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Controlling Corruption Through Collective Means: Advocating the Inter-American Convention Against Corruption

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Abstract

This Note argues that the Convention offers the most effective approach to combating corruption and that all states should sign and ratify it. Part I discusses corruption, explains its history and its harmful effects, and describes international organizations whose purposes and principles are directly opposed to the harm corruption is capable of perpetrating. Part II presents existing approaches to combating corruption. Part III argues that all states should adopt the OAS approach. This Note concludes that states can best combat corruption through the OAS approach because it offers the most comprehensive and, therefore, the most effective of the existing solutions.

CONTROLLING CORRUPTION THROUGH COLLECTIVE MEANS: ADVOCATING THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION

*Robert H. Sutton**

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

INTRODUCTION

Corruption² of government officials has existed in multiple forms for centuries throughout the world.³ It is only within the last thirty years, however, that the public has begun to call for a systematic plan to eradicate governmental corruption.⁴ This outcry began in earnest in the post-Watergate era of the early 1970s⁵ and led to the passage, in 1977, of the U.S. Foreign Corrupt Practices Act ("FCPA").⁶ Since the emergence of this pub-

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1. PLATO, *THE LAWS* 349 (A.E. Taylor trans., 1960) (emphasis omitted).

2. See Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 51 AM. POL. SCI. REV. 417, 419 (1967) (defining corruption as "behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence").

3. See NEIL H. JACOBY ET AL., *BRIBERY AND EXTORTION IN WORLD BUSINESS: A STUDY OF CORPORATE POLITICAL PAYMENTS ABROAD* 7-43 (1977) (describing history of corruption of government officials in Middle East, Sub-Saharan Africa, India, Southeast Asia, Latin America, Western Europe, communist countries, and United States); ROBERT KLITGAARD, *CONTROLLING CORRUPTION* 7 (1988) (stating "corruption is as old as government itself" and citing example from 2300 years ago); JOHN T. NOONAN, JR., *BRISES* xx-xxii (1984) (stating that bribery has existed worldwide in multiple forms from approximately 3000 B.C. through present day).

4. See JACOBY ET AL., *supra* note 3, at xiii-xv (discussing rise of public sentiment directed against corruption of non-U.S. government officials in 1960s, cresting in post-Watergate era of early 1970s).

5. *Id.*

6. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78m(b), 78m(d)(1), 78m(g), 78m(h), 78dd-1, 78dd-2, 78ff(a), 78ff(c) (1988)). The U.S. Congress passed the Foreign Corrupt Practices Act ("FCPA") in 1977 in response to the growing realization of the harms corruption causes. See S. REP. NO. 114, 95th Cong., 1st Sess. 4 (1977) (stating that, in free market systems, "it is basic that the sale of products should take place on the basis of

lic movement, commentators have analyzed the effects of corruption from a commercial and economic standpoint, noting that corruption poses difficulties for all actors involved.⁷ Such difficulties can range from a decrease in the efficiency of market transactions to a general political destabilization of the corrupted state.⁸ The Organization of American States ("OAS")⁹ has recently proposed a solution to these problems in the Inter-American Convention Against Corruption ("Convention"),¹⁰ adopting many themes contained in other previously-advocated approaches.¹¹

price, quality, and service" and that "[c]orporate bribery is fundamentally destructive to this basic tenet").

7. See JACOBY ET AL., *supra* note 3, at 183-85 (discussing adverse effects of governmental corruption on local economies and on corporations transacting with corrupt governments); KLITGAARD, *supra* note 3, at 36-48 (discussing harmful effects of corruption on efficiency of market transactions, distribution of resources among market actors, motivations of government actors, and political stability of host state); *Transnational Bribery*, 117 BUS. AM. 112, 112-14 (discussing corrupt environments and their effects on businesses and economies); Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399, 403-05 (1993) (discussing adverse effects of governmental corruption on local economies). Some of the problems corruption poses include distorting the natural functioning of market competition, increasing production costs for producers, posing barriers to trade, and creating an uneven distribution of wealth weighted to the upper classes. Baker, *supra*, at 403-04; JACOBY ET AL., *supra* note 3, at 183-85; *Transnational Bribery*, *supra*, at 112-13.

8. KLITGAARD, *supra* note 3, at 36-48.

9. OAS CHARTER arts. 1, 8. The Organization of American States ("OAS") is a regional agency within the United Nations and contains only Western Hemisphere independent states. *Id.* Article 52 of the U.N. Charter enables the creation of regional agencies. U.N. CHARTER art. 52, ¶¶ 1-4.

10. Inter-American Convention Against Corruption, Mar. 29, 1996, OEA/Ser.K/XXXIV.1 CICOR/doc.14/96 rev.2, 35 I.L.M. 724 (1996) [hereinafter Convention]. The Inter-American Convention Against Corruption ("Convention") is a treaty aimed at eradicating corruption among its signatories. Convention, *supra*, pmb., at 727. It attacks individual acts of corruption and the systems which permit corrupt acts to flourish. *Id.* arts. VI-IX, XI, at 729-31. It also promotes cooperation among states in a collective effort to eradicate corruption. *Id.* art. XIII-XVI, at 731-32. The Convention is open for accession by OAS member-states as well as by non member-states. *Id.* art. XXIII, at 733. Additionally, signatories may make reservations as to any specific provision, provided that such reservations are not incompatible with the Convention's object and purpose. *Id.* art. XXIV, at 733.

11. See Michael Levi, *Serious Fraud in Britain: Criminal Justice versus Regulation*, in CORPORATE CRIME: CONTEMPORARY DEBATES 181, 181-98 (Frank Pearce & Laureen Snider eds., 1995) [hereinafter CORPORATE CRIME] (discussing comparative effectiveness of criminal versus regulatory measures in combating criminal acts in business transactions); Gilbert Geis & Joseph DiMento, *Should We Prosecute Corporations and/or Individuals?*, in CORPORATE CRIME, *supra*, at 72, 72-86 (discussing comparative effectiveness of pursuing corporations versus individuals in criminal prosecutions arising from criminal acts in business transactions). The Convention adopts both criminalization

Some of these previously-advocated approaches are capable of attacking corruption on a transnational level, striving for the eradication of corruption through agreements among states¹² or through private codes of corporate conduct.¹³ Other approaches attack corruption on a purely state level, advocating the use of regulatory measures instead of criminalization¹⁴ and targeting corrupt individuals instead of the corporations for which they work.¹⁵ One state-level approach, the U.S. Foreign Corrupt Practices Act,¹⁶ adopts a combination of these other state-level measures.¹⁷

This Note argues that the Convention offers the most effective approach to combating corruption and that all states should sign and ratify it. Part I discusses corruption, explains its history and its harmful effects, and describes international organizations whose purposes and principles are directly opposed to the harm corruption is capable of perpetrating. Part II presents existing approaches to combating corruption. Part III argues that all states should adopt the OAS approach. This Note concludes that states can best combat corruption through the OAS approach because it offers the most comprehensive and, therefore, the most effective of the existing solutions.

I. THE PROBLEMS CORRUPTION PRESENTS

To those taking part in international business transactions, corruption is, and historically has been, apparent at all levels of

and regulatory approaches to fighting corruption and targets both the individuals and the corporations involved. Convention, *supra* note 10, arts. III, VI-IX, at 728-30; see *Id.* art. VI ¶ 1(e), at 729 (stating that Convention is applicable to "[p]articipation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit" any act of corruption that it lists).

12. Convention, *supra* note 10; *Council Recommendation on Bribery in International Business Transactions*, Organization for Economic Cooperation and Development, C(94)75/FINAL (May 27, 1994), 33 I.L.M. 1389, 1390-92 (1994) [hereinafter *Bribery Recommendation*]; *Recommendation of the Council on the Tax-deductibility of Bribes to Foreign Public Officials*, Organization for Economic Cooperation and Development, C(96)27/FINAL (Apr. 11, 1996), 35 I.L.M. 1311, 1311-12 (1996) [hereinafter *Tax Recommendation*].

13. Baker, *supra* note 7, at 405-33.

14. Levi, *supra* note 11, at 181-95.

15. Geis & DiMento, *supra* note 11, at 72-85.

16. 15 U.S.C. §§ 78a, 78m(b), 78m(d)(1), 78m(g), 78m(h), 78dd-1, 78dd-2, 78ff(a), 78ff(c) (1988).

17. *Id.*

government-producer relations.¹⁸ A free market economy¹⁹ requires equal access for all market actors,²⁰ yet barriers to free trade, in the form of governmental corruption,²¹ exist in profu-

18. NOONAN, *supra* note 3, at xxii. Recipients of corrupt payments: [H]ave ranged from constables and sheriffs to the Speaker of the House (U.S., nineteenth century), the Speaker of the House of Commons (U.K., seventeenth century), the president of Honduras, the president of Italy, the prime minister of Japan, the prince-consort of the Netherlands, the Lord Chancellor of England (seventeenth century).

Id. See JACOBY ET AL., *supra* note 3, at 4-7 (discussing pervasiveness of corruption in dealings with governments at all official levels); KLITGAARD, *supra* note 3, at 41, 44 (stating that "[p]ossibilities for corruption create nefarious incentives throughout the society" and that these possibilities lead officials to "spend an increasing amount of their time looking for ways to secure bribes and extort payments").

