

A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives

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A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non- Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives

Barbara Crutchfield George*
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Introduction

Within the last decade, there has been a concerted effort from a number of sources to control the pervasive and persistent problem of corruption¹

1. In 1967 John Nye defined corruption as private-regarding pecuniary or status gains or exercise of private-regarding influence. See John S. Nye, *Corruption and Political*

among the international business community. Corruption undermines democracy and development, fundamentally distorts public policy, discourages investment, leads to the misallocation of resources, discriminates against the poor, and destroys public confidence in democratic government.² Despite the enhanced global awareness of the corrosive effects of corruption within the political, economic, and social spheres, there presently are no clear, definitive indications that the occurrence of corruption has declined.³ A recent Gallup poll commissioned by Transparency International (TI).⁴ found that thirty-three percent of the 779 multinational executives surveyed believe that the problem of corruption in the business world is worsening.⁵ Commenting on the Gallup Poll survey, TI's Chairman, Peter Eigen, said that "[t]he data provides [sic] a disturbing picture of the degree to which leading exporting countries are perceived to be using corrupt practices."⁶ In a statement made in 1999, David Aaron, Undersecretary of Commerce for International Trade, noted that "there is a huge amount of money at stake. Just last year, there have been allegations of foreign bribery in 55 contracts worth \$37 billion."⁷

Subsequent to the initial passage of the U.S. Foreign Corrupt Practices Act (FCPA)⁸ in 1977, there have been several significant developments, such as the adoption in 1997 of the Organization of Economic Cooperation and Development (OECD) Convention on Combating Bribery of For-

Development: A Cost-Benefit Analysis, 61 AM. POL. SCI. REV. 417, 419 (1967). The working definition provided by Transparency International (TI) is that corruption is an abuse of entrusted power for private profit. See Barbara C. George & Kathleen A. Lacey, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 17 (1999).

2. See Augustin Gurza, *In Mexico, Corruption Can Be Hazardous to One's Health*, L.A. TIMES, May 25, 1999, at B1; Peter Eigen, *The Central Role of Civil Society in Combating Corruption in the Era of Globalisation*, Address to the Carter Center "Transparency for Growth" Conference (May 4, 1999) (transcript available at Transparency Int'l, *Key TI Speeches* <http://www.transparency.de/documents/speeches/pe_carter_address.html>) [hereinafter Eigen Address].

3. See Philip Segal, *Despite Laws, Bribery Thrives, Executives Say*, INT'L HERALD TRIB., Jan. 21, 2000, at 13.

4. TI is a nongovernmental organization based in Berlin and established for the purpose of targeting and exposing worldwide corruption. See generally Transparency International, *Press Release: Transparency International Publishes 1997 Corruption Perceptions Index* (visited Jan. 26, 2001) <<http://www.transparency.de/documents/press-releases/1997/1997.31.7.cpi.html>>.

5. See generally Segal, *supra* note 3.

6. Transparency Int'l, *Press Release: New Poll Shows Many Leading Exporters Using Bribes* (Oct. 26, 1999) <http://www.transparency.de/documents/cpi/cpi-bpi_press-release.html>.

7. International Trade Ass'n, *Press Release by Undersecretary of Commerce, David Aaron, Special "On-Line" Hotline to Combat Bribery of Foreign Officials* (June 30, 1999) <<http://www.ita.doc.gov/media/0630bribery.htm>>. Unless otherwise noted, references to monetary figures are in U.S. dollars.

8. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff) (amending scattered sections of 15 U.S.C. §§ 77a-78kk (1994)), amended by International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

eign Public Officials in International Business Transactions (OECD Convention)⁹ and the inception of active non-governmental organizations (NGOs) like TI. Despite these developments, current evidence of extensive business corruption shows that critical gaps remain in the mechanisms used to fight corruption. Closing these gaps will require heightened awareness by and increased cooperation among diverse entities. First, there must be a means to establish leverage over the public sector procurement process. Second, cultural attitudes toward corruption must be modified. Other necessary strategic components are grassroots initiatives within developing nations, the homes of many of the bribe-takers, to mobilize civil society¹⁰ and the private sector. Cooperation among all entities involved—government officials, legislatures, multilateral development institutions, industry groups, trade unions, and civil society in both developing and industrialized nations—will be necessary to eliminate global business corruption.

This article (1) discusses why the emerging global economy creates an environment that requires integrity in the marketplace; (2) demonstrates the inability of purely legislative measures to eradicate corruption; (3) summarizes the nature and costs, both social and economic, of business corruption; (4) describes current anti-corruption initiatives by industrialized nations; (5) reviews grassroots initiatives by NGOs to combat corruption; (6) analyzes the role of multilateral development banks in tying aid to meeting anti-corruption requirements; (7) evaluates current anti-corruption agendas emanating from developing countries; and (8) recommends a strategy to unite the diverse entities necessary to a successful campaign against corruption.

This article focuses primarily on business entities within industrialized countries who bribe government officials in developing nations,¹¹ but it should be noted that corrupt acts also occur between business entities in industrialized countries and government officials in developed nations. However, corruption is not as common between companies in developing nations and the government officials in developed countries, presumably because their current economic relationship does not provide the opportunity.

I. Background

International business transactions carry the inherent threat and temptation for bribery and corruption. Bribery is arguably the most detrimental

9. Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Convention].

10. "Civil society" in this context applies to "all those elements of society, and all those arrangements within it, that exist outside the state's reach or instigation." David Rieff, *The False Dawn of Civil Society*, NATION, Feb. 22, 1999, at 11.

11. Ten of these developing nations, including Mexico, Brazil, the People's Republic of China, India, and Indonesia, have been labeled as big emerging markets, or 'BEMS,' by the Commerce Department. While these rapidly growing markets present great opportunities for investment, several of these BEMS are viewed as being among the world's most corrupt nations.

corrupt practice to extraterritorial business transactions,¹² and bribery of foreign public officials for the purpose of influencing the award of international contracts is ubiquitous. Statistics show that in the five years from April 1994 to April 1999, bribes to foreign officials played a role in the award of 294 contracts worth about \$145 billion.¹³ According to U.S. Commerce Department figures, U.S. businesses collectively lost \$37 billion worth of overseas contracts in 1998 because of foreign bribery.¹⁴

Bribery in business transactions occurs in a variety of industries, including military procurement, aerospace, infrastructure, energy, and transportation. Corruption has even been alleged to have penetrated the inner circles of the World Bank (Bank), the multilateral financial organization that ostensibly campaigns against corruption when loaning money to countries.¹⁵ Only a handful of large multinational corporations based in wealthy industrialized nations commit the vast majority of corrupt transactions.¹⁶

Bribery assumes many forms and, due to its characteristically clandestine nature, it is often difficult to detect.¹⁷ The origins of bribery can be traced back for centuries from several cultures and religions.¹⁸ Today,

12. See Steven R. Salbu, *Bribery in the Global Market, A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 256 (1997). U.S. companies have lost billions of dollars in business to foreign companies that pay bribes. *Id.* (citing Amy Borrus, *A World of Greased Palms: Inside the Dirty War for Global Business*, BUS. WK., Nov. 6, 1995, at 36, 37; Robert S. Greeberger, *Foreigners Use Bribes to Beat U.S. Rivals in Many Deals*, *New Report Concludes*, WALL ST. J., Oct. 12, 1995, at A3).

13. See OECD, *Fact Sheet: OECD Anti-Bribery Convention* (June 30, 1999) <<http://www.ita.doc.gov/media/0630factsheet.htm>>; Glenn R. Simpson, *Foreign Deals Rely on Bribes, U.S. Contends*, WALL ST. J., Feb. 23, 1999, at A3.

14. See Scott Doggett & Annette Haddad, *Commercial Bribery Under Attack*, L.A. TIMES, Mar. 20, 2000, at C2.

15. See Lorraine Adams, *World Bank Discovers Possible Fraud*, INT'L HERALD TRIB., July 17, 1998, at 1. A civil lawsuit was brought against a former Bank official, Fritz Rodriguez, in U.S. District Court for recovery of tens of thousands of dollars in alleged kickbacks that the World Bank believes the defendant took from a contractor on a water utility project in Algeria. *Id.*

16. See Simpson, *supra* note 13.

17. The following story was related by a commercial counselor of a European government regarding the great ingenuity displayed in devising methods of illegal payoffs: [A]fter long—but unsuccessful—efforts to sell . . . road machinery to the Minister of Public Works of a certain Caribbean nation[, one] ambassador suggested a payoff to the Minister Knowing the Minister was a bibliophile, he acquired a first edition of a classic book and inserted \$20,000 between its pages. He then called on the Minister and presented the book “with the compliments and best wishes” of his country. The Minister thanked him, thumbed through the pages of the book, noted the contents, and calmly laid down the book with the remark, “Mr. Counselor, I understand that this book has been published in a two-volume edition.” The counselor . . . knew that he could not double the bribe. Being quick-witted, however, he replied, “Mr. Minister, my government is unable to give you the two-volume edition, but we will supply an appendix.” An order for the machinery was soon executed!

NEIL H. JACOBY ET AL., *BRIBERY AND EXTORTION IN WORLD BUSINESS* 197 (1977).

18. See JOHN T. NOONAN, *BIBES* 12-30 (1984). Bribery, in the context of “oppressive gift taking,” can be traced back at least as early as 1500 B.C. in Egypt, Mesopotamia, Assyria, and Babylonia. *Id.*

bribery of public officials and government workers may assume the form of a cash payment,¹⁹ a deposit to a designated offshore account,²⁰ or a consulting fee.²¹ A bribe may be disguised as a gift, a token of appreciation for some completely separate and legitimate purpose,²² or as a travel disbursement to finance a resort vacation.²³ Also, there are questionable areas of alleged corruption, such as cronyism, favoritism, nepotism, and patronage.²⁴

Bribery is usually an effective means of obtaining business contracts. Companies that allegedly engage in systematic bribery regularly become the successful bidders.²⁵ However, it is possible for these companies to be out-bribed by competitors.²⁶

A. Why the Emerging Global Economy Creates an Environment that Requires Integrity in the Marketplace

Globalization is a modern phenomenon that has ushered in a new business dynamic and era of social stability. The Cold War era, which ended in 1989 with the fall of the Berlin Wall, was characterized by its emphasis on nation-states divided by political ideologies.²⁷ The international system of globalization which followed the Cold War has created an integration of nation-states, bound together by the Internet and other barrier-breaking

19. See, e.g., Don Kirk, *Foes in Seoul Say 'Mr. Clean' Is Losing Fight on Corruption*, INT'L HERALD TRIB., Aug. 4, 1999, at 1. Lim Chang Yuel, governor of a province near Seoul, South Korea, was charged with taking more than \$400,000 in bribes from a bank executive who was attempting to prevent the government from closing his insolvent bank. This was particularly embarrassing because Mr. Lim had been the finance minister in 1997 and had negotiated for the International Monetary Fund to bail out Korea's troubled economy. *Id.*

20. See, e.g., Michael R. Gordon, Neela Banerjee, Eric Schmitt, *Tales of Corruption in Russia and a 'Lapse' by Bank of New York*, INT'L HERALD TRIB. (Sept. 24, 1999) at 23. At the center of a scandal involving alleged money-laundering by Russians, including high level Kremlin officials, was an "offshore" account at the Bank of New York used to deposit approximately four billion dollars a day. *Id.* Ordinarily, offshore accounts are in places like the Cayman Islands, Liechtenstein, or Switzerland. The offshore financial centers that handle the illicit wealth are now being targeted by TI in a call for the international community to declare as "banking outlaws" those institutions that do not adhere to international standards. *Id.*

21. See, e.g., Glenn R. Simpson, *Mobil Defends Payments Made to Panamanians*, WALL ST. J., Apr. 5, 1999, at A24. Mobil was accused of paying "\$2.7 million in consulting fees after securing the right to operate a Panama Canal fueling terminal formerly used by the U.S. government." *Id.*

22. See Kirk, *supra* note 19, at 4. The Environment Minister in South Korea, an actress by profession, was forced to resign after businesses "plied her with about \$ 20,000 to thank her for a performance in Moscow during a state visit there earlier in the year." *Id.*

23. Depending on the country the officials are from, the total per diem paid during their visit could be the equivalent of more than a year's salary.

24. See James Cox, *Asia Shakes Up Cozy, Corrupt Business Practices*, USA TODAY, Jan. 28, 1998, at 4B; Helmut Sohmen, *Critical Importance of Controlling Corruption*, 33 INT'L LAW. 863, 866 (1999).

25. See generally Salbu, *supra* note 12.

26. See generally Simpson, *supra* note 21.

27. See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 7, 8 (2000).

technologies.²⁸

For business, technology has contributed to the creation of a borderless economy; for society, both the removal of restrictions on international commerce and the integration of nation-states into collectives such as the European Union diminish the likelihood of a third World War.²⁹ The globalization trend is likely to continue as a result of these benefits.

A recent study on globalization shows that those nations which most opened their markets to free trade enjoyed not only tremendous economic growth but also striking social improvements.³⁰ Globalization brings with it an increase in economic growth and an expansion of trade and commerce. Unfortunately, with the expansion of commercial opportunity comes the specter of corruption fueled by increased competition for lucrative contracts. James Wolfensohn, President of the World Bank, asserts that "corruption is the biggest issue on the minds of voters and the single inhibiting factor for private investment."³¹ Tolerance for inefficiencies, such as corruption, has become much lower as a result of globalization.³² A country cannot remain competitive and attractive to foreign investors if it has a reputation for a corrupt and inefficient government.³³

Despite the immense amount of negative publicity surrounding globalization, as evident at the World Trade Organization's (WTO) 1999 meeting held in Seattle³⁴ and, more recently, in Prague,³⁵ globalization conceivably could forward anti-corruption initiatives by coordinating the efforts of multilateral organizations. As one example of this potential, Dai Xianglong, Chief of China's central bank, recently announced reforms intended to combat fraud and corruption, which were motivated primarily by China's efforts to gain entry into the WTO.³⁶ "Such reforms are intended to assist the transition of China's state banks from ailing institutions into sound commercial enterprises."³⁷

TI's Chairman has offered a good explanation for why bribery cannot be allowed to continue unchecked in a globalized society. Eigen asserts that "[c]orruption . . . undermines good government, fundamentally dis-

28. See *id.* at 8, 9.

29. The integration of European countries into the European Union is an example of this. See Chantal Momege & Valerie Landes, *European Law*, 32 INT'L. LAW. 387 (1998).

30. See Flora Lewis, *No, Globalization Isn't a Menace to Social Values*, (Feb. 19, 2000) <http://web.nps.navy.mil/~relooney/3041_1355.htm>.

