of society and undermines the effectiveness of the state and the political legitimacy of government.”¹²⁹

Moreover, when bribery is condoned in developing countries, organized crime flourishes.¹³⁰ Poorly developed administrative and political structures coupled with a lack of legal legitimacy leave countries in a transitional stage of development particularly vulnerable to widespread organized crime.¹³¹ As stated by Robert Leiken: “Rent-seeking lives next-door to plunder. And corruption is the silent partner of organized crime.”¹³² Public officials in developing countries receiving exceedingly low wages often succumb to large inducement payments offered by drug traffickers and other organized crime groups to pass through Customs or to avoid arrest or criminal prosecution.¹³³ Large cash payments are frequently made to corrupt officials to compel them to “overlook” criminal behavior.¹³⁴ In developing countries, drug money often competes with bribes from foreign businesses to line the pockets of government officials.

When crime organizations are protected by the government in return for bribe payments, organized crime groups may actually merge with the state.¹³⁵ Nigerian crime rings net billions of dollars by performing functions typically ascribed to the state, such as issuing passports and other travel documents.¹³⁶ Once organized crime groups infiltrate government structures and

127. See Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 59-60.

128. *Id.* at 60.

129. Shihata, *supra* note 20, at 461 (quoting S. Rose-Ackerman, *The Political Economy of Corruption—Causes and Consequences*, World Bank, Viewpoint Note No. 74 (1996)).

130. See *Drug Trafficking Hearing*, *supra* note 20, at 46.

131. See generally *Eastern Europe Launches Purge on Ports Corruption*, *supra* note 5. See also *Drug Trafficking Hearing*, *supra* note 20, at 46. Overseas corruption provides the indispensable nurturing habitat for criminal organizations, protecting them from punishment and offering a stable environment to thrive and to grow into international combines.

132. *Drug Trafficking Hearing*, *supra* note 20, at 94.

133. See *id.*

134. See TI SOURCE BOOK, *supra* note 15, ch. 2.

135. See *Drug Trafficking Hearing*, *supra* note 20, at 97.

136. See *id.*

purchase immunity from law enforcement agencies, they may transform crime into the country's most profitable export.¹³⁷ Iraq and Cuba are modern examples of countries that have exported political violence and tyranny for profit.¹³⁸ Today, countries such as Colombia, Russia, and China are considered by many to be "crime-exporting countries."¹³⁹ Such countries often develop efficient "shadow economies" that feature professional bribers who provide entrepreneurs and foreign investors with access to the bureaucracy.¹⁴⁰ The problem is exacerbated when citizens become aware of corruption within the government. When the public believes the elite politicians and civil servants are accepting bribes, they may see no reason why they, too, should not help themselves to the riches by engaging in criminal conduct.¹⁴¹

3. Corruption Threatens the Spread of Democratic Governments and Market Economies Worldwide

Corruption undermines the legitimacy of democratic systems of government and threatens the credibility of capitalism and free-market economics.¹⁴² When public officials are perceived as self-interested and dishonest, public trust in the government deteriorates and the rule of law is gradually subverted.¹⁴³ Officials who receive windfalls through transnational bribery are not accountable to their citizens.¹⁴⁴ As a result, governments that already lack stability due to their transitional nature are further weakened because they fail to maintain public trust and credibility.¹⁴⁵

137. *See id.*

138. *See id.*

139. *Id.*

140. *Id.* at 98.

141. *See* TI SOURCE BOOK, *supra* note 15, ch. 1.

142. *See* Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 73 (The International Chamber of Commerce warned that corruption "could undermine the most promising development of the post Cold-War era . . . the spread of democratic governments and of market economies worldwide"). *See generally* Donald J. Johnston, The OECD and the Fight Against International Corruption, Opening Statements at the Conference on Bribery in International Business Transactions (Nov. 6, 1996), available at <http://www.oecd.org/news_and_events/release/nw9610>; JEFFREY P. BIALOS & GREGORY HUSISIAN, THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES 150-51 (1997).

143. *See* Nichols, *supra* note 1, at 342-43. *See also* TI SOURCE BOOK, *supra* note 15, ch. 1 ("The public sees officials, and officials seem to see themselves, as existing not to provide a service to the public, but as a body that is not accountable to the public they profess to serve.").

144. *See* Kantor, *supra* note 53, at 112.

145. *See id.*

Corruption and bribery become increasingly rampant during transitional periods when nations abandon prior, more centralized forms of government and adopt democratic institutions and freer trade. In addition, bribery and corrupt practices are increasingly reported to the public as censorship is lifted and restraints on reporting are eliminated.¹⁴⁶ The public perceives soaring levels of corruption, further undermining support for political transition and market reform.¹⁴⁷ A public opinion survey published by the U.S. Information Agency in 1995 indicated that majorities in Central and Eastern Europe perceive increased corruption since the collapse of communism.¹⁴⁸ Similarly, a recent World Bank report found corruption to be one of the most significant factors contributing to popular resistance to market reform.¹⁴⁹ Eventually, citizens may become so disenchanted with changes to the government and perceived increases in governmental corruption that they demand a reversion to the prior form of government.¹⁵⁰

At the 1996 Conference on Bribery in International Business Transactions, the Secretary-General of the OECD warned that as the global community becomes increasingly aware of the "tremendous harm caused by corruption," general confidence in democratic government is threatened, particularly in new democracies.¹⁵¹ Transparency International's efforts to reduce transnational bribery have been based on the premise that "[i]f corruption cannot be brought under control, it can threaten the viability of democratic institutions and market economies."¹⁵² Recently, the World Bank has become increasingly vocal in cautioning that corruption, left unchecked, "may undermine popular confidence in the public service to the degree that it may provoke and provide the justification for violent changes of government."¹⁵³ If corruption persists, citizens in developing countries may begin to assume that capitalism is inextricably

146. See, e.g., Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 61 ("Crime and corruption usually went unreported in the Soviet bloc press, and the lifting of censorship may have fed the widespread public impression of soaring corruption.").

147. See generally TI SOURCE BOOK, *supra* note 15, ch. 1; Kantor, *supra* note 53.

148. See Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 61.

149. See Nichols, *supra* note 1, at 349.

150. See *id.*

151. Johnston, *supra* note 142.

152. TI SOURCE BOOK, *supra* note 15, ch. 1.

153. ROBIN THOEBALD, CORRUPTION, DEVELOPMENT AND UNDERDEVELOPMENT 131 (1990) (quoting World Bank, *World Development Report*, at 17 (1983)).

intertwined with corruption.¹⁵⁴ Consequently, there is a real danger that they may eventually reject capitalism and the democratic form of government with which it is so often associated.¹⁵⁵

Public sentiment in the former Soviet bloc nations lends support to this fear. According to a recent World Bank survey, sixty-five percent of Russians believe that corruption is endemic to capitalist systems and that they enjoyed a more favorable standard of living under the past communist regime.¹⁵⁶ One commentator has stated:

Angered by what they see as the corruption of their society by these malignant manifestations [bribery and crime], many Russians are turning against the notion of a market society. The call for re-nationalization of some newly privatized gas, oil, aluminum and military industries by a newly appointed official in charge of privatization is but one reflection of that feeling . . . The danger is that the backlash against criminality could eventually lead to the coming to power of a fascist leader or a 'man on a white horse' pledged to throw out the thieves and restore law and order. For many Russians that is becoming a more and more attractive alternative.¹⁵⁷

Clearly, the continued growth of democratic forms of government depends on the success of efforts to reduce transnational bribery and systematic corruption.