19. See Murray N. Rothbard, *Free Market*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 636, 636 (David R. Henderson ed., 1993) [hereinafter THE FORTUNE ENCYCLOPEDIA OF ECONOMICS] (describing free markets). Rothbard defines "Free Market" as:

[A] summary term for an array of exchanges that take place in society. Each exchange is undertaken as a voluntary agreement between two people or between groups of people represented by agents. These two individuals (or agents) exchange two economic goods, either tangible commodities or non-tangible services

Both parties undertake the exchange because each expects to gain from it. Also, each will repeat the exchange the next time (or refuse to) because his expectation has proved correct (or incorrect) in the recent past. Trade, or exchange, is engaged in precisely because both parties benefit; if they did not expect to gain, they would not agree to the exchange.

Id.

20. See Al Ehrbar, *Supply*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS, *supra* note 19, 86-87 (explaining how markets achieve balance between supply and demand); Rothbard, *supra* note 19, at 636-37 (explaining need for unhindered interaction in free markets). For a free market economy to function effectively, it must be free of barriers to transactions. Rothbard, *supra* note 19, at 636-37. All market actors must have equal access to each other in order to ensure that consumers and suppliers have achieved a balance in what one is willing to exchange for what the other possesses. Al Ehrbar, *supra*, at 86-87. Balance between consumers' and suppliers' willingness to exchange is analogous to intersecting supply and demand curves:

A demand curve traces the quantity of a good that consumers will buy at various prices. As the price rises, the number of units demanded declines. That is because everyone's resources are finite; as the price of one good rises, consumers buy less of that and more of other goods that now are relatively cheaper. Similarly, a supply curve traces the quantity of a good that sellers will produce at various prices. As the price falls, so does the number of units supplied. Equilibrium is the point at which the demand and supply curves intersect—the single price at which the quantity demanded and the quantity supplied are the same.

Id.

21. See Rothbard, *supra* note 19, at 637-38 (analogizing negative effects of coerced payments on individual market actors and on overall market to robbery at gunpoint). Barriers to free trade, which are financial disincentives to entry into the market, discourage market exchanges from taking place. *Id.* at 638. By protecting existing suppli-

sion in many parts of the world,²² preventing local markets from realizing their full potential.²³ This has led to an environment in which secret payments, instead of quality and price, may influence purchase decisions.²⁴ Ultimately, corruption has negative implications beyond a simple market analysis, hobbling the progress of developing nations' economies,²⁵ eroding public confidence in the host governments, and destabilizing them.²⁶ There are international organizations, however, including the OAS and the Organization for Economic Cooperation and Development ("OECD"),²⁷ whose purposes and principles are directly opposed

ers from additional competition, these barriers can lead to a decrease in incentive to innovate and to a general stagnation among existing producers. Robert Hessen, *Capitalism*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS, *supra* note 19, at 110, 113-14. Tariffs, for example, by relieving domestic producers from foreign competition, are capable of posing sizable costs to local economies. Douglas A. Irwin, *Free Trade Agreements and Customs Unions*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS, *supra* note 19, at 530. By requiring producers to pay bribes as a precondition to engaging in certain transactions, the government actors requesting such bribes are imposing these additional costs on the producers. JACOBY ET AL., *supra* note 3, at 184-85.

22. JACOBY ET AL., *supra* note 3, at 4-43. Strong local ties to family and tribe, in addition to low levels of remuneration for those in government service, has led to corruption's profusion throughout the Middle East, Sub-Saharan Africa, India, Southeast Asia, Latin America, Western Europe, and the United States. *Id.*

23. See KLITGAARD, *supra* note 3, at 39-41 (arguing that corruption of government officials promotes economic inefficiency and inequitable distribution of resources); Rothbard, *supra* note 19, at 638 (stating that coerced transactions ultimately lead to "reduced productivity and living standards for all"). As some commentators have noted, however, corruption can have beneficial results in certain limited circumstances. KLITGAARD, *supra* note 3, at 30-36; Nye, *supra* note 2, at 427. In situations where goods or services are allocated by political ties, random selection, or some other criteria not related to the supply and demand for these goods or services, "corruption may instead allocate goods according to willingness and ability to pay." KLITGAARD, *supra* note 3, at 31. Corruption may also enable the circumvention of constraining bureaucratic regulations, thereby speeding exchanges. *Id.* at 32. Despite such occasional benefits, commentators have on balance found that "the harmful effects of corruption greatly outweigh the (occasional) social benefits." *Id.* at 36; cf. Nye, *supra* note 2, at 427 (stating "it is probable that the costs of corruption in less developed countries will exceed its benefits except for top level corruption involving modern inducements and marginal deviations and except for situations where corruption provides the only solution to an important obstacle to development").

24. JACOBY ET AL., *supra* note 3, at 183-84; KLITGAARD, *supra* note 3, at 39-41.

25. JACOBY ET AL., *supra* note 3, at 183-84.

26. See *id.* at 180-81 (stating that bribery of government officials causes such officials to place their own needs above those whom they serve); KLITGAARD, *supra* note 3, at 44-46 (discussing adverse effects of corruption on public faith in and stability of political institutions).

27. OECD CHARTER arts. 1, 3. The Organization for Economic Cooperation and development ("OECD") is an international body of states whose common goal is to further worldwide economic growth and stability through collective means. *Id.*

to the kinds of harm corruption poses.²⁸

A. Corruption in a Business and Historical Context

Corruption is an unavoidable element of many international business transactions, evident at all levels of producer-government relations from dealings with lower-level bureaucrats²⁹ to upper-echelon political officials.³⁰ The prevalence of corruption in international business transactions is not a recent phenomenon.³¹ Government actors' exploitation of their positions for their own personal gain has existed for centuries in many parts of the world.³²

1. Corruption in International Business Transactions

Corrupt payments occur as a result of producers' as well as government actors' impulses, occurring as much because of producers' desire for special treatment as because of government actors' desire for personal benefit.³³ Corrupt payments also vary in their objectives.³⁴ They may facilitate otherwise normal government functions, secure special treatment, or avoid hardship.³⁵ One may define corrupt payments as transfers of objects of value, the purpose of which is to influence the behavior of public officials in their legislative, judicial, or administrative ac-

28. OAS CHARTER, arts. 2-3, *amended by* Protocol of Amendments to the Charter of the OAS, Dec. 14, 1992 [hereinafter Protocol of Washington], *reprinted in* *Organization of American States: Integrated Text of the Charter as Amended by the Protocols of Buenos Aires and Cartagena de Indias; the Protocol of Amendment of Washington; and the Protocol of Amendment of Managua*, 33 I.L.M. 981, 1010-12 (1994) [hereinafter *Integrated Text*]; OECD CHARTER, art. 1.

29. See JACOBY ET AL., *supra* note 3, at 93-94 (discussing payments to rank-and-file government employees).

30. See *id.* at 92-93 (discussing payments to major political leaders).

31. See *id.* at 4-43 (discussing history of corrupt payments worldwide); KLITGAARD, *supra* note 3, at 7 (discussing corrupt payments in ancient India, China, and Greece); NOONAN, *supra* note 3, at 3-424 (discussing instances of corruption worldwide from 3000 B.C. through 1800 A.D.).

32. JACOBY ET AL., *supra* note 3, at 4-43; KLITGAARD, *supra* note 3, at 7; NOONAN, *supra* note 3, at 3-424.

33. JACOBY ET AL., *supra* note 3, at 91; *cf.* NOONAN, *supra* note 3, at 3 (stating "[r]eciprocity is in any society a rule of life, and in some societies at least it is *the* rule of life").

34. See JACOBY ET AL., *supra* note 3, at 101-17 (discussing purposes of corrupt payments); KLITGAARD, *supra* note 3, at 19-20 (discussing various purposes of corrupt payments in Philippines' Bureau of Internal Revenue in mid 1970s).

35. JACOBY ET AL., *supra* note 3, at 101-17; KLITGAARD, *supra* note 3, at 19-20.

tions.³⁶ More specifically, the goal of corrupt payments includes influencing these government actors to fulfill their normal duties, to fulfill them at a faster-than-normal rate, to refrain from imposing hardships that the government actors have threatened the commercial actors with, or to bestow some other special treatment upon those individuals making the payments.³⁷

Commentators have typically categorized corrupt payments as bribery³⁸ or extortion,³⁹ depending on which party to the transaction is the source of the desire for payment.⁴⁰ Most corrupt payments occur because of impulses from both parties to the transaction.⁴¹ Prior experience has taught the government actor and the commercial actor that they may both gain by a

36. JACOBY ET AL., *supra* note 3, at 86. *But see* KLITGAARD, *supra* note 3, at 23 (noting that "[d]efinitions are not static" and that "[s]ocieties' understandings of what counts as 'corrupt' evolve").

37. *See* JACOBY ET AL., *supra* note 3, at 101-17 (describing purposes of foreign political in influencing conduct of government actors); KLITGAARD, *supra* note 3, at 19-20 (describing purposes of bribes given to officials in Philippine Bureau of Internal Revenue in mid 1970s). Examples of hardships with which government actors may threaten commercial actors include onerous changes in agreements with the host government, artificially inflated, or extortionate, taxes, and a refusal to grant protection from an unstable or criminally-minded civilian population. JACOBY ET AL., *supra* note 3, at 102, 110-11, 112-13; KLITGAARD, *supra* note 3, at 19. Examples of special treatment which government actors may bestow upon commercial actors includes obtaining or retaining business with the host government and approving a lower tax assessment than the commercial actor merits. JACOBY ET AL., *supra* note 3, at 114-15; KLITGAARD, *supra* note 3, at 19-20.

38. *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939); *see* JACOBY ET AL., *supra* note 3, at 90 (discussing definition of bribery as making of payments to others in hopes of influencing conduct). In 1939, the Seventh Circuit noted that the Federal Trade Commission had applied the term "commercial bribery" to sellers' practices "of secretly paying money or making gifts to employees or agents to induce them to promote purchases by their own employers from the sellers offering the secret inducements." *American Distilling Co.*, 104 F.2d at 585.