31. Sougata Mukkerjee, *Open Markets Spawn Corruption*, BUS. NEWS, Sept. 22, 1997, at 2.

32. See generally Sohmen, *supra* note 24.

33. See FRIEDMAN, *supra* note 27, at 9, 180.

34. See Thomas L. Friedman, *Senseless in Seattle*, L. B. PRESS TELEGRAM, Dec. 3, 1999, at A25; Kenneth Klee, *The Siege of Seattle*, TIME, Dec. 13, 1999, at 32.

35. See Joseph Kahn, *Protestors Battle Police in Prague*, INT'L. HERALD TRIB., Sept. 27, 2000, at 1.

36. See Erik Eckholm, *China to Reform Banking Sector*, INT'L HERALD TRIB., Jan. 21, 2000, at 13. China plans to enforce a "real name rule" which will discontinue the prior rule of allowing the hiding of money gained through bribery, embezzlement, or other nefarious ways under an unlimited number of false names. *Id.*

37. *Id.*

torts public policy, leads to the misallocation of resources, harms the private sector and private sector development and particularly hurts the poor."³⁸ "[B]y undermining trust in political institutions and public officials and by distorting government policy against the best interests of the majority, corruption impairs the process of democracy."³⁹ Democratic ideals may not appeal to all members of the global economy; however, as countries with vastly different political, social, and economic ideologies are drawn into the world market, each must realize the necessity of providing a level playing field, if only in order to increase the confidence of their prospective trading partners.

Some economists have advanced the argument that bribery can be very useful in underdeveloped economies, serving as an "oiling of the wheels" to accelerate economic growth.⁴⁰ However, in the context of the modern global economy, and according to clearly defined institutional organization charts,⁴¹ this argument no longer appears credible. One need look no further than the crisis caused in Indonesia, where President Suharto amassed a family fortune of \$30 billion by bestowing lucrative contracts to his children and ignoring bids by contractors who would otherwise have been successful under a competitive bidding process.⁴² The economic distortions caused by Suharto's nepotism crippled Indonesia's intra-national competition and seriously curtailed foreign investment, contributing to Indonesia's 1998 economic crisis.⁴³

B. Prevailing Cultural Attitudes That Affect Prevention of Business Corruption

The culture of the country in which a business transaction occurs often determines the character of the transaction.⁴⁴ As examples, political payments are a feature of Middle Eastern life, where the payment of *baksheesh* in the Arabic and Turkish-speaking countries, and of *roshveh* in Iran is embedded in the social and cultural fabric of these countries.⁴⁵ In Nigeria and other former British West African colonies, functionaries often expect or seek a tip, referred to as "dash," for services rendered to the public.⁴⁶ If no dash is given, the service may be denied. In the former British colony

38. Eigen Address, *supra* note 2; see also Transparency Int'l, *Press Release*, *supra* note 4.

39. Peter Eigen, *Combating Corruption around the World*, 7 J. DEMOCRACY 158, 160 (Jan. 1996).

40. See, e.g., Sohmen, *supra* note 24, at 866.

41. See *id.* at 867.

42. See Philip Shenon, *IMF Storms Indonesia's Family Citadel*, INT'L HERALD TRIB., Jan. 17-18, 1998, at 1.

43. See *id.*

44. See Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 422-26 (1999).

45. See NOONAN, *supra* note 18, at 7. According to Professor Noonan, this can be traced to the days of Ottoman rule and derives from the historical presence of the all-powerful state. The political payment was an accepted method by which the tyranny of the ruler and venality of his officials were curbed.

46. See *id.* at 13.

of India/Pakistan, decades of corruption of government officials by local businesses have firmly established payoffs as an integral part of business-government relations.⁴⁷ Bribery in some nations is so entwined in normal business practice that many of the home countries of active corporate bribers had, until recently, laws making the bribes tax deductible.⁴⁸

In the United States, the motivation to pass the FCPA probably derived from the strong Puritan religious background fostered among the settlers.⁴⁹ Puritan religious ideology fundamentally influenced the American sense of morality.⁵⁰ Many Puritans equated success in business with proof of divine favor and predestination for salvation.⁵¹ Given this origin of American morality, the passage of the FCPA during President Jimmy Carter's term in office⁵² seems to have been a by-product of the righteous indignation and political backlash following the Watergate affair.⁵³ In many Asian, African, and Middle Eastern countries, the basic view of morality may be quite different from that found in the United States.

In general, a symbiotic relationship often arises between cultures of industrialized and developing nations. As a result of colonial domination and poverty, government officials in developing countries rely upon bribes to ensure their livelihood. These government have come to rely on the receipt of payoffs, and businesses within industrialized nations have tasted the vast profits inherent in corrupt transactions. A vicious cycle of corruption arises out of this symbiotic relationship.

C. Inability of Legislative Measures to Eradicate Corruption

The United States began the effort to achieve a legislative solution to extra-territorial bribery in 1977 with the FCPA, the first legislative measure to

47. See *id.* at 14. Robert Wade's description of corrupt engineers dealing with the allocation of water rights to farmers in Southern India provides an interesting example of creative opportunism by the engineers. Those farmers who are upstream paid bribes to gain assurance that the water would be forthcoming while the farmers at the end of the irrigation canal had to pay the engineers to gain water which otherwise might not have been available. See generally Robert Wade, *The System of Administrative and Political Corruption: Canal Irrigation in South India*, 14 J. DEV. STUD. 287 (1982); see also Claire Moore Dickerson, *Political Corruption, Free-Flowing Opportunism*, 14 CONN. J. INT'L L. 393, 395 (1999).

48. See *id.*; see also Beverly McLachlin, *Horchelaga Lecture: Criminal Law: Towards an International Legal Order*, 29 HONG KONG L.J. 448, 450 (1999).

49. See JACOBY ET AL., *supra* note 17, at 197.

50. See, e.g., Roger Hill, *History of Work Ethic* (visited Jan. 26, 2001) <<http://www.coe.uga.edu/~rhill/workethic/hist.htm>> JACOBY ET AL., *supra* note 17, at 197.

51. See JACOBY ET AL., *supra* note 17, at 197.

52. President Carter, a Democrat, was well known for his moralistic views. In his inaugural address, Carter began establishing the framework for discussion of what would become the Foreign Corrupt Practices Act: "To be true to ourselves, we must be true to others. We will not behave in foreign places so as to violate our rules and standards here at home, for we know that the trust which our nation earns is essential to our strength." President's Inaugural Address, 1 PUB. PAPERS 1, 1-4 (1997).

53. See GLADYS ENGEL-LANG & KURT LANG, *THE BATTLE FOR PUBLIC OPINION* 45-47 (1983). Details substantiating the connection between the break-in at the Watergate Apartments, the Nixon administration, and the President's re-election committee were uncovered several months after the election. *Id.*

criminalize bribery.⁵⁴ Despite the strong support of the Department of Justice (DOJ) and Securities and Exchange Commission (SEC), enforcement of the FCPA was minimal.⁵⁵ U.S. businesses secretly continued to bribe foreign government officials.⁵⁶ Its passage signified the U.S. government's unilateral stance against business corruption and resulted in prolonged, vehement objection by the U.S. business community.

The principal objection to the FCPA was that American companies doing business abroad were now placed in the untenable position of competing for contracts against other businesses that were free of FCPA-like restrictions.⁵⁷ Businesses applied pressure to members of Congress to repeal the FCPA. Congress capitulated to some extent by amending the FCPA provisions to clarify the parameters of conduct categorized as bribery.⁵⁸ The FCPA amendments, contained in the 1988 Omnibus Trade and Competitiveness Trade Act,⁵⁹ considerably reduced the strength of the harshest provisions of the FCPA but increased penalties for other violations.⁶⁰ Despite the various amendments to the FCPA, the mere passage of legislation criminalizing extraterritorial bribery has not adequately addressed the problem of bribery by U.S. firms.⁶¹

Fortuitously, a number of precipitating factors during the same time period as the 1988 amendments to the FCPA directed global attention towards the eradication of bribery of government officials by businesses.⁶² Notably, the legislative approach contained in the FCPA was adopted by

54. See Pub. L. No. 95-213, 91 Stat. 1494 (1997).

55. See Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don't, The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANS-NAT'L. L. 1249, 1254 (1999).

56. See *United States v. Goodyear Int'l Corp.*, 2 FCPA Rep. 698.1610 (D.D.C. 1989); *United States v. Lockheed Corp.*, 3 FCPA Rep. 699.131 (N.D. Ga. 1995); *United States v. Mead*, 3 FCPA Rep. 699.533 (D.N.J. 1998).

57. See Michael J. Hershman, *Criminalized Foreign Bribery Will Improve Trade*, NAT'L. L.J. Apr. 27, 1998, at A23; see George & Lacey, *supra* note 1, at 19.

58. The FCPA was amended in 1988 by the Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415.

59. See *id.*

60. See *id.* Persons who are directors, officers, etc., may be criminally fined up to \$100,000. See 15 U.S.C. § 78dd-2(g) (1988). A person who willfully violates a provision may be imprisoned up to five years. See 15 U.S.C. § 78dd-2(g)(2)(A), (B). Corporations convicted of willful violations are subject to fines up to \$2 million. See 15 U.S.C. § 78dd-2(g)(1)(A).

61. See Transparency Int'l, *The 1999 Bribe Payer's Index* (Oct. 26, 1999) <<http://www.transparency.de/documents/cpi/bps.html>>. The 1999 Bribe Payers Index (BPI) lists the United States as having a score of 6.2 on a scale in which ten represents a low perceived level of bribery and zero indicates a high level of bribery. See Doggett & Haddad, *supra* note 14, for mention of Lockheed Corp. paying a record \$24.5 million in penalties in 1995 for illegally paying an Egyptian official \$1 million to win an aircraft contract. See also *Lockheed Corp.*, 3 FCPA Rep. at 699.175 (N.D. Ga. 1995). This is the same Lockheed that was involved in the 1970s during the Watergate scandal in paying \$1 million to Prince Bernhard of the Netherlands, \$1.7 million to Japanese officials, and \$2 million to Italian officials to obtain or retain contracts while at the same time Congress was guaranteeing \$250 million in loans to keep the company from going into bankruptcy. See also Corr & Lawler, *supra* note 55, at 1277.

62. See Gail Edmondson et al., *Europe's New Morality*, Bus. WK., Dec. 18, 1995, at 26.

two major multilateral organizations. In 1996, the Inter-American Convention Against Corruption (OAS Convention)⁶³ was adopted by member nations of the Organization of American States (OAS).⁶⁴ Additionally, OECD members⁶⁵ became signatories in 1997 to a similar treaty making extraterritorial bribery of government officials illegal, the Convention on Combating Bribery in International Business Transactions (OECD Convention).⁶⁶ However, both the OAS and OECD require their signatories to pass domestic implementing legislation,⁶⁷ and the success of these conventions ultimately will depend upon the penalty structure and enforcement measures adopted by individual signatories.

The issue remains whether legislative measures can sufficiently deter businesses from engaging in bribery. The effectiveness of such a legislative approach is undermined in a market economy where the drive for profit dominates. A foreign company's quickest route to maximizing profits in developing and transitional nations may indeed be bribery of a public official. Although some view the legal system as a cure for market imperfections,⁶⁸ one of the reasons that law sometimes fails to compel ethical conduct in the operation of businesses may simply be that the potential for huge profits makes violation of the law seem worth the risk of punishment.

Businesses may have a sufficient interest in the continuance of profits connected with bribery such that legislation alone cannot cure the problem. An example is the continued operation of the drug cartels in Mexico and other Central and South American countries despite the presence of strict anti-drug laws and the dedicated efforts of law enforcement.⁶⁹ The

63. Mar. 26, 1996, 35 I.L.M. 724 [hereinafter OAS Convention]. Signatories include: Argentina, the Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, United States, Uruguay, and Venezuela. *See id.*

64. *See id.* The OAS has thirty-four Western Hemisphere members, including the United States.

65. *See* OECD, *What is OECD[?]*, (visited Jan. 26, 2001) <<http://www.oecd.org/about/general/index.htm>>. The twenty-nine signatory members of the OECD are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Additionally, there are five non-members are signatories, including Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic. OAS signatories include Argentina, the Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, the United States, Uruguay, and Venezuela. *See id.*; OECD Convention, *supra* note 9; OAS Convention, *supra* note 63.

66. OECD Convention, *supra* note 9.

67. *See* OAS Convention, *supra* note 63; OECD Convention, *supra* note 9.

68. *See* EDWARD J. CONRY ET AL., *THE LEGAL ENVIRONMENT OF BUSINESS* 37 (1990).

69. *See* Andrew Gumbel, *Crocodile Tears on Mexico's Wild Border, but Guns and Drugs Won't Go Away*, INDEP. (London), Mar. 19, 2000 at 32. The drug cartels not only continue their illegal practices, but also sometimes murder law enforcement officials who interfere with their activities. *See id.*

lure of tremendous profits sometimes can drive otherwise ethical people to engage in unacceptable, and even illegal, activity.

II. Summary of Initiatives by Multilateral Institutions and Developed Nations

Numerous, scandalous accounts of corruption throughout the world—including Indonesia, the European Union, the United States, and South Korea, to name a few—have focused public attention on the negative impact of corruption.⁷⁰ Consequently, in the last decade, a coalescence of initiatives has resulted in a significant effort by industrialized nations to target business corruption.⁷¹ A number of the more notable actions taken to combat corruption are discussed below.

A. Foreign Corrupt Practices Act

An examination of the development of the FCPA is essential to a proper understanding of the recent OECD and OAS Conventions. Both conventions were modeled in part after the FCPA, and these multilateral organizations were able to take advantage of the successes and failures of the original U.S. legislation and its amendments.⁷²

1. Original Statutory Language

The state of mind of the international business community prior to the initial adoption of the FCPA is apparent from the following statement made by Carl Kotchian, President of Lockheed Corporation from 1969 until 1977:

I knew that if we wanted our product to have a chance to win on its own merits, we had to follow the functioning system If we wanted our product to have a chance, we understood that we would have to pay, or pledge to pay, substantial sums of money in addition to the contractual sales commission.⁷³

Prior to 1977, payoffs were viewed as expected and necessary. In response to this view, Congress addressed bribery in international business transactions by adopting the anti-bribery and accounting provisions of the 1977 FCPA.⁷⁴

70. See, e.g., Roger Cohens & John Tagliabue, *A New Kohl Era Scandal: Kickbacks; \$70 Million in Illegal Payments is Separate from Party Funds Inquiry*, INT'L HERALD TRIB., Feb. 8, 2000, at 1; Alan Friedman, *Berlusconi Gets 2d Conviction in Week*, INT'L HERALD TRIB., July 14, 1998, at 1; *Indonesia Is Said to Seek Scandal Secrecy*, INT'L HERALD TRIBUNE, Sept. 16, 1999, at 19; *Overseer Tells Bosnia to Fight Corruption*, INT'L HERALD TRIB., Aug. 19, 1999, at 6; Edward T. Pound & Kevin Johnson, *Exec Pleads Guilty in IOC Bribery Case*, USA TODAY, Aug. 4, 1999, at 1A; Thomas Sanction, *Cherchez la Femmel: Tripped Up by a High Living Friend, France's Fifth Highest Official Is Probed for Corruption*, TIME, May 11, 1998 at 34.