IV. RECENT MULTILATERAL EFFORTS TO COMBAT TRANSNATIONAL BRIBERY CONSIST ONLY OF "SOFT" LAW

As the costs associated with transnational corruption and bribery have become increasingly intolerable to citizens and governments around the globe, numerous organizations have initiated multilateral efforts to proscribe illicit payments to foreign officials. Thus far, almost all attempts to eliminate transnational bribery have consisted only of "soft law," which is not legally binding on the parties to the agreement.¹⁵⁸ The movement to

154. See BIALOS & HUSISIAN, *supra* note 142, at 151.

155. See *id.*

156. See William Drozdiak, *Justice Italian Style, Unleashed in Europe: Investigating Judges Pursue Anti-Corruption Campaigns Against Politicians, Businessmen*, WASH. POST, July 25, 1994, at A12 (noting that bribery has weakened public faith in the new democracies of Eastern Europe, and the citizens have grown increasingly nostalgic about the "cast-off communist dictatorships").

157. BIALOS & HUSISIAN, *supra* note 142, at 151 (quoting Marshall Goldman, *Comrade Godfather: In Russia, the Mafia Seizes the Commanding Heights of the Economy*, WASH. POST, Feb. 12, 1995, at C2).

158. See Vogelsson, *supra* note 36, at 198. See generally Nichols, *supra* note 1, at 354 (noting that governments "may not have sufficient resources or

combat corruption has produced only two legally binding treaties addressing the problem of transnational bribery.¹⁵⁹ The first of these treaties, the Inter-American Convention Against Corruption, has only regional effect and lacks an effective enforcement mechanism.¹⁶⁰ The more recent legally binding treaty is similarly flawed. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions prohibits only the supply side of bribery¹⁶¹ and has not yet entered into force.

Recent multilateral initiatives to contain transnational bribery have demonstrated that interest in combating corrupt business practices is on the rise. However, these recent initiatives share two common weaknesses; they do not reach the entire globe and they lack enforceability.¹⁶² Most multinational attempts to proscribe the bribery of foreign officials have been characterized as voluntary codes or guidelines.¹⁶³

A. *Efforts by International Organizations to Proscribe Transnational Bribery*

1. The World Trade Organization

The World Trade Organization (WTO) cannot itself outlaw transnational bribery because the rights and obligations it creates apply only to member nations, not to persons, businesses, or other entities.¹⁶⁴ The WTO has historically been successful in negotiating detailed codes of conduct for its members.¹⁶⁵ Consistent with its historical success, the WTO negotiated a Government Procurement Agreement, which entered into force on

opportunities to prosecute transnational bribery"); Stuart H. Deming, *Foreign Corrupt Practices*, 31 INT'L LAW 695, 698 (American Bar Assoc., 1997) (stating that the "international action to date represents the evolution of 'soft' rather than 'hard' law").

159. One critic has stated that "international measures addressing corruption are still in their infancy." Shihata, *supra* note 20, at 469.

160. See Nichols, *supra* note 1, at 361. "[This Convention] contains no means of forcing a reluctant country to act, and allows countries to reserve those parts of the treaty with which they do not care to comply. Observers have already begun to speculate as to the manner in which the treaty will be rendered meaningless." *Id.*

161. The "supply side" of bribery refers to the party making the illicit payment. Under the OECD Convention, receiving a bribe is not criminalized.

162. See Nichols, *supra* note 1, at 360.

163. See *id.* at 361.

164. See *id.* at 377.

165. See *id.*

January 1, 1996.¹⁶⁶ Although this Agreement includes bidding and procurement procedures designed to restrain corruption and bribery, its success has been limited because implementation of the Agreement would require substantial changes in domestic laws and procedures of member countries.¹⁶⁷ Because adoption of the Procurement Agreement is voluntary, rather than mandatory, for WTO members, most countries have expressed an unwillingness to adopt the Agreement.¹⁶⁸

Due to the failure of the Government Procurement Act, the WTO addressed the need to combat corrupt practices in international trade at the first biannual summit meeting held early December, 1996, in Singapore.¹⁶⁹ The summit resulted in the Singapore Ministerial Declaration, which called for a working group to study transparency in government procurement practices, and to develop elements to be included in a future agreement on transparency.¹⁷⁰ Although the WTO has just begun addressing transnational bribery, commentators foresee an increased role of the WTO in coordinating a global effort to combat corruption in international business transactions.¹⁷¹

2. The United Nations

The United Nations, through its Commission on International Trade Law (UNCITRAL), has taken recent steps to restrict corruption in the conduct of international business.¹⁷² UNCITRAL adopted a Model Law on the Procurement of Goods, Construction, and Services (Model Law) on December 9, 1994.¹⁷³ This Model Law was "designed to promote transparency and objectivity in public procurement proceedings."¹⁷⁴ If an offer or price quotation

166. See Almond & Syfert, *supra* note 55, at 441, 441 n.326 (citing Agreement on Government Procurement, Jan. 1, 1981, GATT B.I.S.D. (26th Supp.) (1980) (entered into force Jan. 1, 1981)).

167. See Kantor, *supra* note 53, at 117.

168. See *id.* Signatories are predominantly industrialized countries. Only the United States, Canada, the EU member states, Israel, Japan, Norway, the Republic of Korea, and Switzerland have signed the Government Procurement Agreement. See *id.*

169. See Almond & Syfert, *supra* note 55, at 442.

170. See WTO, Singapore Ministerial Declaration, Dec. 13, 1996, art. 21, reprinted in 36 I.L.M. 218, 226 (1997).

171. See, e.g., Nichols, *supra* note 1, at 361-64, 377-78. (stating that the WTO is in a unique position of being able to enforce codes of conduct).

172. See Deming, *supra* note 158, at 697.

173. See *id.*

174. *Fourth Annual Report of Trade Promotion Coordinating Committee: Hearing Before the Subcomm. On International Finance of the Senate Comm. On Banking, Housing and Urban Affairs*, 104th Cong. 145 (1996) [hereinafter *Fourth Annual Report Hearing*].

is accompanied by a bribe from a contractor or supplier, the Model Law mandates that the offer or proposal be rejected. Although the Model Law challenges bribery in the context of procurement practices, by requiring heightened transparency in accounting and increased objectivity in selecting bids, it serves merely as advisory legislation, and has only been adopted by Poland and Albania.¹⁷⁵

The Economic and Social Council of the United Nations (ECOSOC) was established to devise a specific policy challenging corruption in international business transactions. In July, 1996, ECOSOC adopted a proposal aimed to achieve this goal.¹⁷⁶ Both of these proposals were subsequently adopted by the General Assembly of the United Nations in December, 1996. The "UN Resolution on Action against Corruption" includes an "International Code of Conduct for Public Officials" (Code of Conduct), which is intended to be used as a tool to guide the efforts of Member States in fighting corruption.¹⁷⁷

Under the UN Code of Conduct, "public officials shall at no time improperly use public moneys, property, services or information that is acquired in the performance of, or as a result of, their official duties for activities not related to their official work."¹⁷⁸ Although the Code of Conduct recommends that corporations maintain accurate accounting records and refrain from making bribe payments, the Code is not legally binding in any jurisdiction.¹⁷⁹ Moreover, the UN failed to finalize the Code, and it has never been adopted in any formal manner.¹⁸⁰ In addition to proposing the Code of Conduct, the Resolution on Action Against Corruption calls upon the Secretary-General of the UN to continue his studies of corruption in international business transactions and to intensify his efforts to work with other UN organs and nongovernmental organizations to coordinate anti-corruption initiatives.¹⁸¹

Also proposed by ECOSOC in July 1996, and adopted by the General Assembly of the UN the following December, was the "Declaration Against Corruption and Bribery in International

175. See *id.* at 145-46.

176. See Deming, *supra* note 158, at 698. For an outline of early UN regulation of transnational bribery, see Muffler, *supra* note 7, at 10-11.