39. 18 U.S.C. § 1951(b)(2) (1994); *see* JACOBY ET AL., *supra* note 3, at 90 (discussing definition of extortion as one person's inducing another to confer benefit which other person would not otherwise confer). Title 18, Chapter 95, of the U.S. Code defines extortion, as it uses the term in Section 1951, as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (1994).

40. 18 U.S.C. § 1951(b)(2) (1994); *American Distilling Co.*, 104 F.2d at 585. The impetus for a bribe originates with the individual who confers the benefit, while the impetus for extortion originates with the individual who receives the benefit. 18 U.S.C. § 1951(b)(2) (1994); *American Distilling Co.*, 104 F.2d at 585; *see* JACOBY ET AL., *supra* note 3, at 90 (discussing differing definitions of bribe and extortion).

41. *See* JACOBY ET AL., *supra* note 3, at 90-91 (stating that most corrupt payments "are hybrids of the two types" of payments).

surreptitious conferral of personal benefit.⁴²

Corruption of government functionaries and officials is endemic to most, if not every part, of the world.⁴³ While the United States and many of the more developed nations of the world permit the majority of corporate managers to function domestically with little day-to-day interference from government officials,⁴⁴ overseas commercial transactions often require frequent contact with foreign bureaucracies.⁴⁵ The potential influence that lower-level administrators possess creates tremendous discretionary power over potential and existing investors.⁴⁶

International commercial enterprises are also concerned with other aspects of foreign business environments that can fundamentally affect the viability of the enterprises themselves.⁴⁷ These factors include political risks that the instability or potential hostility of a host government pose,⁴⁸ the local populace's threats or harassment,⁴⁹ intentionally extortionate taxes,⁵⁰ and difficulty in competing with other suppliers in obtaining or re-

42. See *id.* at 91-92 (comparing combination of impulses in such situations to that which commonly occurs during "tipping" transactions, such as between travelers and hotel bell captains); cf. NOONAN, *supra* note 3, at 3 (discussing universality among societies of reciprocity of exchanges).

43. See JACOBY ET AL., *supra* note 3, at 4-43 (describing history of corruption of government officials in Middle East, Sub-Saharan Africa, India, Southeast Asia, Latin America, Western Europe, communist countries, and United States); NOONAN, *supra* note 3, at xx (stating "[b]ribes are today universal; that is, every culture, with insignificant exceptions, treats certain reciprocities with officials as disapproved.").

44. JACOBY ET AL., *supra* note 3, at 4.

45. *Id.*

46. See *id.* at 4-5 (discussing role of lower-level functionaries in overseas transactions). In the words of one commentator, these functionaries:

[P]rocess goods, machinery, and raw materials through customs. They issue visas and work permits for company personnel. They grant permits to build plants or additions to existing facilities. . . . They clear the papers that enable an investor to acquire foreign currency in order to pay an exporter in some other country for an air or sea shipment of raw materials or manufacturing equipment. . . . They can accelerate or retard the receipt of cash needed for the training of local workers. They can interpret an ancient law in ways that will cripple the operations of the business; or, in their discretion, in ways that facilitate operations. They can supply or withhold police or military units for plant protection in remote parts of a country. They can help clarify misunderstandings in the application of local labor, health, or sanitation codes.

Id.

47. *Id.* at 101-02; KLITGAARD, *supra* note 3, at 19-20.

48. JACOBY ET AL., *supra* note 3, at 102.

49. *Id.* at 110-11.

50. *Id.* at 112-13; KLITGAARD, *supra* note 3, at 20.

taining business with the government in question.⁵¹ Upper-level government actors exercise substantial control over these areas of concern, giving these government actors a correspondingly substantial influence over commercial actors.⁵²

2. History of Governmental Corruption

Corrupt payments have occurred for centuries in some regions.⁵³ The specific causes vary from case to case.⁵⁴ But where they occur, the participating government actors view their positions as resources for personal, familial, or tribal gain.⁵⁵ Traditions of strong governmental control⁵⁶ or histories of weak central control,⁵⁷ the latter often coupled with a tradition of strong loyalties to family or tribe, can often produce corruption of government actors.⁵⁸ Many corruption-ridden nations also suffer from a combination of a high degree of public officials' discretionary power over private commercial activities and a low level of compensation paid to those officials, making them particularly susceptible to the temptations of corruption.⁵⁹ Finally,

51. JACOBY ET AL., *supra* note 3, at 114-15.

52. *Id.*

53. See 2 FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* 693 (1973) (describing prevalence of corruption in Ottoman Empire in sixteenth century); JACOBY ET AL., *supra* note 3, at 7, 254 n.5 (describing history of corruption in Middle East); NOONAN, *supra* note 3, at 3-135 (discussing occurrence of bribery in European and Mediterranean societies from 3000 B.C. to 1000 A.D.). The Middle East has seen corrupt conduct by state officials since the sixteenth century and the days of the Ottoman Empire. BRAUDEL, *supra*, at 693; JACOBY ET AL., *supra* note 3, at 7, 254 n.5. Southeast Asia likewise has a long history of corruption, stemming from its equally well-established smuggling trade. JACOBY ET AL., *supra* note 3, at 15-16.

54. JACOBY ET AL., *supra* note 3, at 7-11, 24-25.

55. *Id.*; NOONAN, *supra* note 3, at 704.

56. JACOBY ET AL., *supra* note 3, at 7. In the Middle East, for example, states were traditionally "the major source[s] and owner[s] of capital . . . the primary dispenser[s] of contracts, and the arbiter[s] of the rules of trade and investment." *Id.*

57. JACOBY ET AL., *supra* note 3, at 10, 24.

58. *Id.* Sub-Saharan societies, for example, suffer from internal divisions of loyalty along tribal lines. *Id.* at 10. Similarly, strong ties to family are characteristic of Latin American and Southeast Asian societies. *Id.* at 24. In such internally divided environments, the local government, and the positions of influence it offers, is a resource one may exploit for one's personal, tribal, and familial benefit. *Id.* at 10, 24.

59. *Id.* at 14; KLITGAARD, *supra* note 3, at 74; 3 GUNNAR MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS* 950-51 (1968). As Robert Klitgaard has noted, "[i]llicit activities will be greater when agents have monopoly power over clients, agents enjoy discretion, and accountability is poor." KLITGAARD, *supra* note 3, at 74. India in the late 1970s saw a high prevalence of corruption among its public officials, resulting

while the prevalence of corruption within a government tends to decline as the nation in question develops socioeconomically,⁶⁰ corruption does not necessarily cease to exist at any given level of development.⁶¹ One may even find not-too-distant examples of corruption in 1970s Western Europe⁶² and the United

from a high degree of discretionary power among its public officials coupled with a low level of compensation paid to those officials. See JACOBY ET AL., *supra* note 3, at 14 (citing HINDUSTAN TIMES correspondent who stated, "[n]ot a single file can move if the clerk's palm is not greased.").

60. JACOBY ET AL., *supra* note 3, at 43. Corrupt payments by business organizations to government actors are likely to decrease in frequency as the following socioeconomic developments occur:

The shifting of loyalties from family, clan, and tribe to nation-states.

The opening of institutionalized channels to enable business enterprise to influence political decision making.

The diffusion of education.

The emergence of an economically strong and politically articulate middle class, which historically found corruption inefficient and morally repugnant.

The transfer of wealth and power from a small circle of politicians or dictators to other social groups.

Rising living standards.

The growth of local industry, which will reduce the importance of contraband markets.

The paying of adequate salaries to civil servants, thereby reducing their dependance on a private system of [corrupt] political payments.

The development of strong, independent legal traditions in which uniform, impersonal rules and standards prevail instead of the arbitrary discretion of the civil servants.

The growth of the professions—accounting, law, engineering, teaching, civil service—which infuse their members and eventually, widening circles of society, with strict canons of personal behavior.

Id. at 43-44; cf. KLITGAARD, *supra* note 3, at 207 (stating that "the countries worst off on indices of 'quality of life' are . . . also the worst off in terms of the quantity and quality of data, information-processing skills, 'intelligence' in the psychologist's sense, and, consequently, ignorance and uncertainty" and that "[p]oor information leads . . . to greater corruption").

61. JACOBY ET AL., *supra* note 3, at 43.

62. *Id.* at 32-38. In two separate cases in 1976, Belgian authorities convicted the managing director of Belgium's state telephone system for corruption and receiving bribes, his sentences amounting to over four and a half years in prison. *Id.* at 32-33; *Belgium Ex-Aid Sentenced to Jail in Bribery Case: Telephone System's Former Director Took Presents from ITT Belgian Unit*, WALL ST. J., Feb. 24, 1976, at 4. A British Government investigation in 1976 into the actions of the British Lonrho company revealed that it had made over \$1.6 million in illicit payments to politicians in several undisclosed African states. JACOBY ET AL., *supra* note 3, at 33-34; Bernard. D. Nossiter, *British Glimpse Goings-On at the Top in Juicy Government Report on Lonrho*, L.A. TIMES, July 25, 1976, pt. VII, at 9. In Italy in the mid 1970s, the tradition of facilitating payments as a method of navigating the massive Italian bureaucracy combined with the discretion which Italian tax collectors possessed in the application of tax laws and regulations to create an arena

States.⁶³

B. Harmful Effects of Corruption

While individual actors may benefit from the transfer of corrupt payments,⁶⁴ the ultimate victims are numerous.⁶⁵ The victims of corruption include the market actors of the nations involved, both consumers and producers.⁶⁶ The development of the economy in question also suffers, with investments from outside sources decreasing in frequency and amount as corruption increases in prevalence.⁶⁷ Corruption can also lead to political instability.⁶⁸

which forced corporations to pay bribes in order to avoid unjustified high taxes. JACOBY ET AL., *supra* note 3, at 35-38; see *Italy Renews Its War on Tax Evaders: Country's Economic Health Riding on Success of Campaign*, L.A. TIMES, Dec. 16, 1976, pt. VIII, at 4 (stating that "[s]ome Milan businessmen have said that they pay so much in bribes that there seems little reason to pay the right amount of taxes"). Italian corruption still manifests itself, as the *mani pulite*, or clean hands, campaign to root out corruption continues to demonstrate. George J. Church, *War Against Sleaze*, TIME INT'L, May 6, 1996, at 34, 37. The individuals exposed through this campaign number over 1000 and include the former Prime Minister Bettino Craxi, who received an eight-year prison sentence in April of 1996 for corruption in connection with the construction of the Milan subway system. *Id.* at 39.