71. See generally George & Lacey, *supra* note 1.

72. Interestingly, ten years later, there was a role reversal as Congress looked to the OECD when modeling additional amendments to the FCPA.

73. CHRISTOPHER ENGLHOLM, *WHEN BUSINESS EAST MEETS BUSINESS WEST* 238 (1991).

74. Pub. L. No. 95-213, 91 Stat. 1494 (1977).

a. Anti-bribery Provisions

The 1977 Act included prohibitions against (1) the direct and indirect bribery of foreign officials⁷⁵ by issuers and reporting firms under the jurisdiction of the SEC,⁷⁶ and (2) the direct and indirect bribery of foreign officials by domestic concerns, including any U.S. citizen, national, or resident, and any business entity organized under U.S. law.⁷⁷ Through the use of the terms “issuers” and “domestic concerns,” SEC registrants and non-registrants alike were covered by the FCPA and its resultant amendments to the Securities Exchange Act of 1934.⁷⁸ These terms continue to be used in the same context under the 1988 amendments to the Act.⁷⁹

One major focal point of criticism involved the Act’s intent requirement. The original 1977 Act gave prosecutors an advantage in carrying the burden of proof against a defendant regarding the requisite intent for violations, and this advantage caused a great deal of concern within the business community. The original prohibition covered acts committed “while knowing or *having reason to know*” that sums of money paid would be used to bribe a foreign official.⁸⁰ Congress would later remove the “reason to know” language in the 1988 amendments, and the phrase has not reappeared in any subsequent iterations of the FCPA, the OAS and OECD Conventions, or in any implementing legislation adopted in other countries.

b. Accounting Provisions

Congress passed the accounting provisions⁸¹ of the FCPA as part of a series of amendments to the Securities Exchange Act of 1934. Unlike the anti-bribery sections,⁸² which apply to both “issuers and domestic concerns,” the accounting provisions apply only to “issuers” registered under the Securities Exchange Act of 1934. The provisions represented an attempt to handle the broader problem of corporate concealment of illicit payments, which businesses under SEC jurisdiction often had disguised by means of improper accounting procedures. Although the language has been clarified, the corporate governance approach embedded in the accounting provisions has remained a part of all subsequent legislation.

The 1977 Act swept broadly, and required every issuer of registered

75. See 15 U.S.C. § 78dd-2(h)(2). A “foreign official” was defined by the Act as “any officer or employee of a foreign government, or any department, agency or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency of instrumentality.” *Id.* The term did not include employees of a foreign government whose duties are essentially ministerial or clerical. “Facilitating” or so-called “grease” payments made to these types of foreign government employees were specifically excluded. See *id.*

76. See 15 U.S.C. § 78dd-1(a) (1977).

77. See 15 U.S.C. §§ 78dd-2(a) (1977).

78. See Securities Exchange Act of 1934, 15 U.S.C. § 78a (1988).

79. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), (h), 78m(b)(2) (1997).

80. 15 U.S.C. § 78dd-1(a)(3) (1982) (emphasis added).

81. See 15 U.S.C. § 78m(b)(2) (1977).

82. See 15 U.S.C. §§ 78dd-1, 78dd-2 (1998).

securities⁸³ to (1) make and keep books, records, and accounts which accurately and fairly reflect, in reasonable detail, transactions and dispositions of assets, and (2) devise and maintain a system of internal accounting. As one writer described it, an American company need be neither foreign nor corrupt to come within the scope of the accounting sections of the FCPA.⁸⁴ Because of confusion about interpretation of the language used, Congress added clarifying details in the 1988 amendments.⁸⁵

c. Enforcement Authority

The FCPA divides enforcement authority between the DOJ and the SEC. The DOJ is responsible for criminal enforcement of the anti-bribery provisions⁸⁶ and for civil enforcement actions involving domestic concerns.⁸⁷ The SEC has the authority to investigate and initiate the civil prosecution of issuers under the anti-bribery and accounting provisions of the FCPA.⁸⁸

2. Passage of the 1988 Amendments in an Attempt to Overcome Criticisms of the Business Community Regarding the Negative Effect of the FCPA on Competitiveness

Business critics voiced dissatisfaction with the FCPA, arguing that it disadvantaged American companies because competitor companies from other countries bidding on the same contract remained free to bribe. Critics also objected to key words and phrases in the Act that were not adequately defined.⁸⁹ As an indication of the level of dissatisfaction with the 1977 Act, Congress introduced minor amendments in 1980, 1981, 1984, and 1985.⁹⁰ Finally, in 1988, Congress passed a series of major amendments to the Act that considerably reduced the stringency of many of the provisions but, as if to salve their conscience, substantially increased the penalties for violation.⁹¹

83. Section 102 of the FCPA imposes these requirements on every company having a class of securities registered pursuant to section 12 of the 1934 Act and every company required to file regular disclosure reports under § 15(d) of the 1934 Act. See 15 U.S.C. § 78m(b)(2) (1988).

84. See LAMBERT H. SPRONK, *THE FINANCIAL EXECUTIVE'S HANDBOOK FOR MANAGING MULTINATIONAL CORPORATIONS* 264 (1980).

85. See 15 U.S.C. § 78m(b)(5) (1988).

86. See 15 U.S.C. §§ 78dd-1(d) (1982).

87. See *id.*

88. See 15 U.S.C. §§ 78dd-1, 78dd-2(d), 78ff(c) (1998).

89. See Barbara C. George, *The U.S. Foreign Corrupt Practices Act: The Price Business Is Paying for the Unilateral Criminalization of Bribery*, 4 INT'L J. MGMT. 394, 395 (1987).

90. See generally Laura E. Longobardi, *Reviewing the Situation: What Is To Be Done With The Foreign Corrupt Practices Act?*, 20 VANDERBILT J. TRANSNAT'L L. 431 (1987).

91. See Pub. L. No. 100-418, 102 Stat. 1415; see also International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302. The penalties amounts introduced in 1988 carried over to the 1998 amendments. *Id.*

a. Anti-bribery Provisions

i. Changes to the "Knowing or Having Reason to Know" Requirement

Under the original Act, the requisite intent was established if the defendant company knew or had reason to know that a corrupt act had taken place. Despite the uneasiness generated by this "reason to know" standard, the DOJ only prosecuted a limited number of cases under the bribery provisions of the original Act, all of which involved defendants who clearly had knowledge of the corrupt acts.⁹² Yet, to clear up the uncertainty created by the "knowing or having reason to know" standard, Congress eliminated the phrase "having reason to know" from both the anti-bribery and the accounting sections.⁹³ The amended version's standard of knowledge thus incorporated prohibited acts that involved "actual knowledge" of intended results.⁹⁴ The 1988 Act defined "knowledge" as an awareness of a high probability of the existence of the circumstance.⁹⁵ These revisions, which were retained in the 1998 Act's amendments,⁹⁶ thus eliminated the possibility of prosecution absent actual knowledge.

ii. Clarification of "facilitating payments"

An exception existed under the original Act to allow "facilitating payments" made to foreign officials whose duties were limited to those "essentially ministerial or clerical."⁹⁷ In order to fall within the exemption provision, companies had to be able to determine whether they were making their "facilitating" or "grease" payments to a person whose responsibilities included policy-making. This distinction was especially difficult to make in countries in which significant language and cultural barriers existed.⁹⁸

In the 1988 amended Act, Congress retained the exemptions section but sought to clarify the exemption requirements. The Conference Report defined "routine governmental action" payments as those made for "ordinarily and commonly performed" actions, and expressly excluded from the exemption any governmental approvals involving an exercise of discretion by a governmental official where the allegedly corrupt action triggered the "obtaining or retaining business for or with, or directing business to, any

92. See *supra* note 80.

93. Senator William Proxmire, one of the authors of the 1977 legislation, vehemently objected to amending the Act, claiming that the members of Congress who authorized the softening of the anti-bribery law buried it in a king-sized trade bill. See 134 CONG. REC. 8528 (daily ed. June 24, 1988) (statement of Sen. William Proxmire).

94. See H.R. REP. NO. 100-576, at 919 (1988), reprinted in 1988 U.S.C.C.A.N. 1952. In the Conference Report, Congress discussed that this standard encompasses the concepts of willful blindness and conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act. The requisite "state of mind" for these categories of offenses is that there be a "conscious purpose to avoid learning the truth." *Id.*

95. See *id.*

96. See Pub. L. No. 105-366, 112 Stat. 3302.

97. See 15 U.S.C. § 78dd-2(2) (1977).

98. See John E. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 14 INT'L L. 1009, 1015 (1990).

person.”⁹⁹

The “small facilitation payments” exception has been retained, but, as in the OECD Convention (1997), later conventions have attempted to identify clearly the transactions that fall within this category.¹⁰⁰

iii. Addition of Affirmative Defenses

Congress added two affirmative defenses in an attempt to make it easier for U.S. businesses to compete abroad. Businesses could, without fear of violating the FCPA, make payments associated with transactions in previously questionable areas when the companies could show that the payments were: “1. Lawful Under the Written Laws and Regulations of the Foreign Official’s Country,” or “2. Reasonable and Bona Fide Expenditures.”¹⁰¹ These affirmative defenses remain a part of the 1998 FCPA, and also appear in the OECD Convention, partially modeled after the FCPA.¹⁰²

b. Amendments to the Accounting Provisions

In addition to deleting the “reason to know” standard, Congress also clarified the corporation’s responsibility to make a “good faith effort” in the financial record-keeping and internal accounting controls of foreign subsidiaries in which U.S. companies have a minority interest.¹⁰³ Questions and criticisms regarding the amount of disclosure required by the “reasonable detail” and “reasonable assurance” standards on record-keeping and internal control in the 1977 Act¹⁰⁴ motivated Congress to adopt a “prudent person” standard for disclosure.¹⁰⁵ The requirement thus became that there should be a level of detail and degree of assurance in record-keeping as would satisfy prudent officials in the conduct of their own affairs.¹⁰⁶

c. Requirement that the President Pursue Negotiation of an International Agreement with the OECD

One of the most significant amendments introduced additional language that required the President to pursue negotiation of an international agreement to promote international cooperation against bribery among members of the OECD.¹⁰⁷ The provision expressed the “sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation

99. H.R. REP. NO. 100-576, at 921.

100. See, e.g., Trade Compliance Center, *Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions* (Nov. 21, 1997) <http://199.88.185.106/tcc/data/commerce_html/TCC_2/OECD_Convention/OECD_Convention_Commentaries.html>.

101. 15 U.S.C. § 78dd-1(c)(1) (1988).

102. See 15 U.S.C. § 78dd-1(c)(2) (1988); OECD Convention, *supra* note 9.

103. See 15 U.S.C. § 78m(b)(6) (1988).

104. See GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS: IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS (1981). Congress requested this GAO Report to investigate the impact of the FCPA on U.S. businesses.

105. See S. REP. NO. 95-114, at 7 (1997).

106. *Id.*

107. See 15 U.S.C.A. § 78dd-1 (1988).

and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section."¹⁰⁸ The provision required the President to submit a report to Congress within one year after the date of the enactment of the Act regarding "the progress of the negotiations."¹⁰⁹

When Congress directed the President's efforts toward the OECD, it targeted major bribe payers that competed with U.S. businesses for contracts.¹¹⁰ The OECD is comprised of the strongest industrialized nations in the world, nations accounting for about two-thirds of all global exports and about ninety percent of all foreign direct investment.¹¹¹ Successful negotiation of an OECD international convention had the potential to solve many troublesome competition issues because all of the major competitor countries would thereafter be working within the same framework of constraints.

The United States' negotiations with the OECD extended over a number of years. When the OECD Convention was completed, it included, as a protective measure and as an inducement to OECD members to ratify the Convention, a requirement that the Convention not become effective until ratified by five of the ten largest export-share countries of the OECD and until at least sixty percent of the combined total exports of OECD countries were subject to the terms of the Convention.¹¹² This requirement represented a compromise with Germany and France to address their concern that *all* the major trade competitors be subject to the same anti-bribery restrictions.¹¹³ France has been slow in passing implementing legislation pursuant to the OECD Convention, contending that the "anti-bribery campaign is a ploy by U.S. government and U.S. companies to regain competitive advantage."¹¹⁴

The OECD Convention probably could not have succeeded absent technological changes contributing to globalization and world events giving strength to the aggressive pursuit of an international agreement.¹¹⁵ Without these factors, the reaction to the Convention likely would have been similar to the one elicited by the passage of the 1977 FCPA.

108. *Id.*

109. *Id.*

110. See generally Doggett & Haddad, *supra* note 14.

111. See U.S. State Dep't, *Fact Sheet: OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Mar. 1, 2000) <http://www.state.gov/www/issues/economic/fs_000301_oecd_conv.html>.

112. See OECD Convention, *supra* note 9, art. 15.

113. See Paul Blustein, *Pact to Bar Bribery Is Reached; Major Nations Agree to U.S. Request*, WASH. POST, May 24, 1997, at F1. France, Germany and others were concerned that if the Convention entered into force without the "five out of ten largest export shares" requirement, some of the largest nations might, by holding out, gain a competitive advantage. See OECD Convention, *supra* note 9, art. 15.

114. Simpson, *supra* note 13, at A6. The OECD Convention uses a four step process: 1) signing the convention, 2) ratification, 3) effective date of the Convention, which occurs after meeting the "five of ten largest export shares" requirement, and 4) passage of implementing legislation by the signatories. *Id.*

115. See George & Lacey, *supra* note 1.

B. Organization of American States: Inter-American Convention Against Corruption

A critical triumph for developing nations in North, Central, and South America was the 1996 adoption of the Inter-American Convention Against Corruption¹¹⁶ by the Organization of American States (OAS Convention), a multinational organization comprising thirty-four nations in the Western Hemisphere.¹¹⁷ The OAS Convention was the first multilateral convention to require signatories to criminalize bribery through the implementation of domestic legislation equivalent to the FCPA. The OAS Convention also seeks to "prevent, detect, punish and eradicate corruption in the performance of public functions."¹¹⁸ Therefore, the OAS Convention's prohibitions target both the bribe-giver and the bribe-receiver. This prohibition is broader than that contained within the OECD Convention, which merely targets the conduct of the bribe-givers.