177. See G.A. Res. 51/59, U.N. GAOR 3rd Comm., 51st Sess., 82nd mtg., U.N. Doc. A/51/610 (1996) reprinted in 36 I.L.M. 1039, 1040-41 (1997) [hereinafter G.A. Res. 51/59].

178. *Id.* at Annex, II(6). This code of conduct prohibits public officials from accepting gifts and favors. See generally Salbu, *supra* note 31, at 234.

179. See Nichols, *supra* note 1, at 355-56.

180. See *id.*

181. See G.A. Res. 51/59, *supra* note 177, at 1041.

Commercial Transactions.”¹⁸² This proposal called on Member States “[t]o take effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions,” and to adopt appropriate business codes and standards to prohibit bribery in connection with international commercial transactions.¹⁸³ Most importantly, the proposal urged Member States to criminalize international bribery and to proscribe the tax deductibility of bribes.¹⁸⁴ While the principles espoused in this proposal are bold, its implementation and enforcement have been weak.

3. The Organization for Economic Cooperation and Development

In recent years, the Organization for Economic Cooperation and Development (OECD) has emerged as the one of the strongest vehicles for promoting clean business practices and catalyzing anti-corruption reforms. The OECD is an intergovernmental organization that facilitates the coordination of economic policies among the world’s twenty-seven wealthiest nations.¹⁸⁵ OECD countries export ninety percent of the world’s goods and have come to recognize that their companies supply many of the bribes responsible for debilitating the global trading system as a whole.¹⁸⁶

Through the Committee on International Investment and Multinational Enterprises, OECD members have espoused their intent to “promote good public and corporate governance, and to prevent unfair competition in international trade in investment.”¹⁸⁷ The OECD Development Assistance Committee (DAC) has also become involved in the OECD anti-corruption campaign. The DAC has proposed a strategy to curb corruption in bilateral aid-funded procurement that depends on the addition of anti-corruption provisions in aid-funded procurement

182. See G.A. Res. 51/191, U.N. GAOR 2nd Comm., 51st Sess., 86th mtg., U.N. Doc. A/51/601 (1996), reprinted in 36 ILM 1043 (1997).

183. *Id.* at 1046-47.

184. See *id.* See also Deming, *supra* note 158, at 698.

185. See Nichols, *supra* note 1, at 356; AID, OPIC, OECD Nomination Hearings Before the Senate Foreign Relations Comm., 105th Cong. (1997), available in LEXIS, LEGIS Library, CNGTST File (statement by Amy L. Bondurant, U.S. Representative to the OECD) (stating that “29 industrialized democracies at the OECD from North America, Europe, and Asia promote free market principles all around the globe,” and noting that the OECD has a unique capacity “to achieve consensus on economic issues among the world’s most advanced democracies”).

186. See King, *supra* note 14, at 1; Johnston, *supra* note 142.

187. Johnston, *supra* note 142. OECD members have acknowledged that as the world’s leading trade countries, they have a responsibility for the integrity of the multilateral trading system. See *id.*

contracts.¹⁸⁸ In addition, the Public Management Committee has assisted OECD governments in assessing "their own strength[s] and weakness[es] in protecting the integrity of their governments."¹⁸⁹ OECD anti-corruption efforts have been based on the premise that, while each country is responsible for the conduct of its companies abroad, a multilateral attack on corrupt business practices will be more effective than uncoordinated individual actions.¹⁹⁰

On May 27, 1994, the OECD approved a Recommendation that reflected an agreement among Member States that bribery distorts international competitive conditions, that all countries share a responsibility to reduce the role of bribery in international commercial transactions, and that criminalizing overseas bribery is an aggressive step toward eradication.¹⁹¹ A Working Group was established under the auspices of the Committee on Investment and Multinational Enterprises to track the progress attributable to the Recommendation.¹⁹² Although the 1994 Recommendation demonstrates the intent of each member to honor its commitment to initiate effective action against international corruption vis à vis the other OECD members, the Recommendation is not legally binding on member countries.¹⁹³ The only enforcement mechanisms granted by the Recommendation are monitoring and peer pressure by OECD member states.¹⁹⁴

188. *See id.*

189. *Id.* The Public Management Committee has developed the concept of an "ethics infrastructure" to assist in cleaning up the governments of Member States. *Id.*

190. *See id.* The OECD has stated that "it is not enough just to agree on the laws we should adopt. We must also make sure that every country enforces its law." *Id.* The OECD also stresses that cooperation with the private sector in the fight against corruption is crucial to the potential success of such efforts. *See id.*

191. OECD, Council Recommendation on Bribery in International Business Transactions, C(94) 75/FINAL, May 27, 1994, reprinted in 33 I.L.M. 1389, 1390-91 (1994). *See generally* Henry H. Roszbacher & Tracy W. Young, *The Fourteenth International Symposium on Economic Crime: The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT'L L. 509, 527-28 (1997).

192. *See* Roszbacher & Young, *supra* note 191, at 528. The anti-bribery working group within the OECD met in the autumn of 1994 and held a symposium in March, 1995. *See* Earle, *supra* note 5, at 276. The group also prepared a collection of questions to which member countries were asked to respond. *See id.* Several countries followed through and completed the requested responses. *See id.*

193. *See* Johnston, *supra* note 142; *see also*, Earle, *supra* note 5, at 225-26 (noting that Japan and several European nations objected to U.S. efforts to make the recommendation legally binding).

194. *See id.*

Two years after issuing its first anti-bribery Recommendation, the OECD took its first significant step towards eradicating the practice of transnational bribery.¹⁹⁵ The OECD Council adopted the Recommendation on Tax Deductibility of Bribes to Foreign Public Officials¹⁹⁶ in April, 1996. This Recommendation called on Members that provide tax deductions for bribes to foreign officials to "reexamine such treatment with the intention of denying this deductibility."¹⁹⁷ Because more than half of the OECD Member States treat transnational bribery as a tax deductible business expense, this Recommendation addressed a critical obstacle to the successful elimination of bribery abroad.¹⁹⁸ In May, 1996, the OECD Council met at the Ministerial level and committed itself to criminalizing bribery "in an effective and coordinated manner."¹⁹⁹ The Council eventually reached a consensus on the measures that should be taken and in 1997 recommended steps each member country should take toward criminalizing bribery.²⁰⁰ Responsibility for monitoring the implementation of the Recommendation was delegated to the Committee on Fiscal Affairs, working in concert with the Committee on International Investment and Multinational Enterprises.²⁰¹

Since the adoption of this Recommendation, individual OECD Members have made only limited progress towards prohibiting the tax deductibility of bribes to foreign officials.²⁰² By the end of 1997, only Norway had eliminated the practice.²⁰³ Belgium, the Netherlands, Switzerland, Denmark, and Australia had measures pending in their legislatures to eliminate such tax deductions.²⁰⁴ Several countries, including Germany, Austria, and France, have stated that they will not take action to eliminate the tax deductibility

195. See Kantor, *supra* note 53, at 114-15.

196. OECD, Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials, C(96)27/FINAL, Apr. 11, 1996, reprinted in 35 I.L.M. 1311, 1311 (1996) [hereinafter OECD, C(96)27/FINAL].