63. See JACOBY ET AL., *supra* note 3, at 41-43 (citing examples of corruption in inter-business transactions and suggesting investigation into whether corrupt payments occur between U.S. Government functionaries and foreign business entities domiciled in United States); NOONAN, *supra* note 3, at 604-611 (discussing Abscam, one U.S. government sting operation that revealed that federal, state, and local government officials had taken bribes, some as high as US\$50,000). During the 1970s, U.S. corporations were also the source of a great number of corrupt payments to government actors in other countries. MARSHALL B. CLINARD ET AL., *ILLEGAL CORPORATE BEHAVIOR* 198 (1979). By August of 1976, in response to regulations then in force, 32 of Fortune Magazine's 500 largest corporations had made disclosures to the Securities and Exchange Commission of such payments of over US\$1 million each. *Id.* Four reported payments of US\$20 million or more. *Id.*

64. See KLITGAARD, *supra* note 3, at 191 (stating that "[o]ften corruption helps one party at the expense of another"); see also *supra* notes 38-42 and accompanying text (discussing why corrupt payments occur).

65. See JACOBY ET AL., *supra* note 3, at 142, 183-84 (discussing corruption's harm to producers and consumers); KLITGAARD, *supra* note 3, at 39-44 (discussing harmful effects of corruption on market participants).

66. JACOBY ET AL., *supra* note 3, at 142, 183-84; KLITGAARD, *supra* note 3, at 39-44.

67. See Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 681-712 (1995) (discussing statistical correlations between corruption, investment, and economic growth); see also KLITGAARD, *supra* note 3, at 43-44 (discussing how corruption induces producers to cease production in corrupt market).

68. KLITGAARD, *supra* note 3, at 44-46.

1. Harmful Economic Effects of Corruption

Transactional barriers play a harmful role in the international market, imposing additional costs on market actors and discouraging transactions from occurring.⁶⁹ By forcing producers and consumers to pay higher costs in order to engage in the transaction, corruption functions as a transactional barrier.⁷⁰ As such, corruption imposes additional costs on market actors with the effect of deterring market exchanges from ever taking place.⁷¹

a. Transactional Barriers in the Marketplace

Market actors do not always have the liberty of freely participating in market exchanges.⁷² At times, they must make involuntary payments prior to entering into a given transaction.⁷³ These additional costs have the effect of discouraging the transactions to which the costs are associated, preventing their occurrence.⁷⁴ Any involuntary payment that a producer must make prior to participating in a market is a payment that acts as a barrier to market exchanges, discouraging them from taking place.⁷⁵ Barriers to exchange can also discourage potential participants from entering the market in question, thereby protecting existing suppliers from additional competition.⁷⁶ These barriers can cause substantial harm⁷⁷ by leading to a decrease in the incentive to innovate and to a general stagnation among existing producers.⁷⁸

69. Rothbard, *supra* note 19, at 637-38.

70. See JACOBY ET AL., *supra* note 3, at 142, 183-84 (discussing harm corruption inflicts on producers and consumers).

71. *Id.*

72. Rothbard, *supra* note 19, at 637-38.

73. *Id.*

74. *Id.* at 638.

75. *Id.*

76. Robert Hessen, *Capitalism*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS, *supra* note 19, at 110, 113-14.

77. Douglas A. Irwin, *Free Trade Agreements and Customs Unions*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS, *supra* note 19, at 530. Tariffs, for example, by relieving domestic producers from foreign competition, are capable of posing sizable costs to local economies. *Id.*

78. *Id.*

b. Corruption as a Source of Transactional Barriers

Corruption imposes additional costs on consumers and producers alike.⁷⁹ Consumers, the citizens of the purchasing government, pay these costs through the use of public resources beyond that which is necessary for the purchase of the good.⁸⁰ Producers measure the cost to themselves in the amount of the payment itself as well as in the time necessary for negotiating the amount of the payment.⁸¹ The consumers of a corruptly-acquired good or service pay a higher cost than they would have paid in a market without these unsanctioned barriers to trade.⁸² This cost may take the form of resources wasted on goods or services purchased not because of a rational cost-benefit analysis⁸³ on the citizens' part or on their behalf, but rather because of personal inducements given to their agent, the government actor.⁸⁴ The citizens may also suffer as a result of subsequent damage inflicted on life, limb, or property by the inferior products.⁸⁵ Harm flows to producers as well through the persistence of corrupt transactions.⁸⁶ The uncertainty that producers face regarding the amount they must pay and the payment's potential effect on a given transaction, the added time and expense producers face in negotiating with the recipients of the payment, and the expenditure of an otherwise-unnecessary payment are all additional transaction costs which act as barriers to any invest-

79. JACOBY ET AL., *supra* note 3, at 142, 183-84.

80. *Id.* at 184-85.

81. *Id.* at 142.

82. See JACOBY ET AL., *supra* note 3, at 183 (stating that "the price of the [corruptly acquired] equipment is raised [by the producer] to cover the cost of the bribe").

83. See Paul R. Portney, *Benefit-Cost Analysis*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS, *supra* note 19, 3-6 (explaining cost-benefit analyses). A cost-benefit analysis occurs "[w]henver people decide whether the advantages of a particular action are likely to outweigh its drawbacks." *Id.* at 3.

84. JACOBY ET AL., *supra* note 3, at 183-84; see KLITGAARD, *supra* note 3, at 39-40 (stating that corruption imposes costs "in terms of the waste and misallocation that often accompany it", citing "a typical finding . . . that because of corrupt procurement policies, governments in developing countries pay from 20 to 100 percent more than the price they would pay under noncorrupt conditions").

85. See JACOBY ET AL., *supra* note 3, at 183 (noting "extra costs" associated with corruptly acquired goods stemming from "lesser efficiency"); KLITGAARD, *supra* note 3, at 40 (noting harm to public that can result from corruption).

86. JACOBY ET AL., *supra* note 3, at 142; see KLITGAARD, *supra* note 3, at 42-43 (stating that existence of corruption "may enhance people's uncertainties about the likely benefits of their productive activities" which, in turn, "may create incentives for inefficient risk-avoiding behavior").

ment.⁸⁷

2. Harmful Political Effects of Corruption

Corrupt transactions may also result in the political instability of the host state.⁸⁸ The mere existence of corruption among government actors engenders mistrust of public institutions, destabilizing the political regime.⁸⁹ Corruption's harmful economic effects may further upset a state's political stability by hindering local infrastructure development and, therefore, the functioning of the state itself.⁹⁰ Corruption hinders local infrastructure development by discouraging producers from investing in those markets.⁹¹ This initial lack of investment further discourages producers from investing locally.⁹² As producers move their resources from these local markets to areas in which they may produce more efficiently,⁹³ they also move further away

87. JACOBY ET AL., *supra* note 3, at 142; KLITGAARD, *supra* note 3, at 42-43.

88. Wolfgang Kasper, *Spatial Economics*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS, *supra* note 19, at 82-86; KLITGAARD, *supra* note 3, at 43-46; Nancy Z. Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J.L. & TRADE AM. 179, 184-85 (1996).

89. KLITGAARD, *supra* note 3, at 44-46; Boswell, *supra* note 88, at 184-85. Corruption erodes "public trust in public institutions and leaders, the foundation of democracy." *Id.* at 184.

90. Kasper, *supra* note 88, at 82-86; KLITGAARD, *supra* note 3, at 43-44.

91. See Kasper, *supra* note 88, at 82-86 (describing movement of mobile resources to areas in which market actors may use them more efficiently); KLITGAARD, *supra* note 3, at 43-44. The theory of spatial economics divides production input factors into mobile and immobile elements. Kasper, *supra* note 88, at 83. The theory holds that mobile factors of production, such as capital and expertise, will locate themselves close to the world's economic centers, areas in which it is possible to achieve higher returns per unit of input than elsewhere. *Id.* at 83-84. As corruption's barriers to trade increase the cost of transacting between the corrupt nation in question and an economic center, this increases the economic distance of the corrupt nation from the economic center, leading to an exodus of private-sector resources from the corrupt nation, which in turn leads to a necessarily adverse effect on infrastructure. See *id.* (discussing gravitation of resources to economic centers); Clive Crook, *Third World Economic Development*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS, *supra* note 19, 755, 763 (stating that private businesses are most effective entities for developing infrastructure, such as transportation networks and educational institutions). Empirical analyses also indicate that there is an inverse correlation between the prevalence of corruption and the frequency and amount of investment. See Mauro, *supra* note 67, at 695-700 (discussing how investments from outside sources decrease in frequency and amount as corruption increases in prevalence).