The OAS Convention also criminalizes illicit enrichment. The Convention defines illicit enrichment as "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."¹¹⁹ Each signatory must establish the offense of illicit enrichment within its own legal system.¹²⁰ The United States initially refused to sign the OAS Convention due to this illicit enrichment provision, which was inserted into the Convention at the last minute.¹²¹

The OAS Convention purports to "promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures."¹²² To facilitate cooperation among its members, the OAS Convention includes provisions authorizing extradition of violators¹²³ and seizure of their assets.¹²⁴

The OAS Convention emulates the FCPA by requiring deterrents, such as mechanisms to ensure that publicly held companies maintain books and records that, in "reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts."¹²⁵

In contrast to the penalty provisions in the OECD Convention, which mandate effective and proportionate penalties for violations, the penalties

116. See OAS Convention, *supra* note 63.

117. See *id.* OAS members include: Argentina, the Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, United States, Uruguay, and Venezuela. See *id.*

118. *Id.* art. II.

119. *Id.* art. IX.

120. See *id.*

121. See Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL'Y INT'L Bus. 53, 57 (1999).

122. OAS Convention, *supra* note 63, at art. II.

123. See *id.* art. XIII.

124. See *id.* art. XIV.

125. *Id.* art. III.

for conduct prohibited by the OAS Convention are not clearly specified.¹²⁶ Because the OAS Convention penalties are ambiguous, the Convention may result in less rigorous enforcement and punishment under domestic implementing legislation.

The OAS Convention contains additional measures intended to maintain and strengthen prevention.¹²⁷ These measures address such concerns as transparency and accountability in procurement, oversight and regulatory measures, ethical standards for public officials, and prohibitions applicable to private sector conduct.¹²⁸ Interestingly, the OAS Convention includes a provision encouraging civil society and NGOs to participate in efforts to prevent corruption.¹²⁹

The OAS Convention may be regarded as a bridge from the FCPA to the OECD Convention.¹³⁰ However, the OAS Convention has inherent shortcomings that are primarily the result of weaknesses in its ratification and implementation procedures. The provision allowing signatories to take reservations to specific provisions in their implementing legislation and the unwillingness of some members to criminalize corrupt conduct and/or cooperate with other signatories through extradition contribute to the problem.¹³¹ The OAS ameliorated some of these drawbacks at the Second Summit of the Americas by deciding to support the OAS Convention by developing a strategy for its ratification, drafting codes of conduct for public officials, holding workshops regarding corruption (an important grass-roots effort), and engaging in other efforts aimed at eliminating corruption.¹³²

In spite of the weaknesses discussed above, the OAS Convention plays a pivotal role in the fight against corruption because it is composed of a number of developing nations which have already signed the Convention into force.¹³³ The participation of those nations indicates a willingness to resolve the corruption problem within their borders.

C. World Trade Organization

Another multinational organization that has recently begun to mobilize action against bribery and corruption, specifically in government procurement practices, is the World Trade Organization (WTO).¹³⁴ In the wake of

126. *See id.*

127. *See id.*

128. *See id.* at art. III; Zagaris & Ohri, *supra* note 121, at 58-59.

129. *See* OAS Convention, *supra* note 63, at art. III.

130. *See generally* Corr & Lawler, *supra* note 55.

131. *See generally* Zagaris & Ohri, *supra* note 121.

132. *See* OAS Convention, *The OAS After the Santiago Summit* (visited Jan. 26, 2001) <<http://www.oas.org/en/pinfo/week/summi2t.htm>>.

133. *See* OAS Convention, *supra* note 63. Signatories include: Argentina, the Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, United States, Uruguay, and Venezuela. *See id.*

134. *See* WTO Director General Renato Ruggiero, Address at the Brookings Institution Forum, "The Global Trading System: A GATT 50th Anniversary Forum" (Mar. 4, 1998).

World War II, GATT was formed to create an international trade organization.¹³⁵ The WTO is the successor to GATT, and its purpose is to provide a framework for the regulation of international trade and to supervise members' compliance with its policies.¹³⁶ The WTO is a member-driven, consensus-based organization, rather than an organization operated by an executive board.¹³⁷ Its members enforce its rules themselves according to negotiated procedures.¹³⁸

In 1996, the concept behind the WTO celebrated its 50th anniversary at a meeting commonly referred to as the Uruguay Round.¹³⁹ At that meeting, the United States raised the issue of targeting corruption in the government procurement process and specifically listed the failure to "enforce anticorruption laws in the government procurement context" as a "trade barrier in the Uruguay Round Agreements."¹⁴⁰ Consequently, the 1996 WTO Ministerial Declaration¹⁴¹ included a provision establishing the Transparency in Government Procurement Working Group to study transparency in government procurement practices. The Working Group issued a 1999 Report to the General Council on Transparency in Government Procurement (Report) in which it noted all the data and submissions it considered as part of its study.¹⁴² Although the Declaration constituted an initial step by the WTO toward addressing corruption, the United States Trade Representative (USTR) formally requested a more aggressive stance, indicating that the WTO should take a leadership role in the campaign against corruption by adopting anti-bribery measures.¹⁴³

The USTR stated that the WTO,¹⁴⁴ by virtue of its multilateral membership base, is in an ideal position to adopt measures banning the receipt of bribes by public officials and thereby target the demand-side of these illicit transactions.¹⁴⁵ TI is also pressuring the WTO.¹⁴⁶ Additionally, in

135. See WTO, *About the WTO* (last modified Feb. 9, 1997) <http://www.wto.org/english/thewto-e/thewto_e.htm>.

136. See *id.*

137. See *id.*

138. See *id.*

139. See Agreement on Government Procurement, General Agreement on Tariffs and Trade, Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

140. Corr & Lawler, *supra* note 55, at 41.

141. See WTO, *Singapore Ministerial Declaration* (Dec. 13, 1996) (visited Jan. 26, 2001) <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec.htm>.

142. See WTO, *Report (1999) to the General Council* (Oct. 12, 1999) <http://www.wto.org/english/tratop_e/grpoc_e/tran99_e.htm>.

143. See WTO, *Statement by the Honourable Charlene Barshefsky, Acting United States Trade Representative* (Dec. 9-13, 1996) (visited Jan. 26, 2001) <http://www.wto.org/english/thewto_e/minist_e/min96_e/st5.htm>; Lucinda A. Low & Kathryn C. Atkinson, *Led by the U.S., the World Wages War on Corruption*, NAT'L L.J., Mar. 3, 1997, at B14.

144. See Corr & Lawler, *supra* note 55. The membership of the WTO is broader than the OECD. Unlike the OECD, the WTO includes many developing countries in addition to industrialized nations. See *id.*

145. See *id.*

146. See Stephen Fidler, *WTO Urged to Act on Trade Corruption*, FIN. TIMES, Sept. 23, 1998, at 10.

June 1999, the OECD indicated that it was analyzing how the WTO rules address corruption and bribery.¹⁴⁷ The role of the WTO is critical in mobilizing developing nations, both at the highest governmental level and at the grassroots level, to participate actively in the campaign against corruption. Thus, the WTO should do more to assume a leadership role in the fight to reduce corruption.

D. United Nations

The December 1996 Declaration Against Corruption and Bribery in International Commercial Transactions¹⁴⁸ was incorporated into the U.N. Resolution¹⁴⁹ a few months later. This resolution urges members to criminalize the payment of bribes to public office holders of other states in international commercial transactions and encourages members to establish programs to deter and prevent bribery and corruption.¹⁵⁰

In an attempt to regulate the conduct of bribe-takers, the U.N. General Assembly adopted on December 12, 1996 an International Code of Conduct for Public Officials.¹⁵¹ It appears that the United Nations has now adopted measures that target both bribe-givers and bribe-takers in public positions, although it has not yet adopted any convention with binding effect.

E. European Union

World-wide attention was focused in early 1999 on the European Union (EU) due to allegations that the European Commission, the executive body of the fifteen-nation European Union, engaged in corruption, fraud, and nepotism.¹⁵² The European Parliament voted to appoint a five-member team to investigate the allegations of corruption. The team's "devastating report" condemned the commissioners for their "poor or failed administration, citing several examples of fraud, mismanagement and nepotism."¹⁵³ Noticeably, the report evidenced European concern and attention regarding the issue of corruption.¹⁵⁴ This concern is yet another indication of current global interest in confronting and eliminating perceived corruption in both the corporate and political arenas.

147. See generally *OECD to Study How WTO Rules Combat Corruption and Bribery*, INSIDE U.S. TRADE, June 18, 1999.

148. *United Nations Declaration Against Corruption and Bribery in International Commercial Transactions*, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/191 (Dec. 16, 1996) <<http://www.un.org/documents/ga/res/51/a51r191.htm>>.

149. See *id.* (referencing UN Resolution).

150. See *id.*; see generally Thalif Deen, *U.S. Seeks U.N. Declaration Against Bribery*, INTER PRESS SERVICE, July 23, 1996.

151. See United Nations, *United Nations International Code of Conduct for Public Officials* (Dec. 12, 1996); see also generally Samia Nakhoul, *U.N. Wants Anti-Graft Code for Officials*, REUTERS WORLD SERVICE, May 1, 1995.

152. See Marion Kerr & Andrew Nagorski, *Forced to Walk the Plank*, NEWSWEEK, MAR. 29, 1999, at 28-31.

153. Rana Dogar & Amanda Bernard, *Will Someone Please Stand Up?*, NEWSWEEK, MAR. 29, 1999 at 31.

154. See Kerr & Nagorski, *supra* note 152, at 28-31.

In recent years, the European Union has devised policy and conducted communications and conventions focusing on current corruption issues. On May 21, 1997, the European Commission adopted a Communication to the Council and to the European Parliament on a Union Policy Against Corruption.¹⁵⁵ The Communication provides Member States with a consistent and coherent policy on corruption in international trade and commerce, as well as in other pertinent areas.¹⁵⁶ However, the Communication does not have the legal effect of a convention.

The European Union's Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (E.U. Convention) was adopted on May 26, 1997.¹⁵⁷ The E.U. Convention criminalizes the bribery of E.U. officials as well as public officials of E.U. member states. However, it does not address transnational bribery with foreign officials of countries that are not members of the European Union.¹⁵⁸

In this Convention, the European Parliament changed its prior policy to address the problem of corruption at the European level, rather than at the level of the individual states.¹⁵⁹ As further evidence of this change in policy, on October 6, 1998, the European Parliament adopted the report of Rinaldo Bontempi, Italian Member of the European Parliament, on combating corruption.¹⁶⁰ The report recommends detailed legislation to combat corruption, targeting such areas as public procurement and accounting standards.¹⁶¹ Finally, the report recommends that all E.U. members ratify the E.U. Convention and adopt the OECD Convention.¹⁶²

On December 22, 1998, the Council of the European Union adopted the Joint Action on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector.¹⁶³ This joint action states that "[e]ach Member State shall take the necessary measures to ensure that legal persons can be held liable for active corruption"¹⁶⁴ and that "[e]ach Member State shall, within two years after the entry into force of this Joint Action, bring forward appropriate proposals to implement this Joint

155. European Union, *Communication to the Council and the European Parliament on a Union Policy Against Corruption* (May 21, 1997) <<http://europa.eu.int/abc/doc/off/rg/en/1997/enx80397.htm#1038>>.

156. *See id.*

157. Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, May 26, 1997, O.J.C. 195, 25.6.1997 [hereinafter E.U. Convention].

158. *See id.*

159. *See Transparency Int'l, TI Newsletter, International Organisations, EU Parliament Adopts Bontempi Report* (Dec. 1998) <<http://www.transparency.de/documents/newsletter/98.4/intorgan.html>>.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See European Union, Joint Action of 22 December 1998 Adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, on Corruption in the Private Sector*, 1998 O.J. (L358) <http://www.consilium.eu.int/ejn/vol_b/5_actions_communes/corruption/13909en.html> [hereinafter Joint Action].

164. *Id.* art. 5.

Action.”¹⁶⁵

The European Union has taken a strong, defined position regarding corruption.¹⁶⁶ Its political and economic power permits it to affect policy in regard to matters such as corruption. The European Union represents the current global trend in which authority, power, and resources are shifting from the nation-state to supranational regional organizations,¹⁶⁷ and it thus can wield significant influence within its region to resolve the problems posed by corruption.

F. Organization of Economic Cooperation and Development

The OECD, whose membership consists of those nations that are the largest exporters of trade and investment in the world, is one of the most important multilateral organizations and has an annual budget of approximately U.S. \$200 million.¹⁶⁸ It is a Paris-based organization, founded in 1961¹⁶⁹ to “achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries while maintaining financial stability, and thus to contribute to the development of the world economy.”¹⁷⁰ Later, it also assumed the task of coordinating assistance to developing countries.

The leadership of the OECD has been a critical element in recent years in the campaign to diminish global corruption; however, “[t]he main sources in developing countries for significant corrupt payments have been the big companies in the OECD nations.”¹⁷¹ A significant amount of the harm resulting from bribery occurs when multinational corporations from the more industrialized countries engage in corrupt activities in less developed countries, frequently in the context of public sector procurement.¹⁷² The OECD also notes that, “[a]s the largest exporters of trade and investment in the world, our multinationals represent, by far, the greatest potential source of bribe money. Given this situation, the supply side was a

165. *Id.* art. 8.

166. See E.U. Convention, *supra* note 157; Joint Action, *supra* note 163; *Second Joint Position of Nov. 13, 1997, defined by the Council on the basis of Article K.3 of the Treaty On European Union on Negotiations Held in the Council of Europe and the OECD on the Fight Against Corruption (97/783/JHA)*, O.J. Nov. 1, 1997.

167. See Reginald Dale, Euro Brings Need for Accountability, *INT’L HERALD TRIB.*, March 31, 1998, at 11.

168. See OECD, *What is OECD[?]* (last modified June 11, 2000) <<http://www.oecd.org/about/general/index.htm>>.

169. See Convention on Organisation for Economic Co-operation and Development, Dec. 14, 1960 [hereinafter 1960 OECD Convention]. See also ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *OECD: HISTORY, AIMS, STRUCTURE* 13 (1971).

170. 1960 OECD Convention, *supra* note 169; see OECD, *supra* note 168, at 5.