197. *Id.* at 1312.

198. See Kantor, *supra* note 53, at 115.

199. OECD, Revised Recommendation of the Council on Combatting Bribery in International Business Transactions, C(97)123/FINAL, May 23, 1997, reprinted in 36 I.L.M. 1018, 1018 (1997) [hereinafter OECD, C(97)123/FINAL].

200. See *id.* at 1019.

201. See OECD, C(96)27/FINAL, *supra* note 196, at 1312.

202. Over half of the 26 OECD members still permit corporations to take tax deductions for bribes paid to foreign officials. See Almond & Syfert, *supra* note 55, at 438-39.

203. See *The Fifth Annual Report on the Status of the National Export Strategy: Hearings Before the Senate Banking, Housing and Urban Affairs Comm.*, 105th Cong. (1997) available in LEXIS, LEGIS Library, CNGTST File (statement of William M. Daley, Secretary of Commerce).

204. See *id.*

of bribes until the issue of criminalization is decided.²⁰⁵ These countries have resisted efforts directed at eliminating tax deductions based on the fear that doing so would threaten the ability of national companies to compete for contracts in the international community. Practical implementation of the Recommendation on Tax Deductibility of Bribes has proven to be more difficult than reaching a consensus on the principles embodied within it.²⁰⁶

The issue of transnational bribery of foreign officials was addressed again at the June, 1996 G-7 Summit in Lyon, France.²⁰⁷ In Lyon, the G-7 declared its support of ongoing efforts in other multilateral organizations to combat bribery.²⁰⁸ The summit "resolved to combat corruption in international business transactions," recognized the OECD Ministers' commitment to criminalize international bribery, and urged the OECD to further examine the appropriate international modalities to facilitate the criminalization of bribery.²⁰⁹ The summit suggested that additional proposals for action be considered in 1997.²¹⁰

In May, 1997, the OECD responded to support from the G-7 by adopting a Revised Recommendation on Combating Bribery in International Business Transactions (Revised Recommendation).²¹¹ This Revised Recommendation called for "effective measures to deter, prevent, and combat the bribery of foreign public officials in connection with international business transactions."²¹² In particular, the Revised Recommendation advocated "the prompt criminalization of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in . . . [the Revised] Recommendation and with the jurisdictional and other basic legal principles of each country."²¹³ The Revised Recommendation also urged Member states to take prompt action to implement the 1996 Recommendation requiring reexamination of the issue of tax-deductibility of foreign bribe payments.²¹⁴ Perhaps the

205. *See id.*

206. Robert Leiken has noted that practical implementation of the Recommendation is "a more difficult and more critical stage." *Drug Trafficking Hearing*, *supra* note 20, at 103.

207. *See id.*

208. *See* Kantor, *supra* note 53, at 115.

209. Making a Success of Globalization for the Benefit of All, G7 Economic Communiqué (June 28, 1996) § 26.

210. *See id.*

211. OECD, C(97)123/FINAL.

212. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, pmbl., available at <<http://www.oecd.org/daf/cmisis/bribery/20nov1e.htm>> [hereinafter OECD Convention].

213. *Id.*

214. OECD Recommendation C(97)123/FINAL, *supra* note 199, at 1019.

most significant aspect of the Revised Recommendation was the decision to draft an international convention to criminalize bribery.²¹⁵ This treaty was planned to be open for signature by the end of 1997, with the goal of its entry into force within one year.²¹⁶

As promised, the OECD convened in December, 1997 to sign the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention).²¹⁷ The Convention had been adopted by the OECD Negotiating Conference on November 21, 1997, and was subsequently signed by OECD Ministers in Paris about three weeks later.²¹⁸ Under this legally binding treaty, cross-border bribes will become an international crime.²¹⁹ Britain, Hungary, Germany, and Argentina were the first countries to sign the accord, described by OECD Secretary-General Donald Johnston as a "major success" in "the important fight against international corruption."²²⁰ French Secretary of State for Foreign Trade, Jacques Dondoux, stated that the Convention marked "the first time that the international community, or at least all the industrial countries, have adopted an operational instrument to fight effectively against international corruption."²²¹

The OECD Convention reflects three basic premises.²²² First, there are two parties to every bribe: the donor and the recipient of the payment.²²³ Second, economic markets and public morality do not always coincide.²²⁴ Third, new rules governing international business will lead to "tougher but fairer competition" in the global market.²²⁵

215. *Id.*

216. *See id.*

217. *See* OECD Convention, *supra* note 212, preamble.

218. *See* Sue Kendall, *Industrial Countries Sign Anti-Bribery Pact*, Agence France Presse, Dec. 17, 1997, available in LEXIS, NEWS Library, AFP File.

219. *See* Suchada Kulawat, *Analysis/killing Off Graft: Securing Global Remedies to a Worldwide Curse*, BANGKOK POST, Dec. 18, 1997, at 8, available in LEXIS, ASIAPC Library, BNGPST File.

220. Kendall, *supra* note 218.

221. *Id.* German Economy Minister Guenter Rexrodt saw the agreement as "a signal to the world that 'the international community will not let corruption damage or endanger the progress made on liberalizing world trade.'" *Id.*

222. For general discussion of the Convention's import, see Riyaz Dattu & John Boscariol, *OECD Countries to Implement Domestic Legislation to Combat Bribery in International Transaction*, INTER-PAC. B. ASS'N J., Mar. 1998, available at <<http://www.mccarthy.ca/oecd.html>>; Madeleine K. Albright, Statement at the Organization for Economic Cooperation and Development Signing Ceremony of the Anti-Bribery and Corruption Convention (Dec. 17, 1997), available at <<http://www.state.gov/www/statements/971217b.html>>.

223. *See* Kulawat, *supra* note 219, at 8.

224. *See id.*

225. *Id.*

Despite the Convention's early fanfare, the treaty offers only a partial solution to the problem of transnational bribery. As stated by Peter Eigen, chairman of Transparency International, "[t]his is only one tool in a whole tool kit of measures to deal with corruption."²²⁶ The scope of the Convention is relatively limited. Article 1 defines the "Offence of Bribery of Foreign Public Officials" as the intentional offer, promise, or gift of any undue pecuniary or other advantage by any person to a foreign public official in order to persuade the official to "act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."²²⁷

The definition of the offense of criminal bribery is clearly under-inclusive. The treaty addresses only "active bribery," defined as "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."²²⁸ Thus, penalties are imposed only on the companies in OECD countries paying out money. Corrupt officials who receive illicit payments are not penalized, as this would constitute interference in a foreign country's sovereignty.²²⁹

Bribes issued to private companies in foreign countries are also not covered by the Convention.²³⁰ Moreover, facilitation payments are not an offense under the Convention because they "do not constitute payments made 'to obtain or retain business or other improper advantage.'"²³¹ Rather, facilitation payments are typically made to induce public officials to perform routine functions, such as issuing licenses or permits.²³² Furthermore, bribes made to political parties or party officials fall outside the scope of the Convention and are not prohibited.²³³ Countries

226. *Id.*

227. OECD Convention, *supra* note 212, art. 1, para. 1.

228. OECD, *Commentaries on the Convention on Combating Bribery in International Business Transactions* (Nov. 21, 1997) available at <<http://www.oecd.org/daf/cmisis/bribery/20nov2e.htm>> [hereinafter OECD, *Commentaries*].