92. Kasper, *supra* note 88, at 84. Without a well-developed infrastructure, producers will bear high costs in producing their products and getting them to a market which will give them the highest return on their investment. *Id.* These increased production and distribution costs lead producers and mobile factors of production to locate in areas where the cost of reaching the economic center is minimized. *Id.*

93. *Id.* at 82. "Businesses locate their plants so as to economize on transport and

from markets neighboring the abandoned market.⁹⁴ This is more likely to occur if neighboring markets are also corrupt.⁹⁵

C. *International Organizations with Recent Proposals for Combating Corruption*

In the past three years, two prominent international organizations, the OAS and the OECD, have offered solutions to the problems corruption poses.⁹⁶ Each organization holds the promotion of economic development as a primary objective.⁹⁷ Each is also committed to collective action to achieve this end.⁹⁸

1. The Organization of American States

The OAS has organized itself with a view to promoting co-

communication costs . . . between the locations of their inputs and the locations of their market demand." *Id.*

94. *See id.* at 84 (discussing how mobile factors of production locate in certain areas so as to minimize cost of reaching economic center).

95. *Id.* at 84.

96. Convention, *supra* note 10; *Bribery Recommendation*, *supra* note 12; *Tax Recommendation*, *supra* note 12.

97. OAS CHARTER art. 2 ¶ f; OECD CHARTER art. 1. Article two, paragraph f, of the OAS Charter lists "[t]o promote, by cooperative action, . . . [members'] economic, social, and cultural development" as an essential purpose of the OAS. OAS CHARTER art. 2 ¶ f. Article 1 of the OECD Charter states that

The aims of the Organisation for Economic Co-operation and Development . . . shall be to promote policies designed:

(a) 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;

(b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

(c) to contribute to the expansion of world trade on a multi-lateral, non-discriminatory basis in accordance with international obligations.

OECD CHARTER art. 1.

98. OAS CHARTER art. 2 ¶ f; OECD CHARTER art. 3. Article 2, paragraph f, of the OAS Charter advocates the promotion of economic development "by cooperative action". OAS CHARTER art. 2 ¶ f. Article 3 of the OECD Charter states that OECD members agree to:

(a) [K]eep each other informed and furnish the Organisation with the information necessary for the accomplishment of its tasks;

(b) consult together on a continuing basis, carry out studies and participate in agreed projects; and

(c) co-operate closely and where appropriate take co-ordinated action.

OECD CHARTER art. 3.

operation among its members.⁹⁹ It has also dedicated itself to the furtherance of specific principles.¹⁰⁰ Among the most prominent of these principles are those of non-intervention¹⁰¹ and collective economic development.¹⁰²

a. Organization

The OAS is a regional organization serving Western Hemisphere states.¹⁰³ The nations of North and South America formed the OAS in 1951 as a regional agency within the United Nations¹⁰⁴ under Article 52 of the U.N. Charter.¹⁰⁵ The OAS is comprised exclusively of Western Hemisphere independent states¹⁰⁶ and currently has thirty-four participating members.¹⁰⁷ The OAS accomplishes its purposes through the General Assem-

99. OAS CHARTER art. 2 ¶ f.

100. *Id.* art. 2.

101. *Id.* art. 2 ¶ b. Article 2, paragraph b, lists as an essential purpose the promotion and consolidation of representative democracy "with due respect for the principle of nonintervention". *Id.*

102. *Id.* art. 2 ¶ f.

103. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 583 (2d ed. 1995).

104. OAS CHARTER art. 1. The Charter was opened for signature in 1948 and entered into force in 1951 pursuant to its provisions on ratification and entry into force. *Id.* arts. 144-45; CARTER & TRIMBLE, *supra* note 103, at 583. The OAS formed in order to allow Western Hemisphere nations collectively to pursue socioeconomic development and regional security. OAS CHARTER art. 2; CARTER & TRIMBLE, *supra*, at 583.

105. U.N. CHARTER art. 52, ¶¶ 1-4. Article 52 states:

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

Id. Articles 34 and 35 govern the general pacific settlement of disputes among U.N. members. *Id.* arts. 34-35.

106. OAS CHARTER art. 8.

107. CARTER & TRIMBLE, *supra* note 103, at 583; Organization of American States, *Member States*, (visited on 2/19/97) <<http://www.oas.org/EN/MSTATES/bckgrdme.htm>> (also on file with the *Fordham International Law Journal*).

bly,¹⁰⁸ the Meeting of Consultation of Ministers of Foreign Affairs,¹⁰⁹ the Permanent Council,¹¹⁰ the Inter-American Council for Integral Development,¹¹¹ the Inter-American Council for Ed-

108. OAS CHARTER arts. 53-59. The General Assembly is the supreme organ of the OAS. *Id.* art. 53. Article 53 provides that the General Assembly possesses the power:

- a) To decide the general action and policy of the Organization, determine the structure and functions of its organs, and consider any matter relating to friendly relations among the American States;
- b) To establish measures for coordinating the activities of the organs, agencies, and entities of the Organization among themselves, and such activities with those of the other institutions of the inter-American system;
- c) To strengthen and coordinate cooperation with the United Nations and its specialized agencies;
- d) To promote collaboration, especially in the economic, social, and cultural fields, with other international organizations whose purposes are similar to those of the Organization of American States.

Id. art. 53 ¶¶ a-d.

109. *Id.* arts. 60-68. Article 60 states that the Meeting of Consultation of Ministers of Foreign Affairs "shall be held in order to consider problems of an urgent nature and of common interest to the American States, and to serve as the Organ of Consultation." *Id.* art. 60.

110. *Id.* arts. 79-91. The OAS Charter provides that the Permanent Council "shall keep vigilance over the maintenance of friendly relations among the Member States, and for that purpose shall effectively assist them in the peaceful settlement of their disputes". *Id.* art. 83. The Permanent Council is "directly responsible to the General Assembly" and derives its authority from "the [OAS] Charter and other inter-American instruments". *Id.* art. 69, amended by Protocol of Amendments to the Charter of the OAS, June 10, 1993 [hereinafter Protocol of Managua], reprinted in *Integrated Text*, *supra* note 28, at 1011. The Permanent Council is also responsible for performing functions "assigned to it by the General Assembly and the Meeting of Consultation of Ministers of Foreign Affairs." *Id.* As the OAS Charter states:

The Permanent Council of the Organization and the Inter-American Council for Integral Development are directly responsible to the General Assembly, and each has the authority granted to it in the Charter and other inter-American instruments, as well as the functions assigned to it by the General Assembly and the Meeting of Consultation of Ministers of Foreign Affairs.

Id.

111. *Id.* arts. 92-97, amended by Protocol of Managua, *supra* note 110, at 1010-12. The OAS Charter states that the purpose of the Inter-American Council for Integral Development is "to promote cooperation among the American States for the purpose of achieving integral development and, in particular, helping to eliminate extreme poverty, in accordance with the standards of the Charter, especially those set forth in Chapter VII with respect to the economic, social, educational, cultural, scientific, and technological fields." *Id.* art. 93, amended by Protocol of Managua, *supra* note 110, at 1011. The Inter-American Council for Integral Development is responsible for performing functions that the General Assembly and the Meeting of Consultation of Ministers of Foreign Affairs have assigned to it. *Id.* art. 69, amended by Protocol of Managua, *supra* note 110, at 1011. The Inter-American Council for Integral Development derives its authority from "the [OAS] Charter and other inter-American instruments" and is "directly responsible to the General Assembly." *Id.*

education, Science, and Culture,¹¹² the Inter-American Juridical Committee,¹¹³ the Inter-American Commission on Human Rights,¹¹⁴ the General Secretariat,¹¹⁵ various Specialized Conferences,¹¹⁶ and various Specialized Organizations.¹¹⁷

b. Goals

The OAS' goals, as manifested through the OAS Charter, are primarily maintaining the territorial and political integrity of its member-states¹¹⁸ and collectively fostering regional socioeco-

112. *Id.* arts. 98-103. The OAS Charter provides that the purpose of the Inter-American Council for Education, Science, and Culture is:

[T]o promote friendly relations and mutual understanding between the peoples of the Americas through educational, scientific, and cultural cooperation and exchange between Member States, in order to raise the cultural level of the peoples, reaffirm their dignity as individuals, prepare them fully for the tasks of progress, and strengthen the devotion to peace, democracy, and social justice that has characterized their evolution.

Id. art. 99.

113. *Id.* arts. 104-110. The purpose of the Inter-American Juridical Committee is:

[T]o serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation.

Id. art. 104.

114. *Id.* art. 111. The principal function of the Inter-American Commission on Human Rights is "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." *Id.*

115. *Id.* arts. 112-15, 117-21, 123-26; *id.* art. 116, *amended by* Protocol of Washington, *supra* note 28, at 1008; *id.*, art. 122, *amended by* Protocol of Managua, *supra* note 110, at 1011. The OAS Charter provides that the General Secretariat:

[S]hall promote economic, social, juridical, educational, scientific, and cultural relations among all the Member States of the Organization, with special emphasis on cooperation for the elimination of extreme poverty, in keeping with the actions and policies decided upon by the General Assembly and with the pertinent decisions of the Councils.

OAS CHARTER art. 116, *amended by* Protocol of Washington, *supra* note 28, at 1008.

116. *Id.* art. 127-28. The OAS Charter states that the Specialized Conferences are: intergovernmental meetings to deal with special technical matters or to develop specific aspects of inter-American cooperation. They shall be held when either the General Assembly or the Meeting of Consultation of Ministers of Foreign Affairs so decides, on its own initiative or at the request of one of the Councils or Specialized Organizations. *Id.* art. 127.