171. David Rovella, *Anti-Bribery Treaty Set for Signing*, *NAT’L L.J.*, Dec. 22, 1997, at B2 (statement by G. Hamilton Loeb, of Los Angeles’ Paul, Hastings, Janofsky & Walker L.L.P.). Note that the OECD countries produce two-thirds of the world’s goods and services. See *id.*

172. See Transparency Int’l, *The Transparency International Bribe Payers Survey* (last modified May 3, 2000) <<http://www.transparency.de/documents/cpi/bps.html>>.

logical place for our countries to start."¹⁷³

To remedy the deleterious effects of corruption, particularly bribery, in international business transactions, the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) on November 21, 1997.¹⁷⁴ As the chief U.S. negotiator of the Convention, Assistant Secretary of State Alan P. Larson stated "thirty-four of the world's largest economies are declaring an end of an era: it will no longer be business as usual for those who bribe."¹⁷⁵

The formal requirement for entry into force was the ratification by five of the ten countries which have the largest export shares among the OECD nations, and which represent at least sixty percent of the combined total exports of the OECD countries.¹⁷⁶ The OECD Convention's entry into force occurred in February 1999, when Canada deposited its instrument of ratification.¹⁷⁷

The Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions, adopted by the Negotiating Conference on November 21, 1997, state that the Convention "seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system."¹⁷⁸ Thus, the Convention acknowledges the sovereignty and cultural characteristics of the individual member nations that become signatories while meeting the Convention's objective of establishing a multilateral mechanism requiring consistent legislation criminalizing bribery.¹⁷⁹

Twenty-nine OECD Members¹⁸⁰ and five non-members—Argentina, Brazil, Bulgaria, Chile and the Slovak Republic—signed the Convention. With their signatures on December 17, 1997 the participating countries committed themselves to ratify and implement the OECD Convention as national legislation by December 31, 1998.¹⁸¹ As of October 5, 2000, twenty-one nations have adopted implementing legislation, and both the OECD Working Group on Bribery and the U.S. State Department are moni-

173. OECD Anti-corruption Unit, *Frequently Asked Questions* (last modified Jan. 18, 2001) <<http://www.oecd.org/daf/nocorruption/faq.htm>>.

174. OECD Convention, *supra* note 9.

175. Transparency International, *Press Release: Transparency International USA Hails Implementation of the OECD Anti-Bribery Convention* (last modified Feb. 9, 2000) <<http://www.transparency.de/documents/press-releases/1998/1998.10.27.oecd.html>>.

176. See OECD Convention, *supra* note 9, at art. 15.

177. See U.S. State Dep't, *supra* note 111.

178. OECD, *Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions* (Nov. 21, 1997) <<http://www.oecd.org//daf/nocorruption/20nov2e.htm>>.

179. See generally Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 Am. Bus. L.J. 485 (2000).

180. See *supra* note 65 for the twenty-nine listed members. See also Ayesha Qayyam, *New Anti-Bribery Treaty Analyzed*, INT'L COM. LITIG., Mar., 1998, at 7.

181. See OECD Convention, *supra* note 9, art.12.

toring the status of the Convention's implementation.¹⁸²

The Convention requires signatories to criminalize bribery of foreign public officials.¹⁸³ Article I prohibits the intentional offer, promise, or gift of "any undue pecuniary or other advantage . . . to a foreign public official . . . in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage."¹⁸⁴ Article III, entitled "Sanctions," sets forth "effective, proportionate and dissuasive criminal penalties" applicable to those who bribe foreign public officials.¹⁸⁵

The OECD Convention tackles the issue of corruption in international business transactions by regulating the conduct of the bribe-givers, the supply-side of the transaction. The Convention does not resolve the remaining concerns regarding other damaging aspects of corruption, including the conduct of bribe-takers. Therefore, to fully address the remaining issues, it is necessary to implement a multi-faceted strategy which includes the OECD, its member nations, and grassroots efforts initiated in the developing countries in which the bribe-takers reside.

G. FCPA Amendments in the 1998 Implementation of the OECD Agreement

In compliance with the requirements of the OECD Convention, the U.S. Congress amended the FCPA on November 10, 1998 by adopting the International Anti-bribery and Fair Competition Act (International Anti-Bribery Act).¹⁸⁶ With extensive existing legislation, Congress easily set about the task of making a few necessary additions to the 1988 FCPA Act.¹⁸⁷

1. Anti-bribery Amendments

The 1998 Act makes it unlawful for any *person*¹⁸⁸ (either an issuer or a

182. See OECD, *Country Reports on the Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation* (June 27, 2000) <<http://www.oecd.org/daf/nocorruption/index.htm>>; U.S. State Dep't, *supra* note 111. The 21 nations are: Australia, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Finland, Germany, Greece, Hungary, Iceland, Japan, Korea, Norway, the U.K., United States, Mexico, Slovakia, Spain, Sweden and Turkey. See *id.*

183. See OECD Convention, *supra* note 9, art.1.

184. *Id.* The language in initial drafts only referred to illicit payments for the purpose of obtaining business, but, upon further review, the OECD altered the language to include payments for any "other improper advantage." *Id.*

185. OECD Convention, *supra* note 9, art. 3.

186. Pub. L. No. 105-366, 112 Stat. 3302 (1998).

187. Pub. L. No. 100-418, 102 Stat. 1415 (1988). The relevant sections that represent a departure from the 1988 amendments are discussed below, and major changes in terms or interpretation are italicized for emphasis and clarity.

188. See 15 U.S.C. § 78dd-1(a)(2) (1998). The term "person" refers to any natural person other than a national of the United States, any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietor organized under the law of a foreign nation or a political subdivision thereof. The 1998 Act fills in the gaps regarding the liability for a foreign national, person, or entity knowingly assisting a U.S. person or entity. A foreign incorporated subsidiary is

domestic concern) knowingly¹⁸⁹ to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to

- (A)(1) *any foreign official*
- (2) any foreign political party or official thereof or any candidate for foreign political office for the purpose of
 - (i) influencing any act or decision of such party, official, or candidate in its or his official capacity,
 - (ii) inducing such party, official or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or
 - (iii) securing any *improper advantage*; or
- (B) inducing such party, official or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.¹⁹⁰

The Act still permits facilitating, or "grease," payments to expedite or secure the performance of routine government functions. However, it further clarifies the parameters of these kinds of payments. For example, "grease" payments are permissible for obtaining licenses, permits, visas, and processing work orders.¹⁹¹

In sum, the 1998 Act criminalizes the act of any U.S. person, issuer, or domestic concern who knowingly offers anything of value, either directly or through an intermediary, to a foreign official, broadly defined, in exchange for an improper advantage in obtaining or retaining business contracts.

2. Anti-bribery Penalties

The relative weakness of penalties and enforcement standards in other countries that have implemented the OECD Convention is a concern for those who are observing the effect of the Convention on the reduction of business corruption. For instance, Japan has been criticized for its inade-

exempt, but a U.S. parent corporation can be liable for knowingly participating in the payments made by the foreign subsidiary. *See id.*

189. *See id.* The Act specifically prohibits payments made directly to a foreign government official as well as payments made to an intermediary while "knowing" that it will be passed on to an official. "Knowledge" is being aware of the high probability that the payment will be made coupled with a conscious disregard of that probability. U.S.C. § 15 78dd-1 (1998).

190. 15 U.S.C. § 78dd-1(a)-(b) (1998) (emphasis added). The definition of "foreign public official" has been amended to include officials of "public international organizations." 15 U.S.C. § 78dd-1(a)(2). This definition is intended to include officials of such organizations as the World Bank and the International Monetary Fund. *See id.* One can interpret the "securing any improper advantage" provision as a ban on payments, transactional or otherwise, to foreign officials for any reason, including money paid to secure the release of a hostage. *See* 15 U.S.C. § 78dd-1(a)(2)(iii).

191. *See* 15 U.S.C. § 78dd-2(4) (1977).

quate penalty structure, which limits jail time to three years and fines to \$20,000 for individuals and \$2 million for corporations.¹⁹² As another example of inadequate enforcement standards, Great Britain has three laws, each passed nearly a century ago, that it claims satisfy the standards set by the OECD convention even though the laws have yet to result in a single conviction.¹⁹³ Similar concerns with other countries have motivated critics, such as attorney James Weinstein, to comment that “we’d like to start seeing some [OECD] prosecutions during the next 24 months [I]f there are no prosecutions in the next two or three years, it’ll lose its edge.”¹⁹⁴

The United States retained the stringent penalty structure established in the 1988 Act.¹⁹⁵ Any domestic concern that violates the anti-bribery section of the Act is subject to a criminal penalty of not more than \$2 million and a civil penalty of not more than \$10,000.¹⁹⁶ Any officer, director, or U.S. citizen, national or resident, who is an employee or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, shall be fined not more than \$100,000 or imprisoned not more than five years, or both.¹⁹⁷ The civil penalty for the same class of individuals is not more than \$10,000.¹⁹⁸

3. *Accounting Provisions*

The requirements on publicly-held U.S. corporations are essentially the same as those set forth in the 1988 Act:

- (A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
- (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that
 - (i) transactions are executed in accordance with management’s . . . authorization;
 - (ii) transactions are recorded . . . in conformity with generally accepted accounting principles;
 - (iii) access to assets is permitted only in accordance with management’s . . . authorization; and
 - (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.¹⁹⁹

To date, the SEC has not placed direct emphasis on enforcing sanctions for violations of these provisions. It has used the FCPA only as an additional

192. See Simpson, *supra* note 13.

193. See Doggett & Haddad, *supra* note 14.

194. *Id.* at C2. Martin J. Weinstein is a former federal prosecutor and partner in the Washington law firm of Foley & Lardner. See *id.*

195. See 15 U.S.C. § 78 dd-2(g)(1)(A),(B) (1988).

196. See *id.*

197. See *id.*

198. See *id.* § 78 dd-2(g)(1)(B), (2)(B), § 78dd-2(g)(2)(A).

199. *Id.* § 78m(b)(2).

theory when proceeding against a person or entity on violations of other sections of the securities laws.

4. Accounting Penalties

The penalties for accounting violations include the following: (1) a penalty that equals the greater of \$5000 for a natural person or \$50,000 for any other person, or the gross amount of pecuniary gain realized by a defendant as a result of the violation;²⁰⁰ (2) these maximum penalties increase to \$50,000 for a natural person or \$250,000 for any other person if the violations involve fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;²⁰¹ and (3) the maximum penalties further increase to \$100,000 for a natural person and to \$500,000 for any other person if, in addition to the fraud and other acts of malfeasance listed in (2) above, the violation also directly or indirectly results in substantial losses or creates a significant risk of substantial losses to other persons.²⁰²

H. Council of Europe

Another example of a regional anti-corruption initiative is the Council of Europe's (Council's) Criminal Law Convention on Corruption, which criminalizes bribes paid to public officials and private parties, as well as a wide range of other criminal offenses connected with corruption.²⁰³ Other offenses include corruption of office-holders in international organizations, members of national and foreign parliaments, judges and international office-holders of international courts of justice, and deriving advantages from unprofessional conduct and the laundering of profits gained from bribery.²⁰⁴ The Council's Convention tackles the issue of corruption very broadly, and it has a detailed monitoring procedure to report on the progress made by the twenty-seven signatories in implementing its provisions.²⁰⁵ The Council of Europe has become a leader in international efforts to fight corruption and works cooperatively with the OECD's Working Group on Bribery in International Business Transactions.²⁰⁶

The Council of Europe's own Working Group has completed work on a Civil Convention on Corruption, which would allow parties allegedly injured by acts of corruption to sue for damages.²⁰⁷ The Council of

200. See *id.* § 78u(d)(3)(B)(i).

201. See *id.* § 78u(d)(3)(B)(ii).

202. See *id.* § 78u(d)(3)(B)(iii).

203. See *id.* Criminal Law Convention on Corruption, Jan. 27, 1999, Strasbourg, Europ. T.S. No. 173; see also Briefing by Undersecretary of State, Stuart Eizenstat, and Undersecretary of Commerce, David Aaron, *The OECD Anti-Bribery Convention* FEDERAL NEWS SERVICE, June 30, 1999 [hereinafter Briefing].

204. See Transparency Int'l, *TI Newsletter, International Organisations: Council of Europe Asked to Sharpen Convention* (Dec. 1998) <<http://www.transparency.de/documents/newsletter/98.4/intorgan.html>>.

205. See *id.*

206. See *id.*

207. See Civil Law Convention on Corruption, Nov. 4, 1999, Europ. T.S. No. 74 [hereinafter Civil Law Convention on Corruption].

Europe's Committee adopted the Civil Law Convention on November 4, 1999.²⁰⁸ The Council of Europe can provide valuable assistance in diminishing corruption in its region by assessing the necessary changes at the regional, national, and local levels, and by monitoring the implementation and enforcement of its conventions.

III. Anti-Corruption Guidelines Utilized by International Financial Institutions/Multilateral Development Banks

Public sector procurement often is significantly funded by multilateral development banks such as the World Bank and the IMF.²⁰⁹ According to Peter Eigen of TI, "[b]illions of dollars are misappropriated each year in the process of public sector contracting."²¹⁰ Media attention and public concern flowing from this misappropriation of funds has caused the World Bank and the IMF to become increasingly vocal about their decisions to deny loans to countries that are unable or unwilling to rid themselves of bribery, kickbacks, and political payoffs.²¹¹

A. World Bank

The Bank—with its divisions, the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA)—was created to “assist in reconstruction after World War II. Reconstruction has remained an important focus of the Bank’s work, given the increasing number of natural disasters, complex humanitarian emergencies, and postconflict rehabilitation needs that have characterized the developing and transition economies.”²¹² The Bank stimulates productive investment in developing countries by lending capital to the countries for infrastructure projects,²¹³ financing banking and corporate reform, and engaging in other projects intended to provide a social cushion to the poor and unemployed in transition economy nations.²¹⁴ In addition, the Bank is a key player in the battle against corruption in the public procurement process within developing nations.²¹⁵

The Bank, through a number of mechanisms, has recently intensified its focus on preventing corruption. In 1997, the Bank published a report evaluating its role in combating corruption, stating that while it cannot formally take “a coercive stance,” it can lawfully withhold aid or other

208. *See id.*

209. *See* Transparency Int'l, *Islands of Integrity: The Integrity Pact* (visited Jan. 26, 2000) <http://www.transparency.de/activities/ip_attachm-a.html>. “Public sector’ in this context includes national and provincial governments . . . as well as parastatals (state owned corporations) and other organizations carrying out public functions.” *Id.*

210. Eigen Address, *supra* note 2.

211. *See id.*

212. World Bank, *About the World Bank Group, History* (visited Jan. 29, 2001) <<http://www.worldbank.org/html/extdr/about/history.htm>>.

213. *See id.*

214. *See* World Bank, *Helping Countries Reduce Corruption* (visited Jan. 29, 2001) <www1.worldbank.org/publicsector/anticorrupt/helping.htm>.