229. See Kendall, *supra* note 218.

230. See *id.*

231. OECD, *Commentaries*, *supra* note 228 (quoting OECD Convention, *supra* note 212, art. 1, para. 1).

232. See *id.*

233. See Kendall, *supra* note 218. U.S. Secretary of Commerce William Daley has criticized this aspect of the Convention and has suggested that a Convention condoning bribes to political machines, such as Zaire's Mobutu Sese Seko or the Philippines' Ferdinand Marcos, will be only marginally effective. See Daley, *supra* note 19, at 22.

such as Germany and France have argued that condemning bribes to political parties would pose constitutional problems due to a lack of similar specific legislation for their own political parties.²³⁴ OECD members have expressed both a shared concern and an intent to address this problem.²³⁵

The OECD has worked to convince nonmembers to sign the Convention, as well.²³⁶ So far, five non-OECD countries, Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic, have adopted the treaty.²³⁷ In doing so, these countries have demonstrated their intent to abide by the new rules governing international business. However, the Convention is not expected to enter into force until 1999.²³⁸ The Convention will enter into force when one of two scenarios occurs. First, if at least five of the ten largest OECD economies, representing at least sixty percent of total OECD exports, ratify the Convention by the end of 1998, the Convention will immediately enter into force.²³⁹ If the required number of OECD countries have not passed enabling legislation by the end of 1998, the Convention will enter into force at the start of 1999, as long as two countries have ratified it.²⁴⁰

Signatories were obligated to submit the Convention to their legislatures for ratification by April 1, 1998.²⁴¹ Because the Convention is not self-executing, signatories must enact implementing laws that criminalize bribery in a manner consistent with terms of the Convention.²⁴² The Convention's potential to successfully establish a multilateral anti-corruption regime will be realized only if signatories are able to achieve prompt ratification, full implementation, and appropriate

234. See Kendall, *supra* note 218.

235. See *id.* The OECD has agreed to continue work on this issue and has stated that the issue will be visited again at the next OECD ministerial meeting in early 1998. See *id.*

236. See OECD, *Commentaries*, *supra* note 228 (discussing the OECD Convention, *supra* note 212, art.13). The OECD has appealed to nonmembers to adhere to the 1997 OECD Revised Recommendation and to participate in the OECD Working Group on Bribery in International Business Transactions. See *id.* Nonmembers that participate in the Working Group are eligible to sign the OECD Convention. See *id.* The current procedures governing participation by non-OECD members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. See *id.*

237. See Kulawat, *supra* note 219, at 8.

238. See Kendall, *supra* note 218.

239. See OECD Convention, *supra* note 212, art. 15, para. 1.

240. See *id.* at art. 15, para. 2.

241. See Lucinda A. Low & Michael L. Burton, *Anti-Bribery Pact: Corruption Is Target of Multilateral Efforts*, NAT'L L.J. (New York), May 4, 1998, at C5.

242. See *id.*

enforcement.²⁴³ In the United States, the Convention must be ratified and implementing legislation must then be enacted by Congress to ensure that the Foreign Corrupt Practices Act is brought into conformity with the Convention.²⁴⁴ On May 1, 1998, a month after the target date of April 1, President Clinton submitted the Convention to the Senate with a recommendation that the Senate "give early and favorable consideration to the Convention, and that it give its advice and consent to ratification."²⁴⁵

Although the Convention will become legally binding after December 31, 1998, as long as at least two signatories have ratified it, "such a limited endorsement would be tantamount to a major failure of the entire process."²⁴⁶ The ability of the Convention to achieve its goals depends upon ratification by the maximum number of countries.²⁴⁷ Since no country will want to be the first to subject itself to stricter regulation, "it is vital that all 34 countries act swiftly and simultaneously in ratifying the convention."²⁴⁸

B. *The Role of Multilateral Developments Banks*

Multilateral Development Banks (MDB) play an important role in the crusade against transnational bribery since they control funds that may potentially be used by borrowers to engage in corrupt business practices.²⁴⁹ Both the NAFTA-created North American Development Bank (NADBank) and the World Bank have recently instituted policies to discourage transnational

243. *See id.*

244. *See id.* The Convention repeats many principles already addressed by the FCPA, but Senate ratification will require the amendment of the FCPA in several respects to ensure consistency between the two overlapping laws. *See id.*

245. *Clinton Letter to Senate on Convention of Combating Bribery of Foreign Public Officials in International Business Transactions*, U.S. Newswire, May 1, 1998, available in 1998 WL 5685396.

246. Transparency International, *OECD Convention Update: Ratification Process Enters Crucial Phase* (March 4, 1998) <<http://www.transparency.de/press/1998.3.4oecd-update.html>>.

247. *See id.*

248. *Id.*

249. The Development Committee of the World Bank and the International Monetary Fund released a report addressing international bribery in March, 1996. *See Kantor, supra* note 53, at 119. In this report the Development Committee Task Force "emphasized the MDB's important role in helping member countries create and maintain an environment of effective government and a strong civil society, including a reliable framework of rules and institutions." *Id.* The report also recommended that MDB's coordinate procurement policies and rules. *See id.*

bribery in the context of MDB-funded projects. MDB policies intended to limit opportunities for borrowers to engage in corrupt transactions generally consist of anti-bribery provisions in loan and procurement contracts and the requirement that corporate borrowers have policies in place that prohibit bribery.

1. North American Development Bank

NADBank has adopted guidelines that require companies to certify that they have not engaged in bribery of government officials in NADBank-funded projects.²⁵⁰ In addition, borrowing companies must assert that they have not been convicted of bribery within the five year period prior to such certification.²⁵¹ Corporate policies prohibiting bribery are a prerequisite to receiving NADBank funds, and companies that are found to engage in bribery may be barred from future eligibility for involvement in NADBank-funded or guaranteed projects.²⁵²

2. World Bank

Efforts by the World Bank to restrain bribery in international business transactions have focused on increasing transparency and clarifying bidding procedures.²⁵³ In 1995, the World Bank issued revised procurement rules intended to strengthen transparency and began requiring the use of Standard Bidding Documents in bidding procedures.²⁵⁴ Preventing bribery and corruption was the overriding goal of these revisions.²⁵⁵ In July 1997, the World Bank approved anti-bribery amendments to the loan conditions, procurement rules, and standard bidding documents.²⁵⁶ Pursuant to these amendments, the Bank will reject a contract bid or cancel a loan if the bidder or the borrower has engaged in fraud or corruption in the procurement or

250. *See id.* at 116.

251. *See id.*

252. *See id.* Companies convicted for transnational bribery are precluded from participating in NADBank-funded projects. *See id.*

253. *See Fourth Annual Report Hearing, supra* note 174, at 146. The World Bank is required by its Articles of Agreement "to ensure that the proceeds of its loans will be used only for the purposes for which they are granted and to disburse its loans only as expenditures on the projects it finances are actually incurred." INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT ARTICLES OF AGREEMENT, Feb. 16, 1989, Art. III, § 5(c), available at <<http://www.worldbank.org/html/extdr/arttoc.htm>>.

254. *See Fourth Annual Report Hearing, supra* note 174, at 146.

255. *See Deming, supra* note 158, at 698.