117. *Id.* arts. 112-29. The OAS charter provides that the Inter-American Specialized Organizations "are the intergovernmental organizations established by multilateral agreements and having specific functions with respect to technical matters of common interest to the American States." *Id.* art. 129.

118. *Id.* arts. 2, 3, 27-28. Articles 2, 3, 27, and 28 list the strengthening of peace and security and respecting the principle of non-intervention as among the OAS's es-

conomic development.¹¹⁹ Maintaining and respecting the independence of OAS members is a recurring tenet of the OAS Charter.¹²⁰ The OAS Charter, however, repeatedly requires extensive collective action in the area of economic development.¹²¹ As a regional agent of the United Nations, the OAS must ensure

sential purposes, proclaiming non-intervention as a principle to which its members adhere, prohibiting acts of aggression by members against other members, and pledging collective opposition to such acts. *Id.* The OAS's actions following the September 1991 coup in Haiti are a recent example of the OAS's commitment to maintaining the political integrity of its members. CARTER & TRIMBLE, *supra* note 103, at 584. In the month following the coup, the OAS denounced the overthrow of Jean-Bertrand Aristide, the democratically elected president, and imposed a trade embargo. *Ad Hoc Meeting of Ministers of Foreign Affairs: Support to the Democratic Movement of Haiti*, M.R.E. Res. 1/91, O.A.S. M.R.E., O.E.A./Ser.F/V.1 (1991); CARTER & TRIMBLE, *supra* note 103, at 584. When the OAS perceived that the Haitian military leader was not complying with the July 1993 Governor's Island Agreement between himself and Aristide, the OAS responded in June of 1994 by banning all commercial flights and financial transactions to and from Haiti. *Ad Hoc Meeting of Ministers of Foreign Affairs: Call for the Return to Democracy in Haiti*, M.R.E. Res. 6/94, O.A.S. M.R.E., O.E.A./Ser.F/V.1 (1994); CARTER & TRIMBLE, *supra* note 103, at 584. Some critics note that the OAS had difficulty in ensuring compliance with these resolutions and had attempted unsuccessfully to enforce similar sanctions on four previous occasions. *Ad Hoc Meeting of Ministers of Foreign Affairs: Support for Democracy in Haiti*, M.R.E. Res. 2/91, O.A.S. M.R.E., O.E.A./Ser.F/V.1 (1991); *Ad Hoc Meeting of Ministers of Foreign Affairs: Restoration of Democracy in Haiti*, M.R.E. Res. 3/92, O.A.S. M.R.E., O.E.A./Ser.F/V.1 (1992); *Ad Hoc Meeting of Ministers of Foreign Affairs: Reinstatement of Democracy in Haiti*, M.R.E. Res. 4/92, O.A.S. M.R.E., O.E.A./Ser.F/V.1 (1992); *Ad Hoc Meeting of Ministers of Foreign Affairs: Support for the Haitian People*, M.R.E. Res. 5/93, O.A.S. M.R.E., O.E.A./Ser.F/V.1 (1993); CARTER & TRIMBLE, *supra* note 103, at 584.

119. See OAS CHARTER arts. 29-32, 34-51 (detailing collective measures member-states pledge to take toward integral development); *id.* arts. 2, 3, 33, *amended by* Protocol of Washington, *supra* note 28, at 1006-08 (listing cooperative promotion of member-states' economic, cultural, and social development as among OAS's essential purposes, proclaiming economic cooperation as a principle to which its member states adhere, and listing measures to take toward integral development); *id.* arts. 92-97 *amended by* Protocol of Managua, *supra* note 110, at 1009-12 (establishing an Inter-American Council for Integral Development). The OAS General Assembly reaffirmed its commitments to integrated development in June of 1995, calling for programs assisting members in identifying potential areas of cooperation and in implementing cooperative projects, for the encouragement of participation by educational and research institutions in human resource training and development, and for the development of a strategy for mobilizing additional developmental financial resources which provides for the participation of members as well as developmental agencies and financial institutions. *Partnership for Development and Struggle to Overcome Extreme Poverty*, A.G. Res. 1354, O.A.S. A.G., XXV-O/95 (1995).

120. OAS CHARTER arts. 16, 18, 27-28; *id.* arts. 2, 3, *amended by* Protocol of Washington, *supra* note 28, at 1006-07.

121. *Id.* arts. 29-32, 34-51; *id.* arts. 2, 3, 33, *amended by* Protocol of Washington, *supra* note 28, at 1006-08; *id.* arts. 92-97, *amended by* Protocol of Managua, *supra* note 110, at 1009-12.

that its actions are consistent with the United Nations' purposes and principles.¹²² One of the United Nations' principles is that of non-intervention in the domestic affairs of other states.¹²³ Although this provision is already binding on the OAS members, given their independent status as U.N. members, the provision also appears throughout the OAS Charter,¹²⁴ including in its preamble.¹²⁵ In listing the promotion and consolidation of representative democracy as an essential purpose of the OAS, the OAS Charter states that its members should accomplish this purpose with respect for the principle of non-intervention.¹²⁶

The OAS Charter also enumerates several principles related to non-intervention that it seeks to affirm.¹²⁷ It establishes that respect for the personality, sovereignty, and independence of states is central to international order.¹²⁸ It also declares that each state possesses the right to organize its own social, political,

122. U.N. CHARTER art. 52 ¶ 1. Article 52 allows for the formation of regional agencies, "provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." *Id.* This caveat does not prevent a regional agency from providing more stringent restrictions on members' actions than those contained in the U.N. Charter. *Id.* See Hugo Caminos et al., *The OAS Charter After Forty Years*, 82 AM. SOC'Y INT'L L. PROC. 101, 102-03 (1988) (discussing how OAS Charter's non-intervention provisions are more restrictive than U.N. Charter's). As one commentator notes, the OAS Charter's provisions regarding non-intervention make the U.N. Charter's corresponding provisions "seem modest and restrained in contrast." Caminos et al., *supra*, at 102.

123. See U.N. CHARTER art. 2 ¶ 7 (stating that no member state may "intervene in matters which are essentially within the domestic jurisdiction of any state"). The International Court of Justice discussed the extent of states' individual jurisdictions and how the principle of non-intervention affects these jurisdictions in *Case Concerning Military & Paramilitary Activities In & Against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14 (June 27, 1986). The Court stated that, although the U.N. Charter does not define the principle of non-intervention, this principle is "part and parcel of customary international law." *Id.* at 106. As to states' individual jurisdictions, the Court held that the principle of non-intervention prevents states from intervening in "matters in which [other] State[s] [are] permitted, by the principle of State sovereignty, to decide freely." *Id.* at 108. Although the Court did not enumerate all matters on which states may decide freely, it did state that one such matter is "the choice of a political, economic, social and cultural system, and the formulation of foreign policy." *Id.*

124. OAS CHARTER arts. 16, 18, 27-28; OAS CHARTER arts. 2, 3, *amended by* Protocol of Washington, *supra* note 28, at 1006-07.

125. See OAS CHARTER pmbl. ("Resolved to persevere in the noble undertaking that humanity has conferred upon the United Nations, whose principles and purposes they solemnly reaffirm").

126. *Id.* art. 2 ¶ b.

127. *Id.* art. 3 ¶¶ b, c, arts. 16, 18-21.

128. *Id.* art. 3 ¶ b. In article 3, paragraph b, the OAS reaffirms the principle that "[i]nternational order consists essentially of respect for the personality, sovereignty,

and economic affairs and that each state must also refrain from interfering in the affairs of other states.¹²⁹ It treats non-intervention as bound to other fundamental rights and duties as well, such as the right of a state to develop its cultural, political, and economic life.¹³⁰

The OAS Charter also contains several explicit prohibitions on intervention and the use of force.¹³¹ It explicitly denies any member the right to intervene in any way, for any reason, in any other state's internal or external affairs.¹³² By its terms, this prohibition applies to any interference or attempted interference against a state's political, economic, or cultural elements.¹³³ The

and independence of States, and the faithful fulfilment of obligations derived from treaties and other sources of international law." *Id.*

129. *Id.* art. 3 ¶ e. In article 3, paragraph e, the OAS reaffirms the principle that "[e]very state has the right to chose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State." *Id.* Paragraph e further holds that, subject to that principle, "the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems." *Id.* The International Court of Justice has held that this principle is also a fundamental principle of customary international law and, thus, applies to all states, even if it did not appear in any separate international agreement. *Nicaragua v. United States of America*, 1986 I.C.J. at 106. The Court also noted, however, that "examples of trespass against this principle are not infrequent". *Id.*

130. OAS CHARTER art. 16. Article 16 lists as a fundamental right of each member the right "to develop its cultural, political, and economic life freely and naturally." *Id.* Article 16 further states that, "[i]n this free development, the State shall respect the rights of the individual and the principles of universal morality." *Id.*

131. *Id.* arts. 18-21. On the other hand, at least one critic has noted that the sentiments of these prohibitions "have far out run the capacities of the OAS to manage the real world conflicts among states within the hemisphere." Caminos et al., *supra* note 122, at 103. As one scholar commented:

Witness the U.S. effort in Guatemala in 1954; Venezuelan and Panamanian material aid to the anti-Somoza forces in Nicaragua in the 1970s; the American invasion of Grenada; and the admitted Sandinista support for the anti-government guerrillas in El Salvador in the 1980s. The intractable conflict of our age is Central America. Yet, in spite of articles 18 through 21 of the 1948 Charter, the OAS has been essentially irrelevant to the Central American conflicts. It has not become, in the 40 years of its history under the Charter, a viable means of resolving conflicts involving the use of force in the Americas.