215. *See id.*

funding to countries that have not adequately addressed corruption.²¹⁶

The World Bank Institute (WBI), as part of the World Bank Group, “facilitates action-oriented and participatory programs to promote good governance and curb corruption in client countries.”²¹⁷ To combat corruption in client countries, the WBI cooperates with other World Bank Group entities, outside organizations, and stakeholders within client countries to conduct diagnostic surveys and organize coalitions.²¹⁸

In May 1998, the World Bank created the Oversight Committee on Fraud and Corruption to review allegations of corruption by any member.²¹⁹ Through the Economic Development Institute, the World Bank conducts Integrity Workshops and procurement seminars.²²⁰ In October 1998, the World Bank established a telephone hotline to facilitate the reporting of fraud and corruption.²²¹ The Bank also conducts ongoing research to diagnose the extent and character of corruption in a given country.²²²

The Bank has been mindful of corruption within its own organization too. Accordingly, it authorized independent audits of fifty-four of its own projects in the last two years.²²³ The audit revealed that the Bank had been involved in “misprocurement on about 40 contracts with a total contract value of \$ 40 million.”²²⁴

In part due to the findings of the audit, the Bank has strengthened its anti-corruption stance by banning firms that offer bribes from participating in future Bank-financed procurement projects. In addition, it maintains the right to cancel loans to governments whose officials solicited bribes and require borrowing countries and their contractors to comply with anti-corruption guidelines as a prerequisite to aid.²²⁵

The guidelines provide that, upon discovery of fraudulent or corrupt conduct by a bidder or, once financing has been granted, by a borrower, the bank will reject the bidder’s proposals for awards, cancel the remaining portions of loans . . . and debar the borrower from future World Bank financing for a stated period of time or indefinitely.²²⁶

216. See World Bank, *Preventing Corruption in Bank Projects* (visited Jan. 29, 2001) <<http://www1.worldbank.org/publicsector/anticorrupt/prevent.htm>>.

217. World Bank, World Bank Institute, *Governance and Anti-Corruption, Overview & Strategy* (visited Jan. 29, 2001) <<http://www.worldbank.org/wbi/governance/overview.htm>>

218. See *id.*

219. See World Bank, *supra* note 216.

220. See *id.*

221. See World Bank (visited January 29, 2001) <<http://www1.worldbank.org/publicsector/prevent.htm>>.

222. See World Bank, *supra* note 214.

223. See *id.*

224. *Id.*

225. See George & Lacey, *supra* note 1, at 34; Low & Atkinson, *supra* note 143, at B9.

226. Low & Atkinson, *supra* note 143, at B14; see also World Bank, *Procurement Guidelines: 1.15 Fraud and Corruption* (revised Jan., 1999) <<http://www.worldbank.org/html/opr/procure/intro.html#p115>>.

Thus, if a bidder is found to have engaged in corrupt behavior, the Bank can bar it from future bids; and if a borrower has engaged in corruption, the remaining portions of the loan may be cancelled. The development of guidelines calling for specific economic and financial consequences when corruption is detected reflects the growing reluctance of international agencies to provide capital to nations riddled with corruption. The guidelines also evidence the agencies' efforts to reduce corruption in the procurement process of emerging countries.

B. International Monetary Fund

The IMF was officially established when twenty-nine countries signed its Articles of Agreement on December 27, 1945.²²⁷ The IMF was created to "promote international monetary cooperation; to facilitate the expansion and balanced growth of international trade; to promote exchange stability; to assist in the establishment of a multilateral system of payments; to make its general resources temporarily available to its members experiencing balance of payments difficulties under adequate safeguards;"²²⁸ and to consult and collaborate on international monetary problems generally.²²⁹ The IMF presently has 182 member nations, representing all regions of the globe.²³⁰ It is headquartered in Washington D.C. and boasts a staff of over 2600 individuals drawn from 122 different countries.²³¹

Surveillance is one mechanism employed by the IMF to promote international exchange rate stability.²³² The IMF's surveillance activities have prompted some commentators to characterize the IMF as a "global watchdog," suitably positioned to determine when and where a financial crisis may occur.²³³ If necessary, the IMF can infuse capital into troubled economies, thereby acting as a catalyst to restore private sector confidence in the system and attract investment to the economy.²³⁴

As a creditor, the IMF has the power to attach certain conditions to the money that it provides; for instance, it may insist that an applicant adopt institutional reform measures intended to eliminate corrupt practices which undermine economic stability.²³⁵ Thus, the IMF possesses significant leverage to require that developing nations reduce internal

227. See International Monetary Fund, *The IMF at a Glance* (last modified Jan. 2001) <<http://www.imf.org/external/np/exr/facts/glance.htm>>.

228. *Id.*

229. See Tom Petrino, *The Financial "White Knight": IMF Demystified*, L.A. TIMES, Nov. 22, 1997, at A1.

230. See International Monetary Fund, *About the IMF* (January 26, 2001) <<http://www.imf.org/external/about.htm>>.

231. See International Monetary Fund, *supra* note 227.

232. See *id.*

233. See *id.*

234. See *id.*

235. See International Monetary Fund, *IMF Adopts Guidelines Regarding Governance Issues* (Aug. 4, 1997) <<http://www.imf.org/external/np/sec/nb/1997/NB9715.htm>> [hereinafter *Guidelines*].

corruption.²³⁶

In August 1997 the IMF adopted stringent guidelines to promote public sector transparency and accountability. These guidelines were adopted to improve efficiency and support sustained economic growth.²³⁷ According to the guidelines, the IMF has adopted a “more proactive approach in advocating policies” and actively pursues “the development of institutions and administrative systems that aim to eliminate the opportunity for corruption [and] fraudulent activity in the management of public resources.”²³⁸ The IMF’s aims to achieve “an evenhanded treatment of governance issues in all member countries,” “enhanced collaboration with other multilateral institutions, in particular the World Bank” and an improved “use of complementary areas of expertise [among anti-corruption initiatives].”²³⁹

The IMF has been involved in several well-publicized bailouts in the last few years, including those occurring in Mexico, Thailand, South Korea, and Indonesia.²⁴⁰ These bailouts not only focused global attention on the continued existence of corruption but also demonstrated the potential influence of the IMF in “promoting good governance in all its aspects, . . . improving the efficiency and accountability of the public sector, and tackling corruption.”²⁴¹

IV. Transparency International, The Leading Non-governmental Institution in the Fight Against Corruption

A. Background and Achievements

The three necessary components to confront corruption successfully are: (1) the implementation of multilateral conventions targeting corruption; (2) the efforts of international financial institutions; and (3) grassroots efforts within civil society to overcome cultural attitudes that support bribery and corruption. The first two components have been addressed above; the third is discussed below.

Since its inception in Berlin in 1993, TI has experienced a rapid rise in stature to its present position as the preeminent NGO combating corruption worldwide.²⁴² It is the only international NGO exclusively devoted to curbing corruption, and it views itself as seeking “to empower civil society

236. See *id.* The IMF funding pool is the sum of subscriptions by the IMF’s 182 member nations, which essentially keep a share of their national currencies on deposit with the IMF. The IMF deals only with a recipient country’s central bank, feeding money directly into that institution and thus bolstering the financial reserves ultimately backing the government. See Petrino, *supra* note 229, at A1.

237. See generally *supra* note 236.

238. Guidelines, *supra* note 235.

239. *Id.*

240. See Paul Blustein, *Hard Part Begins for Seoul and the IMF*, INT’L HERALD TRIB., Nov. 24, 1997, at 1; Evelyn Iritani, *Pacific Blues*, L.A. TIMES, Nov. 22, 1997, at D1.

241. Guidelines, *supra* note 235.

242. See Transparency Int’l, *TI’s Structure* (last modified Jun. 23, 2000) <<http://www.transparency.de/organisation/index.html>>.

to play a meaningful role in countering corruption.”²⁴³ TI operates at the grassroots level to empower “civil society”²⁴⁴ within target countries.²⁴⁵ Thus, TI signifies a collaboration of non-governmental forces, unified in their efforts against corrupt practices.

TI is based on the conviction that “corruption impacts negatively not only on human rights and economic development, but also undermines stability and can threaten peace and security.”²⁴⁶ Accordingly, TI has identified four primary areas of damage caused by bribery and corruption: (1) humanitarian—that “corruption undermines and distorts development and leads to increasing levels of human rights abuse;” (2) democratic—that “corruption undermines democracies and in particular the achievements of many developing countries and countries in transition;” (3) ethical—that “corruption undermines a society’s integrity;” and (4) practical—that “corruption distorts the operations of markets and deprives ordinary people of the benefits which should flow from them.”²⁴⁷ These policy statements make it clear that TI’s anticorruption efforts are broad-based.

TI emphasizes prevention and systematic reform “[i]nstead of attempting to expose individual examples of corruption.”²⁴⁸ To accomplish its goals, TI targets not only government officials who accept bribes, but also the businesses that offer bribes. TI thus pursues a reduction in corrupt practices by parties on both sides of a given corrupt transaction, and views such demand and supply-side targeting as critical to an effective anti-corruption campaign.

TI gathers data regarding the perceived extent of corruption, develops systems to combat corruption, engages various multinational organizations to encourage the passage of conventions aimed at eliminating corruption, and organizes conferences for the exchange of information about current levels of corruption world-wide.²⁴⁹ In sum, “TI builds national, regional and global coalitions, embracing the state, civil society and the private sector, in order to fight domestic and international corruption.”²⁵⁰ TI’s formation of coalitions is a critical step towards eradicating corruption.

243. Transparency Int’l, *Mission Statement* (last modified Feb. 9, 2000) <<http://www.transparency.de/mission.html>>.

244. “Civil society” in this context applies to “all those elements of society, and all those arrangements within it, that exist outside the state’s reach or instigation.” Rieff, *supra* note 10, at 11.

245. See Eigen Address, *supra* note 2.

246. Transparency Int’l, *Press Release: Concluding Statement of the 1998 Annual General Meeting of Transparency International (TI) [at] Kuala Lumpur 16, September 1998* (last modified February 9, 2000) <<http://www.transparency.de/documents/press-releases/1998/1998.agm.statement.html>>.

247. Transparency Int’l, *Welcome* (last modified Apr. 10, 2000) <<http://www.transparency.de/welcome.html>>.

248. Corr & Lawler, *supra* note 55, at 1254.

249. See Transparency Int’l, *supra* note 243. TI’s Mission Statement includes a statement of purpose: “TI assists in the design and the implementation of effective integrity systems [and] . . . collects, analyses and disseminates information and raises public awareness on the damaging impact of corruption (especially in low-income countries) on human and economic development.” *Id.*

250. *Id.*

1. *New Bribe Payers Index*

In 1999 TI developed, with the assistance of Gallup International Association, a Bribery Index of Leading Exporting Nations (BPI), which measures the sources of international corruption.²⁵¹ During the data collection phase, more than 770 executives at major corporations, chambers of commerce, commercial banks, and law firms in fourteen emerging-market nations answered detailed questionnaires about their perceptions of which countries are home to multinational corporations that are paying bribes.²⁵² In the BPI, TI and Gallup selected those emerging markets "where there is a reasonable spread of international competition" and difficulties with bribery in international business transactions.²⁵³

The BPI ranks exporting nations on a one to ten scale, where ten represents a very low perceived level of bribery, and one indicates a very high level of bribery.²⁵⁴ Sweden had the best score, 8.3.²⁵⁵ It is interesting to note that despite a two-decade history since the adoption of the FCPA,²⁵⁶ the United States had a score of 6.2 in the 1999 BPI.²⁵⁷

"The scale of bribe-paying by international corporations in the developing countries of the world is massive. Actions by the majority of governments of the leading industrial countries to curb international corruption are modest."²⁵⁸ Dr. Peter Eigen has stated,

the press focuses on the developing countries of the world when reporting on the CPI because corruption is perceived to be greatest there, but I urge the public to recognise that a large share of the corruption is the explicit product of multinational corporations, headquartered in leading industrialised countries, using massive bribery and kick-backs to buy contracts in the developing world and the countries in transition.²⁵⁹

As TI points out, the purpose of the BPI is to raise public awareness about the "supply-side" of bribery transactions.²⁶⁰ In subsequent years, it plans to measure perception to see if the OECD Convention, and the domestic legislation implementing it in OECD nations, has an effect on the perceived

251. Transparency Int'l, *supra* note 61.

252. See Transparency Int'l, *Questions and Answers on the 1999 TI Corruption Perceptions Index (CPI) [and] the 1999 Bribe-Payer's Index (BPI)* (last modified Jul. 3, 2000) <http://www.transparency.de/documents/cpi/cpi-q_and_a.html>. The fourteen countries that responded to the poll were India, Indonesia, Philippines, South Korea, Thailand, Argentina, Brazil, Colombia, Hungary, Poland, Russian Federation, Morocco, Nigeria, and South Africa. See *id.*

253. *Id.*

254. See *id.*

255. See Transparency Int'l, *supra* note 61.

256. 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2 (1988).

257. See Transparency Int'l, *supra* note 61.

258. Transparency Int'l, *The TI Bribe Payers Survey*, (last modified May 3, 2000) <<http://www.transparency.de/documents/cpi/bps.html>>.

259. Transparency Int'l, *TI Press Release: Transparency International Publishes 1997 Corruption Perceptions Index* (July 31, 1997) <<http://www.transparency.de/documents/press-releases/1997/1997.31.7.cpi.html>>.

260. See *id.*

extent of bribery.²⁶¹

2. *Corruption Perception Index*

For the last five years one of TI's most widely publicized activities has been its annual survey ranking countries based on their perceived level of bribetaking, the TI Corruption Perception Index (CPI).²⁶² The Index is published in cooperation with the University of Göttingen by Johann Graf Lambsdorff and has become an internationally acknowledged instrument for measuring corrupt practices, as perceived by business people. The CPI ranks countries by the degree to which they are perceived to be home to bribe-takers, and thus it is an attempt to measure the demand side of bribery transactions.²⁶³

Dr. Eigen, Chairman of TI, characterizes the CPI as "a measure of lost development opportunities" that establishes an empirical link "between the level of corruption and foreign direct investment."²⁶⁴ Because such data are important to multilateral lending institutions, nations seeking international investment and funding from entities such as the World Bank and the IMF are compelled to analyze the CPI data carefully and attempt to correct any revealed problems of corruption within their own countries.