256. *See id.* at 699.

execution of the contract.²⁵⁷ Offending companies found will be denied the right to participate in future Bank-funded projects.²⁵⁸

To strengthen the policy laid out in the anti-bribery amendments, the World Bank employed specific language to address corrupt practices in the recently revised Guidelines for Procurement under IBRD Loans and IDA Credits. Section 1.15 mandates that borrowers, bidders, suppliers, and contractors under World Bank-financed contracts "observe the highest standard of ethics during the procurement and execution of such contracts."²⁵⁹ In furtherance of anti-corruption policy goals, the Guidelines provide the World Bank with "the right to require that contracts financed by a World Bank loan, a provision be included requiring Suppliers and Contractors" to cooperate in World Bank inspections and audits of "accounts and records relating to the performance of the [World Bank-financed] contract."²⁶⁰ The policies outlined in the Guidelines apply only to contracts for goods and works financed, at least partially, by World Bank Loans.²⁶¹

In looking towards the future, World Bank management has identified several reforms necessary to successfully control the spread of corruption. First, economic policy reforms and institutional reforms are needed in developing countries.²⁶² Second, the Bank must heighten its fiduciary responsibilities in connection with funded projects.²⁶³ Finally, the Bank must enhance its supervision of procurement practices.²⁶⁴ This requires increased procurement staffing, more rigorous review of procurement by headquarters, and limited delegation of oversight to field offices.²⁶⁵

257. *See id.*

258. *See id.* These companies may be blacklisted from participation in Bank-funded contracts either indefinitely or for a stated time period. *See id.*

259. GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS, § 1.15, available at <<http://www.worldbank.org/html/opr/procure/intro.html>>.

260. *Id.* at § 1.15(e).

261. Deming, *supra* note 158, at 699. For the procurement of contracts for goods and works which are not funded by a Bank loan, the borrower may adopt other methods which ensure that the project will be carried out in a diligent and efficient manner. *See id.*

262. *See* Kantor, *supra* note 53, at 118.

263. *See id.*

264. *See id.*

265. *See id.*

C. Regional Initiatives to Proscribe Transnational Bribery

Efforts by regional organizations to curb transnational bribery at the supranational level have become increasingly aggressive in recent years. Organizations such as the Council of Europe, the European Parliament, the Council of Securities Regulators of the Americas (COSRA), and the Organization of American States (OAS) have initiated numerous reforms aimed at eliminating corruption in international business transactions. While regional organizations cannot proscribe bribery globally, the measures they implement send a message to the world that corrupt business practices will not be tolerated. In addition, they combat bribery on a more manageable scale and add momentum to the global campaign against corruption.

1. Council of Europe

In June of 1994, the Council of Europe adopted a multifaceted program addressing corruption in transnational business.²⁶⁶ Under this program, the Council of Europe established a multidisciplinary group on corruption (GMC) "to promote research projects, training programs, and exchanges in practical experiences on corruption."²⁶⁷ The GMC's initial report contained a series of anti-corruption recommendations, including "proposed legal reforms that would alter existing administrative, tax, civil, commercial, and criminal laws in most countries."²⁶⁸ Public and private codes of conduct and sanctions for illicit payments were also discussed.²⁶⁹ However, the keystone of the GMC report was a recommendation that corruption should become a "punishable offense irrespective of the place where it was committed and of the country to which the official to whom the illegal payment was made belonged."²⁷⁰

266. See Deming, *supra* note 158, at 696.

267. *Id.*

268. *Id.* at 697.

269. See *id.* at 696.

270. *Id.* at 697 (quoting Paolo Bernasconi, *New Criminal Law Provisions Against the Corruption of Public Officials: Analysis of the Gaps in Substantive Law, Procedural and International Mutual Assistance; Proposals for Remediating Them*, COUNCIL OF EUROPE, MULTIDISCIPLINARY GROUP ON CORRUPTION, at 10 (Dec. 31, 1994)). The GMC report found that the "time is therefore ripe to consider revising national criminal legislation along the lines of the Foreign Corrupt Practices Act which has been in force in the United States since December 19, 1977." *Id.* (quoting Bernasconi, *supra*).

2. European Parliament

Efforts to combat the bribery of public officials have also been endorsed by the European Parliament. In December, 1995, the European Parliament adopted the Report of the Committee on Civil Liberties and Internal Affairs on Combating Corruption in Europe (Report).²⁷¹ This report was based on the notion that the increasing internationalization of trade, coupled with inadequate criminal and legal provisions to prevent corruption, will probably result in corrupt practices at the international level.²⁷² In the Report, the GMC recommended that "Member States abolish any tax legislation and other legal provisions or rules which indirectly encourage corruption and make it a punishable offense for national or foreign officials and decision-makers to be granted or to accept advantages."²⁷³

3. Council of Securities Regulators of the Americas

As European organizations have displayed a new willingness to reconsider the legality of international bribery, organizations representing the Americas have taken concrete steps toward the criminalization of corrupt business practices. At the Fifth Annual Meeting of COSRA, on June 20-21, 1996, the organization adopted a Resolution on Combating Illicit Payments by Public Companies (Public Company Resolution).²⁷⁴ The Public Company Resolution calls on member countries to use their best efforts to "develop and promote laws that address illicit payments made by public companies."²⁷⁵ In addition, the Public Company Resolution calls for the development and promotion of independent auditing

271. Report of the Committee on Civil Liberties and Internal Affairs on Combating Corruption in Europe, EUR PARL DOC., (EN A4-314) 3 (1995) [hereinafter Combating Corruption Report].

272. See Deming, *supra* note 158, at 697.

273. Combating Corruption Report, *supra* note 271, at 5.

274. PRACTISING LAW INSTITUTE, THE SEC SPEAKS IN 1997: OFFICE OF INTERNATIONAL AFFAIRS, THE SEC'S INTERNATIONAL ENFORCEMENT PROGRAM, AND BILATERAL AND MULTILATERAL INITIATIVES 840, available in WESTLAW 980 PLI/Corp 747 [hereinafter THE SEC SPEAKS IN 1997]. "COSRA was founded by securities regulators to promote market integrity through the development of high regulatory standards throughout the region." *Id.* COSRA is gradually enlarging and the ranks of its members include countries at various levels of market development. See *id.* COSRA "has advanced compatible regulatory structures in the Americas by endorsing principles of cooperation, enforcement and oversight that commits its members to the development of safe, fair and transparent markets." *Id.*

275. *Id.* at 841.

procedures capable of detecting illicit payments and slush funds.²⁷⁶

The Public Company Resolution was supplemented by a Declaration on Combating Bribery in the Americas.²⁷⁷ This declaration was adopted by seventeen countries on June 20, 1996.²⁷⁸ In this declaration, members stated their intention to enforce laws addressing illicit payments made to domestic and foreign public officials.²⁷⁹ The declaration demonstrated a commitment to the "vigilant oversight of public companies," based on appropriate independent auditing procedures that provide "reasonable assurance of detecting errors and irregularities including those that may result from illegal acts such as bribery."²⁸⁰

4. Organization of American States

The most comprehensive attack against international corruption has been the product of initiatives undertaken by the OAS.²⁸¹ Comprised of more than thirty countries in North and South America, the OAS issued its first resolution proscribing corrupt practices in 1992.²⁸² Thereafter, a Working Group was established to examine the role of integrity and civil ethics in international trade. On June 1, 1994, a second resolution concerning bribery in international trade was adopted by the General Assembly of the OAS.²⁸³

Efforts by the OAS to eradicate transnational bribery culminated in the Inter-American Convention Against Corruption

276. See *id.*; see also Nichols, *supra* note 1, at 359.

277. This Declaration is reprinted in *THE SEC SPEAKS IN 1997*, *supra* note 274, at 858-59.

278. See *id.* at 859. The Declaration has been adopted by: Argentina, Brazil, Canada-Ontario, Canada-Quebec, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Jamaica, Mexico, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela. See *id.*

279. Declaration on Combating Bribery in the Americas, reprinted in *THE SEC SPEAKS IN 1997*, *supra* note 274, at 858-59.