Id.

132. OAS CHARTER art. 18. Article 18 states that "[n]o State or any group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." *Id.*

133. *Id.* Article 18 declares that the prohibition on interference in a state's internal or external affairs applies "not only [to] armed force but also [to] any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements." *Id.*

OAS Charter further prohibits the use of economically or politically coercive measures as a means to force a state's will in obtaining an advantage for that state.¹³⁴ It also forbids the military occupation of any state by another¹³⁵ and declares that the members of the OAS will use force only in self-defense and in accordance with existing treaties.¹³⁶

Despite a strict policy of non-intervention, the U.N. Charter permits and encourages international regional cooperation in economic, social, cultural, and humanitarian matters.¹³⁷ International regional cooperation is one of the overriding aims of the OAS Charter.¹³⁸ International cooperation features in the OAS Charter's preamble.¹³⁹ The OAS Charter lists the promotion of cooperation among its members, specifically cooperation relating to socioeconomic development, as one of its essential

134. *Id.* art. 19. Article 19 forbids any member to "use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." *Id.*

135. *Id.* art. 20. Article 20 establishes that:

The territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

Id.

136. *Id.* art. 21. Article 21 states that the members of the OAS "bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof." *Id.* At least one invocation of this exception has proved controversial. CARTER & TRIMBLE, *supra* note 103, at 1420. Some question whether the OAS recommendation of action against Cuba during the 1962 missile crisis complied with U.N. Charter provisions regarding advisement of the Security Council. *Id.*

137. U.N. CHARTER art. 52 ¶ 1; see U.N. CHARTER art. 1 ¶ 3 (stating that one purpose of United Nations is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character"). Despite the prominence which the U.N. Charter gives to cooperative efforts, the importance of maintaining the principle of non-intervention supercedes the importance of cooperative efforts. See OAS CHARTER art. 3 ¶ e (noting that command to members to "cooperate fully among themselves" is itself subject to "the duty to abstain from interfering in the affairs of another State"). See also *id.* art. 30 (stating that "cooperation for integral development . . . should . . . respect the priorities established by each country in its developmental plans"); cf. *id.* art. 34 (forbidding members to adopt measures that adversely affect development of other states).

138. OAS CHARTER pmbl., art. 2 ¶¶ e, f, art. 3 ¶ e, arts. 29-32, 34-51; *id.* art. 3 ¶ k, art. 33, amended by Protocol of Washington, *supra* note 28, at 1007-08.

139. See *id.* pmbl. (stating that OAS members are "[p]ersuaded that their welfare and their contribution to the progress and the civilization of the world will increasingly require intensive continental cooperation").

purposes.¹⁴⁰ It also specifies the full cooperation among all American states as an important principle.¹⁴¹ A recent amendment to the OAS Charter also places specific emphasis on economic cooperation among American states and establishes that such cooperation is essential to the region's well-being and development.¹⁴²

Finally, the OAS Charter devotes an entire chapter to integral development.¹⁴³ Chapter VII commands OAS members to unite in their efforts to develop their economies, societies, cultures, educational systems, and scientific and technological fields, holding such development essential to peace and security.¹⁴⁴ Chapter VII also places specific emphasis on the need for cooperating to further economic development by mandating cooperation in the resolution of critical problems threatening the economic development or stability of a particular nation,¹⁴⁵ the development of improved conditions for trade in basic commodities,¹⁴⁶ the development of measures designed to result in de-

140. See *id.* art. 2 ¶ f (declaring as an essential purpose "[t]o promote, by cooperative action, their economic, social, and cultural development"); see also *id.* art. 2 ¶ e (establishing search for "the solution of political, juridical, and economic problems that may arise among them" as essential purpose).

141. *Id.* art. 3 ¶ e.

142. See *id.* art. 3 ¶ k, amended by Protocol of Washington, *supra* note 28, at 1007.

143. *Id.* arts. 29-32, 34-51; *id.* art. 33 amended by Protocol of Washington, *supra* note 28, at 1007-08. Article 29 defines integral development, stating that it "encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved." *Id.* art. 29.

144. *Id.* arts. 29-32, 34-51; *id.* art. 33 amended by Protocol of Washington, *supra* note 28, at 1007-08.

145. *Id.* art. 36. Article 36 provides that "[t]he Member States agree to join together in seeking a solution to urgent or critical problems that may arise whenever the economic development or stability of any Member State is seriously affected by conditions that cannot be remedied through the efforts of that State." *Id.*

146. *Id.* art. 38 ¶ b(i). Article 38 declares that:

The Member States, recognizing the close interdependence between foreign trade and economic and social development, should make individual and united efforts to bring about the following: . . . b) Continuity in their economic and social development by means of: i) Improved conditions for trade in basic commodities through international agreements, where appropriate; orderly marketing procedures that avoid the disruption of markets, and other measures designed to promote the expansion of markets and to obtain dependable incomes for producers, adequate and dependable supplies for consumers, and stable prices that are both remunerative to producers and fair to consumers.

Id.

pendable incomes for suppliers and dependable supplies for consumers,¹⁴⁷ and the development of conditions to promote members' export earnings, especially among the developing nations.¹⁴⁸

2. The Organization for Economic Cooperation and Development

The OECD is an international association of states whose common goal is to pursue worldwide economic growth and stability.¹⁴⁹ All OECD members have pledged to achieve this goal through collective measures.¹⁵⁰ The primary source for implementing these collective measures is the OECD Council.¹⁵¹

a. Organization

The OECD is an international organization whose membership is not restricted by geographical location.¹⁵² It formed in 1960¹⁵³ and currently has twenty-nine members.¹⁵⁴ Its original members were the members of the Organization for European Economic Cooperation,¹⁵⁵ whose function was to administer

147. *Id.*

148. *Id.* art. 38 ¶ b(iv). Article 38 declares that:

The Member States, recognizing the close interdependence between foreign trade and economic and social development, should make individual and united efforts to bring about the following: . . . b) Continuity in their economic and social development by means of: . . . iv) Conditions conducive to increasing the real export earnings of the Member States, particularly the developing countries of the region, and to increasing their participation in international trade.

Id.

149. OECD CHARTER art. 1.

150. *Id.* art. 3.

151. *Id.* art. 7.

152. *Cf. id.*, pmbl. (stating that OECD members are convinced that cooperation to extent broader than among United States, Canada, Turkey, and nations of Western Europe "will make a vital contribution to peaceful harmonious relations among the peoples of the world").

153. *Id.* pmbl.

154. Telephone interview with Mrs. K. Segerstrom, Information Officer, Organization for Economic Cooperation and Development (Mar. 10, 1997); Organization for Economic Cooperation and Development, *OECD Member Countries (and date of joining)* (last modified on Oct. 31, 1996) <<http://www.oecd.org/about/member-countries.html>> (also on file with the *Fordham International Law Journal*).

155. OECD CHARTER pmbl. In the Preamble to the OECD Charter, the original OECD members recognize "that the economic recovery and progress of Europe to which their participation in the Organisation for European Economic Co-operation has

U.S. aid in reconstructing Europe after the Second World War.¹⁵⁶ Representatives or Ministers from all OECD members comprise the OECD Council, which is the source of all OECD actions.¹⁵⁷ Unless members agree unanimously in special circumstances, all OECD members must unanimously agree before they may take any decisions binding on members or make any recommendations to members.¹⁵⁸

b. Goals

The aims of the OECD are economic in nature.¹⁵⁹ The purpose of these aims is to promote economic growth among OECD members and non-members.¹⁶⁰ OECD members also agree to pursue cooperative measures in accomplishing these aims.¹⁶¹ Through the OECD Charter, OECD members agree to promote policies whose purposes are to achieve a high level of economic

made a major contribution, have opened new perspectives for strengthening that tradition and applying it to new tasks and broader objectives." *Id.*

156. HENRY G. AUBREY, ATLANTIC ECONOMIC COOPERATION 9 (1967); Organization for Economic Cooperation and Development, *The OECD and Its Origins*, (visited on Mar. 9, 1997) <<http://www.oecd.org/about/origins.htm>> (also on file with the *Fordham International Law Journal*).

157. OECD CHARTER art. 7. Article seven states that "[a] Council composed of all the Members shall be the body from which all acts of the Organisation derive. The Council may meet in sessions of Ministers or of Permanent Representatives." *Id.*

158. *Id.* arts. 5-6. Article 5 provides that the OECD may "(a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organisations." *Id.* art. 5. Article 6 states that

1. Unless the Organisation otherwise agrees unanimously for special cases, decisions shall be taken and recommendations shall be made by mutual agreement of all the Members.

2. Each Member shall have one vote. If a Member abstains from voting on a decision or recommendation, such abstention shall not invalidate the decision or recommendation, which shall be applicable to the other Members but not to the abstaining Member.

3. No decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures. The other Members may agree that such a decision shall apply provisionally to them.

Id. art. 6.

159. *See id.* art. 1 (stating that OECD's aims are to promote policies for achieving "the highest sustainable economic growth and employment and a rising standard of living, while maintaining financial stability," policies for contributing to "sound economic expansion" in OECD and non OECD countries, and policies for contributing to "the expansion of world trade on a multilateral, non-discriminatory basis").