Publication of the 1999 CPI attracted media attention all over the globe. TI held simultaneous press conferences at their headquarters in Berlin and in Washington D.C.²⁶⁵ Ninety-nine countries were included in the 1999 Corruption Perception Index, an increase from the eighty-five included in the 1998 survey.²⁶⁶ TI observed that

[a]fter some controversy over the fairness of the index to developing countries—and to Latin America in particular—it was interesting to see the fairness with which the media reported and to note that the constructive message behind the CPI was well understood by the Latin American media: corruption needs to be taken seriously.²⁶⁷

The 1999 CPI is a "poll of polls," and has a different methodology

261. *See id.*

262. *See* Transparency Int'l, *1999 Corruption Perceptions Index* (last modified Aug. 23, 2000) <<http://www.transparency.de/documents/cpi/index.html>>. The Index draws on surveys undertaken by Gallup International, the World Competitiveness Yearbook, by Political and Economic Risk Consultancy in Hong Kong, DRI/McGraw Hill Global Risk Service, Political Risk Services in Syracuse, NY, among other sources.

263. *See* Transparency Int'l, *Press Release: New Poll Shows Many Leading Exporters Using Bribes* (Oct. 26, 1999) <http://www.transparency.de/documents/cpi/cpi-bpi_press-release.html>.

264. *Id.*

265. *See* Transparency Int'l, *TI Newsletter, Special Feature, The 1999 Corruption Perceptions Index and the New Bribe Payers Index (1999)* available at <<http://www.transparency.de.documents/newsletter/99.4/index.html>>.

266. *See* Transparency Int'l, *Questions & Answers* (last modified Jul. 3, 2000) <<http://www.transparency.de.documents/newsletter/99.4/>>.

267. Transparency Int'l, *The Scandal of Slow International Co-operation*, (Dec. 1998) <<http://www.transparency.de/documents/newsletter/98.4/>>.

than the BPI.²⁶⁸ In the 1999 poll, Denmark retained the highest CPI score, a virtually corrupt-free score of 10.²⁶⁹ The country perceived as the worst in terms of corruption was Cameroon, with a score of 1.5, drawn from four surveys.²⁷⁰ The United States, despite the twenty-two year history of the FCPA,²⁷¹ has a CPI score of only 7.5.²⁷²

Seemingly out of fairness to less-developed nations, TI maintains that it is more important to evaluate an individual country's score as compared to the ten-point maximum rather than to focus exclusively on the ranking of a given country relative to other countries.²⁷³ Peter Eigen stated in regard to the 1999 CPI that "[a]gain this year we are seeing many very poor countries in the lowest positions on the CPI. We would caution that it would be wrong to call these countries the most corrupt in the world."²⁷⁴ He stressed that "[g]overnments of countries with low CPI scores need to do far more to publicly acknowledge the problems, to confront the issues, to subject the corrupt companies and the corrupt officials to prosecution and to earn public confidence by their anti-bribery policies."²⁷⁵

TI reports that the CPI has had a positive impact on the national politics of various countries and has helped to shape public awareness and concern regarding corruption.²⁷⁶ "We know that publication of the CPI has contributed to raising public awareness of the cancer of corruption," notes Eigen.²⁷⁷ "While some governments rejected the implicit criticism out of hand, others have acted on it, initiating reforms to strengthen their integrity systems."²⁷⁸ Dr. Eigen specifically mentioned Malaysia as one such example.²⁷⁹

TI has reviewed and revised certain aspects of the CPI based on its own insights and the response of some developing nations.²⁸⁰ These developing nations perceive a bias in the CPI against their countries. In other words, while the CPI reflects that developing nations often are the sites of

268. See *id.* The Index draws on surveys undertaken by Gallup International, the World Competitiveness Yearbook, Political and Economic Risk Consultancy in Hong Kong, DRI/McGraw Hill Global Risk Service, Political Risk Services in Syracuse, NY, among other sources. See *id.* It is important to emphasize that the BPI (as well as the CPI) is based on perceptions of corruption, not on empirical evidence of actual corruption, because such information is virtually impossible to obtain. TI publishes detailed reports discussing the methodology of both indices and reviews the methodology through a Steering Committee. See Transparency Int'l, *Questions & Answers* (last modified July 3, 2000) <http://www.transparency.de/documents/cpi/cpi-q_and_a.html>.

269. See *id.*

270. See *id.*

271. 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2 (1998).

272. See Transparency Int'l, *Corruption Perceptions Index*, *supra* note 262.

273. See *id.*

274. *Id.*

275. *Id.*

276. See *id.*

277. Transparency Int'l, *Corruption Perceptions Index*, *supra* note 262.

278. *Id.*

279. See *id.*

280. See Transparency Int'l, *Scandal*, *supra* note 268. See Transparency International, *Special Feature: Corruption Perception Index 1999* (Dec., 1999) <<http://www.transparency.de/documents/newsletter/98.4/index.html>>.

public official bribe-takers,²⁸¹ the CPI does not reflect that the private sector bribe-givers frequently reside in the more industrialized nations.²⁸² The concerns expressed by the developing nations regarding the one-sided focus of the CPI were instrumental in TI developing the Bribe Payers Index.

The TI Year 2000 CPI was released on September 13, 2000.²⁸³ The 2000 CPI is a composite index, drawing on sixteen surveys from eight independent institutions.²⁸⁴ It is based on surveys conducted over the 1998-2000 period.²⁸⁵ TI maintains that “[t]his multi-year approach is more accurate and realistic.”²⁸⁶

The CPI indices are instrumental in raising worldwide awareness of corrupt business practices. However, perhaps the most important contribution TI can make to the struggle to eradicate corruption is to continue influencing cultural attitudes regarding corruption through a variety of grassroots initiatives, such as their National Chapters and Integrity Pacts.²⁸⁷

B. Anti-Corruption Efforts in Developing Nations & Elsewhere

1. *TI National Chapters*

TI maintains that its coordination and support of its National Chapters in individual countries is necessary to bring the battle against corruption to the grassroots level.²⁸⁸ Currently over seventy-seven TI National Chapters work actively within their home countries to design national anti-corruption strategies.²⁸⁹ These chapters operate independently of government, business and partisan political interests.²⁹⁰

TI, through its National Chapters, is able to carry the fight against corruption to the grassroots level by organizing and sponsoring Integrity Workshops, National Anti-Corruption Days, cartoon and essay competitions, and radio “phone-in” and other whistleblowing projects for the reporting of corrupt practices.²⁹¹ The National Chapters engage in other activities, such as monitoring privatization initiatives and political cam-

281. Transparency Int'l, *TI Newsletter, The 3rd Page, TI Annual General Meeting Kuala Lumpur, September 1998* (Dec. 1998) <<http://www.transparency.de/documents/newsletter/98.4/third.html>>.

282. *See id.*

283. *See* Transparency Int'l, *Press Release: Transparency International Releases the Year 2000 Corruption Perceptions Index, New Index Is Based on Multiple Surveys from 1998-2000* (Sept. 13, 2000) <<http://www.transparency.de/documents/cpi/2000/cpi2000.html>>.

284. *See id.*

285. *See id.*

286. *Id.* (statement made by TI Executive Director Jeremy Pope).

287. *See* Transparency Int'l, *Programmes and Activities* (last modified Jan. 15, 2001) <<http://www.transparency.de/activities/index.html>>.

288. *See* Transparency Int'l, *National Chapters and Contacts* (last modified Jan. 5, 2001) <<http://www.transparency.de/organisation/chapters/>>.

289. *See id.*

290. *See id.*

291. *See* Transparency Int'l, *National Chapter Activities* (last modified Feb. 9, 2000) <<http://www.transparency.de/activities/chapter-activities.html>>.

paign funding, overseeing public hearings on major construction projects, and developing educational tools regarding corruption.²⁹² Additionally, the Chapters are instrumental in implementing TI's Integrity Pact program, helping to ensure integrity and transparency in government and public procurement projects by arranging Integrity Pledges for public officials and providing guidance throughout the Integrity Pact process.²⁹³

TI is convinced that anti-corruption efforts are sustainable only "with the involvement of all the stakeholders[, including] . . . the state, civil society and the private sector."²⁹⁴ TI's aim thus is to achieve cooperation among diverse non-governmental entities. It focuses its energies upon the formation of coalitions, including the construction of information-sharing systems. Finally, TI strives to operate in a non-confrontational way, and, accordingly, it does not "name names" or publicize individual cases of corruption.²⁹⁵

A critical step in TI's effort to mobilize all relevant stakeholders is the establishment of National Chapters.²⁹⁶ Although TI currently has National Chapters in over seventy countries worldwide, with 263 chapters in nations such as South Korea, Cambodia, Malaysia, Russia, Bolivia, Guatemala,²⁹⁷ and Kenya,²⁹⁸ TI has not yet been successful in establishing chapters in certain major countries. For example, Japan currently has only a national contact.²⁹⁹

2. Integrity Pacts

TI's Integrity Pacts (IPs)³⁰⁰ are an important part of its grassroots-level initiative.³⁰¹ An IP results when a national government and bidding companies mutually promise not to engage in corrupt public procurement practices; bidding companies publicly pledge not to use bribes, while government agencies pledge total transparency on the part of its officials in awarding the contract.³⁰² The IP is designed to ensure the absence of corruption in the handling of selected contracts with International Financing

292. *See id.*

293. *Id.*; Transparency Int'l, *The Integrity Pact (TI-IP): The Concept, the Model and the Present Applications, A Status Report as of December 8, 2000* (last modified Jan. 12, 2001) <http://www.transparency.de/activities/ip_status-report.html>.

294. Transparency International, *Welcome to Transparency International* (last modified Apr. 10, 2000) <<http://www.transparency.de/welcome.html>>.

295. See United Nations, *Corruption and Integrity Improvement Initiatives in Developing Countries, The Role of Civil Society* by Peter Eigen (visited Jan. 26, 2001) <<http://magnet.undp.org/Docs/efa/corruption.htm#5.%20The%20Role>>.

296. See, e.g., Transparency Int'l, *TI Newsletter, National Chapters and Contacts in the Americas* (visited Jan. 29, 2001) <<http://www.transparency.de/documents/newsletter/98.4/index.html>>.

297. *See id.*

298. See Transparency Int'l, *National Chapters and Contacts* (last modified Jan. 5, 2001) <<http://www.transparency.de/organisation/chapters/index.html>>.

299. *See id.*

300. See Transparency Int'l, *supra* note 287.

301. See Frank Vogl, *The Supply Side of Global Bribery*, *NEW PERSP.*, at 63f; Transparency Int'l, *supra* note 293.

302. See Transparency Int'l, *supra* note 293.

Institutions and selected external donor-financed projects.³⁰³

According to TI's concept paper, the IP is intended to accomplish two objectives:

(a) to enable companies to abstain from bribing by providing assurances to them that (i) their competitors will also refrain from bribing, and (ii) government procurement agencies will undertake to prevent corruption, including extortion, by their officials and to follow transparent procedures; and

(b) to enable governments to reduce the high cost and the distortionary impact of corruption on public procurement.³⁰⁴

The IP concept is recommended also for privatization programs, for licensing procedures in telecommunications, transport, mining, and logging.³⁰⁵ Consulting bids can be handled accordingly.³⁰⁶

The main features of the Integrity Pact are:

a formal no-bribery commitment by the bidder, as part of the signed tender document; a corresponding commitment of the government to prevent extortion and the acceptance of bribes by its officials; disclosure of all payments to agents and other third parties; sanctions against bidders who violate their no-bribery commitment; involvement of Civil Society in monitoring the bid evaluation; and public disclosure of the award decision alternatively to the involvement of Civil Society or preferably in addition to it.³⁰⁷

TI recommends that the respective bidders be notified of the IP concept as early in the bidding process as possible.³⁰⁸ In addition, as part of the pre-qualification procedures, bidders should be required to certify their commitment to the IP concept to show that they qualify to submit a bid.³⁰⁹ To assist in the implementation of its IP program, TI drafted a model "Invitation to Tender for Public Sector Procurement" as well as a "Model Communication by the Government of XYZ to all Bidders invited to Tender for the YYY Project."³¹⁰

TI must educate nations regarding its IP program and assist national efforts to implement the IPs. One example of a failed attempt to implement an IP-like program involved a coalition of African nations obtaining construction funds from the World Bank. In 1998, the Chairman for Global Coalition for Africa, Robert McNamara, and the Executive Secretary of the Global Coalition of Africa, Ould Abdallah, received a commitment from the governments of seven African states—Benin, Malawi, Ethiopia, Tanzania, Mali, Mozambique and Uganda—to participate in an IP.³¹¹ The states submitted a written request to the World Bank that future construction

303. *See id.*

304. *Id.*

305. *See id.*

306. *See id.*

307. *Id.*

308. *See id.*

309. *See id.*

310. Transparency Int'l, *Integrity Pacts in Colombia, Annex A*, (last modified Jan. 12, 2001) <http://www.transparency.de/activities/ip_annex-a.html>.

311. *See id.*

projects be subject to the IP.³¹² However, “[t]he Bank decided that the IP had a chance to succeed only if a number of minimum conditions regarding governance in the country were fulfilled [and] . . . [u]nfortunately, the IP has not been introduced into any Bank-financed activities in those countries.”³¹³ These states’ failed attempt to initiate a successful IP program underscores the importance of TI’s role as educator, facilitator, and overseer of anti-corruption measures in public sector procurement.

Examples of the successful implementation of IP initiatives are presented by the refinery rehabilitation project in Ecuador and the privatization of telecommunication in Panama.³¹⁴ In Argentina, a limited Integrity Pact to build a new line in the Argentinian metro system is currently in the negotiation stage.³¹⁵

TI has taken critical first steps to curb corruption in public sector procurement of goods and services. While “[m]any governments and business leaders have recognized the high risk and cost of bribery and extortion and [now] seek ways to curb and eventually eliminate corruption in such transactions,”³¹⁶ the fear of losing business contracts to their competitors who continue to pay bribes prevents many business leaders from discontinuing corrupt practices.

3. Conferences

a. The 9th International Annual Anti-Corruption Conference, October 1999

The 9th International Anti-Corruption Conference (IACC)³¹⁷ was held in Durban, South Africa due in part to concerns in the international community regarding the extent of corruption in various African national governments.³¹⁸ This event united 1600 professionals, practitioners and activists in the fight against corruption. Leading officials from aid funding institutions such as the World Bank (President James Wolfensohn), the UN, the UNDP, the African Development Bank and South Africa (President Thabo Mbeki) attended the Durban conference.

IACC conference topics included such diverse topics as the roles of financial donors and of the creative arts in fighting corruption, and strategies for countering money politics and laundering.³¹⁹ The conference yielded the “Durban Commitment,” a statement expressing the participants’ determination to combat corruption.³²⁰

312. See Transparency Int’l, *supra* note 293.

313. *Id.*

314. See *id.*

315. See *id.*

316. *Id.*

317. See Transparency Int’l, *The 9th IACC Annual Anti-Corruption Conference: Global Integrity: 2000 and Beyond-Developing Anti-Corruption Strategies in a Changing World, Durban, South Africa* (Oct. 15-19, 1999) <http://www.transparency.de/documents/annual-report/ar_99/pages/contents.htm>.