280. *Id.* at 858.

281. See Nichols, *supra* note 1, at 359. See generally Lucinda A. Low, *American Bar Association Section of International Law and Practice Report to the House of Delegates: Inter-American Convention Against Corruption*, 31 INT'L LAW. 1121 (1997) (discussing the Inter-American Convention Against Corruption created by the OAS and why the ABA supports the Convention).

282. Nichols, *supra* note 1, at 358.

283. See Vogelsson, *supra* note 36, at 197. This resolution stated that "corrupt practices are capable of frustrating the process of overall development, generating the diversion of resources necessary to the improvement of the economic and social conditions of the people." *Id.*

(OAS Convention).²⁸⁴ This treaty was adopted and opened for signature on March 29, 1996, in Caracas, and was eventually signed by twenty-one nations.²⁸⁵ The OAS Convention represents the first legally binding treaty addressing the issue of transnational bribery.²⁸⁶ Pursuant to the treaty, signatories are required to criminalize the bribery of foreign officials and to allow extradition of both bribe-givers and officials who have accepted bribe payments.²⁸⁷ In addition to criminalizing the receipt of bribes by public officials, signatories must make it a crime for public officials to possess or acquire assets "that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."²⁸⁸ The OAS Convention provides mutual legal assistance in investigations of corruption, and orders the seizure and forfeiture of illicit gains.²⁸⁹ The treaty is open for accession by any state willing to uphold the principles it espouses.²⁹⁰

284. Organization of American States: Inter-American Convention Against Corruption, Mar. 29, 1996, *reprinted in* 35 I.L.M. 724, 724 (1996) [hereinafter Inter-American Convention].

285. *See id.* The following OAS Member States signed the Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. *See id.*

286. *See Nichols, supra* note 1, at 359. The purpose of the treaty is "[t]o promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance." Inter-American Convention, *supra* note 284, art. II, § 2, at 728. The U.S. State Department praised the Inter-American Convention as "the first anti-corruption treaty instrument in the world" and has predicted that it may catalyze the criminalization of transnational bribery in other fora. *Drug Trafficking Hearing, supra* note 20, at 106 (quoting an anonymous State Department source).

287. *See* Inter-American Convention, *supra* note 284, arts. VII, XIII, at 730, 731.

288. Inter-American Convention, *supra* note 284, art. IX, at 730 (describing the crime of "illicit enrichment").

289. *See* Alan P. Larson (U.S. Asst. Secretary of State for Economic & Business Affairs), *Editorial: Leadership Needed to Fight Corruption*, THE HINDU, May 9, 1997, at 12.

290. *See* Inter-American Convention, *supra* note 284, art. XXIII, at 733. The Convention "shall remain open for accession by any other state." *Id.* The accession by states outside the region is one way of expanding the reach of the Convention's measures against transnational bribery. *See Drug Trafficking Hearing, supra* note 20, at 106. *See also* Sutton, *supra* note 85, at 1429 (arguing that the Inter-American Convention "offers the most effective approach to combating corruption and that all states should sign and ratify it").

V. PROPOSED MEASURES TO REDUCE TRANSNATIONAL BRIBERY AND
PROMOTE CLEAN PRACTICES AND ECONOMIC GROWTH
IN DEVELOPING NATIONS

The rising costs associated with corrupt international business transactions have precipitated anti-corruption movements all over the world.²⁹¹ Popular attacks on corruption have been launched in countries as diverse as Argentina, Cambodia, Italy, Hungary, Pakistan, Switzerland, Thailand, and Zimbabwe.²⁹² Today, corruption is being challenged by a diverse collection of opposition parties. Religious groups, the press, nongovernmental organizations, and civil servants have banded together in the campaign against corruption.²⁹³ The repudiation of bribery and kickbacks by societies that once tolerated them has been characterized as a "revolution in public opinion."²⁹⁴ This setting presents the unprecedented opportunity to implement effective reforms capable of significantly reducing transnational bribery.

A. *Addressing the Causes of Corruption*

For anti-corruption reforms to successfully control transnational bribery, they must be based on an understanding of the causes of corruption. Economists Andrei Shleifer of Harvard University and Robert W. Vishny of the University of Chicago have identified several factors that typically accompany corruption.²⁹⁵ They claim that the existence of underpaid public officials, monopoly regimes, and inadequate governmental oversight are indicators of corrupt government.²⁹⁶ These three factors will be discussed below.²⁹⁷

291. See generally Leiken, *An End to Corruption*, *supra* note 4, at A15.

292. See *id.* Anti-corruption movements have also emerged in Saudi Arabia, El Salvador, South Korea, Taiwan, Tanzania, and New Zealand. See *id.*

293. See *id.*

294. *Id.*

295. See Pennar et al, *supra* note 62, at 138 (stating that these economists believe a lack of economic and political competition promotes corruption); see also Andrei Shleifer & Robert Vishny, *Corruption*, 108 Q. J. OF ECON. 599 (1993) (proposing a mathematical model of corruption to show the high cost of corruption for poor nations, more costly even than high taxation). Shleifer and Vishny are American economists who act as advisers to the Russian government. *Bribonomics*, *supra* note 100, at 86.

296. See Pennar et al, *supra* note 62, at 138. When the chances of getting caught and being punished are low, and an honest day's work results in a very low income, accepting bribes is more likely to seem reasonable. See *id.* In addition, "chaotic conditions and weak governments [allow] new corruption opportunities to arise." Haque & Sahay, *supra* note 59, at 762. Empirical studies of bureaucratic corruption have pointed to three primary factors predictive of the

Direct evidence of a negative correlation between public wages and corruption was provided by a recent econometric study conducted by Van Rijckeghem and Weder.²⁹⁸ An analysis of a twenty country sample over the 1982-1994 time period revealed that the ratio of civil service wages to manufacturing wages was a significant predictor of the corruption index.²⁹⁹ In the sample countries, the correlation between these relative wages and the corruption index exceeded eighty percent.³⁰⁰ In addition, the evidence demonstrated that corruption is more common in countries with poorly developed administrative systems and institutions and low government wages.³⁰¹

Low paid public officials are particularly vulnerable to engaging in bribery when they enjoy monopoly power over a government service.³⁰² By definition, officials with monopoly power often have unbridled discretion in the use of their authority. Thus, monopoly control confers the power to charge a higher than optimal price for a service while providing less of it.³⁰³ When officials do not enjoy monopoly power over services, requests for bribes will decline and parties will instead seek the services of another official who either does not demand a bribe or who asks for a lesser amount.³⁰⁴ Officials that enjoy limited monopoly control will be careful to demand small bribes to prevent potential customers from being scared off.³⁰⁵

The connection between poor oversight of public officials and corruption is more intuitive. A lack of accountability allows the official to use his authority to promote his own interests above that of the public he represents. When pervasive corruption within the government leads officials to believe they are entitled to illicit payments as a supplement to low wages, the fear of

degree of corruption: opportunities, low salaries, and poor policing. *See id.* This result seems consistent with Shleifer and Vishny's hypothesis.