318. *Id.*

319. See *id.*

320. See *id.*

The conference ironically served as a pivotal counterpoint to an ongoing South African scandal receiving significant media attention at the time of the conference and involving the Lesotho-South Africa Highlands Water Project.³²¹ An official with the project was charged with accepting bribes of \$ 2 million from twelve international construction firms.³²² World Bank funding accounted for approximately \$ 100 million of the \$ 2.4 billion project;³²³ thus, the possibility exists that the World Bank may debar some of the indicted companies from further Bank-financed projects.³²⁴

The scandal demonstrates that multilateral conventions alone are insufficient to combat global business corruption. Instead, grassroots initiatives could provide the necessary means to modify cultural attitudes in countries, such as South Africa, where the bribe-takers engage in business as usual; and, finally, aid-funding institutions can and should leverage their ability to lend capital.

b. Asian Development Bank/OECD Workshop on Combating Corruption in Asian and Pacific Economies, October 1, 1999.

In October 1999 the Asian Development Bank (ADB) and OECD sponsored a workshop on countering corruption in Manila, Philippines³²⁵ Two hundred representatives from the private sector and civil society attended the workshop, held in Manila, Philippines, as did participants from 36 countries. Participants included TI, the Pacific Basin Economic Council, the UNDP, and the World Bank. The workshop group discussed strategies to integrate anti-corruption initiatives at all levels, promote stronger enforcement of anti-corruption laws, achieve greater transparency and integrity in government, and develop codes of conduct in the private sector.

V. Coalitions Necessary to Successfully Eradicate Bribery and Corruption: Involvement of Civil Society, Government and Private Sector in Campaign Against Corruption

The three social institutions most responsible for and affected by globalization are government, business, and civil society.³²⁶ However, government and business institutions are often the perpetrators of corruption—with business as the bribe-giver and government the bribe-taker. These groups may therefore be less able or inclined to establish and maintain anti-corruption agendas. As noted by Peter Eigen, of the three institutions,

321. See Transparency Int'l, *TI Newsletter, Bribers to Pay the Price* (Dec. 1999) <<http://www.transparency.de/documents/newsletter/99.4/index.html>>. See generally Paul Blustein, *Lesotho Bribery Charges Reads Like "A Who's Who of Dam-Builders,"* INT'L HERALD TRIB., Aug. 14-15, 1999.

322. See *id.*

323. See Blustein, *supra* note 321.

324. See *id.* (statement of Daoud Khairallah, World Bank Acting General Counsel).

325. See OECD, *ADB/OECD Workshop on Combating Corruption in the Asia-Pacific Region* (Oct. 1, 1999) <<http://www.oecd.org//daf/nocorruption/outreach99.htm#AsiaPacific>>.

326. Peter Eigen, *The Role of Civil Society* (visited Feb. 13, 2001) <<http://magnet.undp.org/DOCS/efa/corruption.htm#5.TheRole>>.

only civil society organizations have the public mandates and the global potential to both declare the improvement of people's lives as the paramount priority, and to do something meaningful about it. Only civil society organizations can provide the impetus, the force, and the leadership to wage the global war against corruption.³²⁷

It is impossible, however, for civil society to remedy corruption alone. A coalition of the three pillars of the social structure—business, government, and civil society—is of paramount importance in the fight against corruption.³²⁸ Each of these sectors has the capacity, based on its unique characteristics, to make critical contributions.³²⁹ Government, when accountable to democratic control, and whose legitimacy thus is derived from the people, can establish the legislative framework to criminalize corrupt conduct.³³⁰ Government is also uniquely situated to provide the access, leadership and resources necessary to reform governmental systems and institute measures to ensure transparency and accountability.³³¹

For any campaign against corruption to succeed, it is also necessary to enlist the cooperation and support of the business community. The private sector can assist in identifying problematic issues and is the ultimate “testing ground for anti-corruption models—no rules and regulations will check corruption if the gap between ethical standards and competitive forces is too wide to be bridged.”³³²

The legitimacy of civil society, like that of democratic government, also emanates from the people; people who, without the profit motivation of the private sector or the political self-interest of government, are concerned with the broadest issues of social welfare in the local, regional, national, and global communities. Civil society can provide the initiative and leadership to build pivotal alliances among these three principal entities. These alliances are absolutely essential to the eradication of bribery and corruption.

The alliance between government, business, and civil society is developing through the mechanisms already established by TI, OECD, OAS, and other organizations with various representative groups of civil society.³³³ As noted by Peter Eigen, “I wish to leave no doubt that Transparency International’s highest priority is strengthening its national chapters and contributing to the humanitarian and anti-corruption endeavors of civil society worldwide.”³³⁴ Transparency International seeks to empower civil society to function successfully. TI has developed a number of mechanisms to involve local communities in its anti-corruption agenda, through utilizing mechanisms such as the Integrity Pact, the National Chapters and

327. *Id.*

328. *See id.*

329. *See id.*

330. *See id.*

331. *See id.*

332. *Id.*

333. *See* OECD, Anti-Corruption Unit, *Private Sector/Civil Society* (last modified Feb. 10, 2000) <<http://www.oecd.org/daf/nocorruption/pscs.htm>>.

334. *Id.*

other efforts previously discussed.³³⁵

TI's Integrity Pact model is one of the most successful collaborations between the three principal partners in the fight against corruption.³³⁶ This model unites government actors and business entities in the public procurement process in an agreement to strive for transparency, accountability, and the elimination of bribery aimed at obtaining or retaining a contract or other improper advantage.³³⁷ Civil society's role in this model is to monitor the agreement.³³⁸ These IPs have been utilized successfully in public procurement projects both in Africa and South America.³³⁹

The OECD is also firmly committed to the involvement of civil society in the battle against corruption. The OECD has stated that it is impossible for any one of the three principal actors involved in corruption—government, the private sector, and civil society—to “address the issue of corruption in isolation from the other two and arguably impossible to tackle the issue effectively without the participation of all three.”³⁴⁰ The OECD regularly consults with partners and representatives from civil society such as the Trade Union Advisory Group (TUAC),³⁴¹ the Business and Industry Advisory Group (BIAC),³⁴² TI, and the International Chamber of Commerce (ICC)³⁴³ through its Working Group on Bribery. These organizations, by virtue of their official consultative status with the OECD, have the opportunity to express their constituents' viewpoints in regard to critical developments such as the OECD Convention and its implementation. Additionally, these groups partner with the OECD in various outreach activities at the grassroots level to include business leaders, academics, non-governmental activists, journalists, members of the chambers of commerce, and other professional groups in the exchange of information and experience regarding international business corruption.³⁴⁴

335. See Transparency Int'l, *supra* note 287.

336. See Transparency Int'l, *supra* note 293.

337. *Id.*

338. *See id.*

339. *See id.*

340. OECD, Anti-Corruption Unit, *supra* note 333.

341. The TUAC was originally founded in 1948 as a trade union committee and now is composed of national trade union centers located in the 29 OECD countries, with partner organizations in non-member countries with cooperation programs. TUAC has official consultative status with the OECD as the “voice of organized labor in industrialized nations.” TUAC, *About TUAC* (visited Jan. 26, 2001) <<http://www.tuac.org/about/about.htm>>.

342. The BIAC was created in 1962 as a mechanism to integrate the advice and counsel of the business communities in the 29 OECD countries with the work of the governmental representatives of the 29 member nations and the OECD staff. The relevant policy issues include topics as diverse as trade liberalization, sustainable development and e-commerce. BIAC, *About BIAC* (visited Jan. 26, 2001) <<http://www.biac.org/framebia.htm>>.

343. See International Chamber of Commerce (ICC), ICC Standing Committee on Extortion and Bribery, *Rules of Conduct to Combat Extortion and Bribery in International Business Transactions*, adopted by the Executive Board, 83rd Sess., Mar. 26, 1996 [hereinafter *Rules of Conduct*].

344. See OECD, Anti-Corruption Unit, *supra* note 333.

As noted previously, the OAS Convention focuses on the importance of civil society in efforts to prevent corruption by including a provision for participation by civil society and NGOs.³⁴⁵ Examples of such involvement by civil society could include drafting educational systems to promote ethical values, enlisting the support of attorneys, accountants and auditors, and, most importantly, incorporating the media in the fight against corruption.³⁴⁶

The International Federation of Journalists established a hotline where journalists as well as public or private officials can report international corrupt practices which are suppressed or remain unpublished.³⁴⁷ The hotline resulted from a conference held in Brussels in September 1999 on "Corruption and the Media."³⁴⁸ Thus, the media can greatly assist civil society by reporting and revealing incidents of corruption and by providing mechanisms for whistleblowers to report incidents of corruption safely and anonymously.

Conclusions

Global economic integration will only increase in the future. The world today is dramatically different than it was during the Cold War era. Now, with globalization, the geographical boundaries of the nation-states assume ever-diminishing importance in business transactions.³⁴⁹

One consequence of the international system of globalization is that multilateral organizations have begun to move more actively toward prohibitions against extraterritorial bribery to gain favorable treatment in contractual negotiations in the early 1990s. Another manifestation of the thrust toward globalization is that many former socialist economies are becoming market driven systems.³⁵⁰ In the present global environment, countries are beginning to realize that there is a direct relationship between foreign investment and prosperity.³⁵¹ The uncertainty and the instability of corruption serve as a deterrent to foreign investment. Transnational firms are most likely to invest in countries where "the rules of the game are clear."³⁵²

The authors argue that the threat of lost business opportunities in the integrated global marketplace will provide one of the most important incentives for change. It is imperative that a unified solution to corrupt

345. See OAS Convention, *supra* note 63, art. III.

346. See OAS, *Report of the Working Group on Probity and Public Ethics in Relation to the Program for Inter-American Cooperation in the Fight Against Corruption* (visited Jan. 29, 2001) <<http://www.oas.org/juridice/english/ga-re's97/Report.htm>>.

347. See Transparency Int'l, *TI Newsletter, International Organisations* (Sept. 1998) available at <<http://www.transparency.org/documents/newsletter/98.3/intorgan.html>>.

348. See *id.*

349. See FRIEDMAN, *supra* note 27, at 181-82.

350. See generally Low & Atkinson, *supra* note 143.

351. See Reginald Dale, *Transnationals' Critics Miss the Point*, INT'L HERALD TRIB., Oct. 10, 2000, at 13.

352. *Id.*

practices arises from the participation of multilateral organizations, NGOs like TI, government, the private sector, and civil society.

A critical first step in the campaign against global corruption is to change cultural norms and perceptions regarding bribery and corruption. When anti-bribery norms are not internalized, cultural environment and individual greed can overcome moral leanings.³⁵³ A global, behavioral anti-bribery norm must first be developed to provide a stable foundation for an effective international legal order.³⁵⁴ In order for it to be effectively curtailed, bribery and business corruption must eventually become viewed by the business community, the global community, and society at large as intuitively improper. Although the task of eradicating business corruption may appear daunting, history teaches us that universal norms against formerly accepted reprehensible behavior can and do develop over time.

A pertinent analogy exists in the shift in the global attitude towards slavery. Through centuries of history, civilizations such as Assyria, Babylonia, Egypt, Persia, China, India, and the Americas regarded slavery as an acceptable way of life.³⁵⁵ However, people gradually but increasingly began to view the slave trade as immoral; so too are people now beginning to change their views about corrupt business transactions. The passage of the FCPA, and the implementing legislation of the OECD and the OAS Conventions, can roughly be equated to the stage at which laws prohibiting slavery were finally adopted. However, legislative adoption of antislavery laws alone was insufficient to alter internalized norms regarding the propriety of slavery. While other countries had already made slavery illegal,³⁵⁶ grudging acceptance of antislavery norms evolved in the United States only after the Civil War and resulted in the adoption of the 13th Amendment to the U.S. Constitution.³⁵⁷ Today, the global community as a whole generally rejects the concept of slavery.

A similar cultural and institutional transformation will have to take place in the world's attitudes toward business corruption—from acceptance of bribery as a profitable and lucrative activity to its rejection as a morally reprehensible and economically unacceptable behavior.³⁵⁸ Anti-bribery laws standing alone cannot overcome the lust for greater profits by bribe-givers (usually international businesses) nor the need or greed of those that demand the bribes (usually public officials). Laws will have little effect on secret bribery negotiations until cultural, governmental, and business attitudes shift and the bribe-exchange transaction becomes an embarrassment.³⁵⁹ It is imperative that certain alliances be utilized fully in the

353. See Dickerson, *supra* note 47, at 395.

354. See generally McLachlin, *supra* note 48.

355. See JUNIUS P. RODRIGUEZ, *CHRONOLOGY OF WORLD SLAVERY IX* (1999).

356. See generally RODRIGUEZ, *supra* note 355.

357. See U.S. CONST. amend. XIII.

358. See generally NOONAN, *supra* note 18.

359. See generally Dickerson, *supra* note 47. Regardless of how prevalent bribery and other corrupt activities may be in a specific culture, it is universally considered inappropriate. As proof, bribery is always done in a furtive fashion. No one advertises that a

fight against corruption. One such critical alliance consists of civil society, business, and government.

The recent worldwide explosion in the forces of democratization and globalization brought about significant changes in the composition of civil society. There are many new and emerging democracies now opening the door to the public policy debate on issues of corruption and bribery, and several civil organizations exist that can publicize injustices and press for institutional reforms.³⁶⁰ Civil society, with the aid of NGOs such as TI, provides a much needed impetus to the global campaign against corruption by focusing attention on the injurious consequences of corruption. Civil society plays a pivotal role in forging the necessary alliance of the three pillars of social structure—government, the private sector, and civil society itself. These three sectors must unite in order to successfully address the relevant issues of corruption.

Finally, a coalition of the industrialized nations, developing and transitional nations, multilateral development banks, and NGOs representing civil society, plus other pertinent entities at the multilateral, national, and grassroots levels are pivotal complements to current anticorruption initiatives. Such a coalition would ideally utilize the following means: multilateral conventions and international treaties (with their associated harmonization of domestic legislation that carry penalties with a high level of severe enforcement); anticorruption guidelines tied to funding in the public procurement process; activities of NGOs (like TI with its Integrity Pacts in the public procurement process and Corruption/Bribery Perception Indices); and grassroots initiatives by civil society that work to alter cultural attitudes toward business corruption. The dynamic energy and focus of such coalitions, utilizing these various strategies, will contribute greatly to the fight against corrupt business activities.

bribe can be arranged or that a bribe will be accepted. No one is honored as a big briber or a big bribee. See generally NOONAN, *supra* note 18.

360. See Eigen Address, *supra* note 2.