297. Robert Klitgaard, a scholar in the field of transnational corruption, has proposed a rough formula for corruption which incorporates a similar understanding of the factors leading to corruption. *See* Robert Klitgaard, *What Can Be Done?*, UNESCO COURIER (Fr.), June 1996, at 34, 35. Under Klitgaard's formula, corruption equals monopoly plus discretion minus accountability. *See id.*

298. *See* Haque & Sahay, *supra* note 59, at 761.

299. *See id.* A panel data estimation procedure was used. *See id.*

300. *See id.*

301. *See id.* While scholars, such as Tanzi, have argued that developing countries have a higher propensity for corruption than industrial countries due to cultural differences, this theory has generally been discredited. *See id.*

302. *See* *Bribonomics*, *supra* note 100, at 86.

303. *See* Klitgaard, *supra* note 292, at 35.

304. *See* *Bribonomics*, *supra* note 100, at 86.

305. *See id.*

punishment may be the only mechanism with the potential to prevent the acceptance of bribes.

Thus, a strategy to effectively combat transnational bribery must ensure that public officials are adequately compensated while demanding increased accountability in return. In addition, a successful anti-corruption strategy must attempt to mitigate monopoly control by encouraging healthy economic competition.

B. *Elements of a Comprehensive Strategy to Control Transnational Bribery*

This section will outline the issues that must be addressed in a comprehensive anti-corruption reform aimed at curbing the bribery of foreign officials in international commercial transactions. An effective solution to the problem of transnational bribery cannot be developed overnight, nor can it be achieved through one treaty. A successful strategy will require a commitment from the international community to criminalize bribery and to eliminate the factors that contribute to its proliferation. A successful approach must include legally binding rules, realistic enforcement measures, and constant monitoring. More importantly, a comprehensive campaign against transnational bribery requires participation from developing and transitional economies, in addition to the efforts of the industrialized world.

An international convention that legally binds signatories is long overdue. Foreign corrupt practices are an international problem requiring an international solution.³⁰⁶ The effectiveness of a potential convention is contingent upon acquiring a broad base of participation, including not only the wealthy OECD member states, but also less-developed countries. The exclusion of developing countries from participation in an anti-bribery convention ensures that only half of the problem will be addressed. A successful convention must proscribe both active and passive bribery. In other words, both making a bribe payment and receiving such a payment must be criminal offenses under the convention.

For the treaty to influence the actions of parties to international business transactions, it must be backed up by effective enforcement. Some scholars have proposed that the WTO is a capable enforcement vehicle, while others have suggested

306. See Lloyd N. Cutler & Daniel M. Drory, *Toward an International Code on Illicit Payments*, in *EMERGING STANDARDS OF INTERNATIONAL TRADE AND INVESTMENT* 33, 40 (Seymour J. Rubin & Gary Clyde Hufbauer eds., 1984) (stating that "[i]t is necessary to have international measures that match the international dimensions of this problem [of foreign bribery]").

establishing a private cause of action.³⁰⁷ The establishment of an independent policing agency is another viable alternative. Sanctions for infringement should include punitive fines and prison sentences.³⁰⁸ Further, the success of the convention in accomplishing the underlying goals should be periodically evaluated. A timeline, including measurable goals, should be the benchmark for comparison.

To facilitate the detection of illicit payments, heightened transparency in corporate accounting is required. Uniform financial disclosure standards aimed at preventing corporate slush funds must be adopted, and random audits by an independent agency should be instituted. Open procurement procedures would reduce opportunities for corrupt transactions. In addition, offers or requests for bribes should be subject to mandatory reporting, and incentives and safeguards should be provided for "whistle blowers." Illicit enrichment should invoke confiscation of funds, as well as criminal sanctions.

Individual countries must act to eliminate the underlying causes of bureaucratic corruption. This will involve restructuring incentives to public officials and increasing accountability.³⁰⁹ Organizational objectives and methods to measure success should be established. Compensation scales must be restructured, so that officials are rewarded for the achievement of identified goals.³¹⁰ Corruption will persist until countries ensure that public officials can earn a reasonable living through honest work. Countries that pay their public officials well are, in effect, "buying a layer of insulation against patronage and bribery."³¹¹ Furthermore, it is imperative that public officials do not have monopoly power over the distribution of goods or the performance of services. Such monopoly control grants the official complete discretion in setting prices and allocating goods and services. Market reforms that encourage exposure of the public sector to internal, domestic, and international competition will inhibit the discretion of corrupt officials by dissolving state monopolies.³¹² As bribes, artificial shortages, and transaction costs are reduced,

307. Compare Nichols, *supra* note 1, 361-64, 377-81 (arguing that the WTO should be used to coordinate a global effort to combat transnational bribery through the use of economic sanctions), with Muffler, *supra* note 7 (proposing a mechanism of enforcement based on private causes of action rather than criminalizing the action of bribery).

308. See Salbu, *supra* note 31, at 286.

309. For an example of such objectives and methods, see Klitgaard, *supra* note 297, at 35-36.

310. See *id.* at 36.

311. Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4, at 68.

312. See *id.*

producers who previously relied on bribes to ensure profitability will instead be forced to focus on improving quality and limiting costs to compete in the marketplace.³¹³

The most efficient approach to curb transnational bribery will involve cooperation among countries, international organizations, multilateral development banks, and nongovernmental organizations dedicated to controlling corruption. While adopting domestic laws and international treaties criminalizing transnational bribery will contribute to restricting corrupt transactions, a coordinated effort drawing upon a broad base of support has a greater capacity to effect change on a larger scale. Efforts by organizations such as the OECD and Transparency International should be supported, and continuing advances should be encouraged.

VI. CONCLUSION

By undermining the efficiency of economic choices, increasing the costs of transactions, reducing state revenues, and contributing to popular distrust of the government, corruption threatens political and economic stability and corrodes social structures. Transnational bribery is a universal concern that threatens the stability of economies around the globe. Although corruption is "detrimental both socially and economically whenever and wherever it occurs," it is particularly menacing to developing countries whose growth depends on the ability to compete in the new commercial world.³¹⁴ Transnational bribery in developing countries has led to declining standards of living, hyper-inflation, and public skepticism regarding the viability of democratic institutions. In countries like Russia, where pervasive corruption has enabled organized crime to merge with the state, popular support for democracy has waned and the resurgence of socialism is considered by many to be a real threat.

As transnational bribery has become increasingly expensive both economically and socially, anti-corruption reforms are gaining support and growing in number. Movements against bribery and corruption have emerged in countries around the world. Both public and private organizations have lent their support to recent anti-corruption efforts. International organizations, regional organizations, and multilateral development banks have taken the first steps towards criminalizing transnational bribery, but efforts so far have proved to be only marginally effective. Robert Leiken has warned that

313. See *id.*

314. TI SOURCE BOOK, *supra* note 15, ch. 1.

“[t]oday’s decisive battles for free trade, development, and democracy may well be fought in the campaign against corrupt practices.”³¹⁵ The need for a comprehensive strategy to control transnational corruption has become apparent in this era of corruption exposes and bribery scandals. The cooperation and coordination of both the industrialized world and developing countries is imperative in galvanizing adequate support for effective reforms.

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315. Leiken, *Controlling the Global Corruption Epidemic*, *supra* note 4.

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