160. *Id.*

161. *Id.* art. 3.

growth for OECD members,¹⁶² to contribute to economic expansion among OECD members and non-members alike,¹⁶³ and to contribute to the general expansion of world trade.¹⁶⁴ In pursuit of these aims, OECD members agree to promote effective use of their resources,¹⁶⁵ pursue policies to encourage economic growth and stability,¹⁶⁶ engage in efforts to reduce barriers to trade and investment,¹⁶⁷ and to contribute to the economic development of both OECD members and non-members by encouraging the flow of capital.¹⁶⁸ The OECD Charter also declares that OECD members will use collective efforts to pursue these aims, keeping each other informed as to their progress,¹⁶⁹ consulting with one another,¹⁷⁰ and taking joint action.¹⁷¹

162. *Id.* art. 1 ¶ a. Article 1, paragraph a, states that OECD members agree to promote policies whose purpose is "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." *Id.*

163. *Id.* art. 1 ¶ b. Article 1, paragraph b, declares that OECD members agree to promote policies that "contribute to sound economic expansion in Member as well as non-member countries in the process of economic development." *Id.*

164. *Id.* art. 1 ¶ c. Article 1, paragraph c, expresses OECD members' commitment to promote policies with the goal of contributing "to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations." *Id.*

165. *Id.* art. 2 ¶¶ a, b. Article 2, paragraphs a and b, state that OECD members agree to "(a) promote the efficient use of their economic resources; [and] (b) in the scientific and technological field, promote the development of their resources, encourage research and promote vocational training." *Id.*

166. *Id.* art. 2 ¶ c. Article 2, paragraph c states that OECD members agree that they will "pursue policies designed to achieve economic growth and internal and external financial stability and to avoid developments which might endanger their economies or those of other countries." *Id.*

167. *Id.* art. 2 ¶ d. Article 2, paragraph d states that OECD members agree that they will "pursue their efforts to reduce or abolish obstacles to the exchange of goods and services and current payments and maintain and extend the liberalisation of capital movements." *Id.*

168. *Id.* art. 2 ¶ e. Article 2, paragraph e states that OECD members agree to "contribute to the economic development of both Member and non-member countries in the process of economic development by appropriate means and, in particular, by the flow of capital to those countries, having regard to the importance to their economies of receiving technical assistance and of securing expanding export markets." *Id.*

169. *Id.* art. 3 ¶ a. Article 3, paragraph a, states that OECD members agree that they will "keep each other informed and furnish the Organisation [sic] with the information necessary for the accomplishment of its tasks." *Id.*

170. *Id.* art. 3 ¶ b. Article 3, paragraph b, states that OECD members agree to "consult together on a continuing basis, carry out studies and participate in agreed projects." *Id.*

171. *Id.* art. 3 ¶ c. Article 3, paragraph c, states that OECD members agree that they will "co-operate closely and where appropriate take co-ordinated action." *Id.*

II. PROPOSALS FOR COMBATING CORRUPTION

Several organizations and commentators have made proposals for combating corruption.¹⁷² Some of these proposals attack corruption on a transnational level, which makes these approaches capable of directing efforts across state borders.¹⁷³ Other proposals would attack corruption on a state level, focusing on corruption's effects within a state.¹⁷⁴

A. Transnational Approaches

Several proposed solutions for combating corruption focus on approaches that are not confined to any one state or its citizens.¹⁷⁵ The OAS has proposed one solution to corruption's problems that involves coordination among governments.¹⁷⁶ Another example comes from the OECD that, like the Convention, offers an approach to combating corruption that requires inter-governmental cooperation.¹⁷⁷ Finally, at least one commentator has suggested abandoning governments' role in combating corruption and entrusting the task to corporations who are better equipped to determine the effects of corrective measures on markets.¹⁷⁸

1. The Inter-American Convention Against Corruption

The OAS publicly recognized the need to combat corrup-

172. See 15 U.S.C. §§ 78a, 78m(b), 78m(d)(1), 78m(g), 78m(h), 78dd-1, 78dd-2, 78ff(a), 78ff(c) (1988) (criminalizing corrupt payments to foreign government officials); Convention, *supra* note 10 (proposing cooperative efforts among its members for eradication of corruption in international business transactions); *Bribery Recommendation*, *supra* note 12 (proposing coordinated efforts among OECD members to combat bribery in international business transactions); *Tax Recommendation*, *supra* note 12; Baker, *supra* note 7, at 399-433 (discussing viability of corporate self-regulation as method for controlling corruption); Geis & DiMento, *supra* note 11, at 72-86 (discussing prosecution of corporations versus prosecution of individuals for criminal violations); Levi, *supra* note 11, at 181-98 (discussing criminalization versus regulatory approaches to regulating corporate conduct).

173. Convention, *supra* note 10; *Bribery Recommendation*, *supra* note 12, at 1389-92; *Tax Recommendation*, *supra* note 12, at 1311-12; Baker, *supra* note 7, at 399-433.

174. 15 U.S.C. §§ 78a, 78m(b), 78m(d)(1), 78m(g), 78m(h), 78dd-1, 78dd-2, 78ff(a), 78ff(c) (1988); Geis & DiMento, *supra* note 11, at 72-86; Levi, *supra* note 11, at 181-98.

175. Convention, *supra* note 10; *Bribery Recommendation*, *supra* note 12; *Tax Recommendation*, *supra* note 12; Baker, *supra* note 7, at 399-433.

176. Convention, *supra* note 10.

177. *Bribery Recommendation*, *supra* note 12; *Tax Recommendation*, *supra* note 12.

178. Baker, *supra* note 7, at 399-433.

tion on December 11, 1994 at the Summit of the Americas in Miami, Florida.¹⁷⁹ Finding that corruption of government officials posed a direct threat to its aims, the OAS expressed its intent to take action against corruption in a document entitled Summit of the Americas Declaration of Principles ("Summit Declaration").¹⁸⁰ In the Summit Declaration, the OAS reaffirmed its adherence to the principles of international law and the principles and purposes that both itself and the United Nations espouse.¹⁸¹ The Summit Declaration lists non-intervention among these principles¹⁸² and reiterates the conviction that the OAS may advance these principles through coordinated efforts.¹⁸³ The Summit Declaration also specifically addresses corruption as a factor affecting the principles and convictions of the OAS,¹⁸⁴ declaring that corruption is a factor of social disintegration that distorts markets and undermines governments' legitimacy.¹⁸⁵

In an accompanying document entitled Summit of the Americas Plan of Action ("Summit Plan of Action"),¹⁸⁶ the OAS sets forth a separate series of proposals devoted to attacking corruption.¹⁸⁷ The Summit Plan of Action suggests establishing

179. Summit of the Americas: Declaration of Principles and Plan of Action, 34 I.L.M. 808, 808-38 (1994) [hereinafter *Summit Declaration & Plan*]. At the Summit of the Americas, "[t]he elected heads of state and government of the Americas" gathered to express their commitment "to advance the prosperity, democratic values and institutions, and security" of the hemisphere. *Id.* at 810.

180. *Id.* at 810-14.

181. *Id.* at 810. At the 1994 Summit of the Americas, participants reiterated their "firm adherence to the principles of international law and the purposes and principles enshrined in the United Nations Charter and in the Charter of the Organization of American States." *Id.*

182. *Id.* at 810. In Summit of the Americas Declaration of Principles ("Summit Declaration"), the OAS reaffirms "the principles of the sovereign equality of states, non-intervention, self-determination, and the peaceful resolution of disputes." *Id.*

183. *Id.* The Summit Declaration states that the OAS recognizes "the heterogeneity and diversity of our resources and cultures, just as we are convinced that we can advance our shared interests and values by building strong partnerships." *Id.*

184. *Id.* at 811.

185. *Id.*; see *id.* at 818 (stating that "[c]orruption in both the public and private sectors weakens democracy and undermines the legitimacy of governments and institutions").

186. *Id.* at 815-35. The Summit of the Americas Plan of Action ("Summit Plan of Action") is a statement of the OAS's intent to adopt the measures which it outlines. *Id.* at 815.

187. *Id.* at 818-19. Although the Summit Plan of Action does not specifically detail how to achieve the anti-corruption measures it advocates, the Appendix to it does state that the OAS, as well as public and private sector partnerships, play important roles in

general transparency of public administration¹⁸⁸ and developing priorities for achieving such transparency.¹⁸⁹ It also calls for measures regarding public employees by advocating that states ensure proper oversight of governmental functions,¹⁹⁰ that states establish standards for addressing conflicts of interest among public employees,¹⁹¹ and that states establish standards for addressing illicit enrichment of public employees.¹⁹² It also proposes strengthening government regulations and the administration of justice.¹⁹³ Finally, the Summit Plan of Action proposes several cooperative measures that promote the adoption of similar measures by other non-Western Hemisphere states with citizens transacting in the Western Hemisphere,¹⁹⁴ the development of a liaison with the OECD,¹⁹⁵ the development of methods of cooperation to enable rapid investigations,¹⁹⁶ and the

connection with combating corruption. *Id.* at 818-19, 835-36, 838. The Appendix also states that the Summit Plan of Action envisages roles for the Inter-American Development Bank and its affiliates in combating corruption. *Id.* at 837.

188. *Id.* at 818. Although the Summit Plan of Action does not define transparency, it does expand on this term by stating that "[a]ll aspects of public administration in a democracy must be transparent and open to public scrutiny," and by calling for governments to "develop priorities for reforms needed to make government operations transparent and accountable" and to "[e]nsure proper oversight of government functions by . . . facilitating public access to information necessary for meaningful outside review." *Id.*

189. *See id.* (stating that governments should "develop priorities for reforms needed to make government operations transparent and accountable").

190. *Id.* The Summit Plan of Action calls for governments to "[e]nsure proper oversight of governmental functions by strengthening internal mechanisms, including investigative and enforcement capacity with respect to acts of corruption, and facilitating public access to information necessary for meaningful outside review." *Id.*

191. *See id.* (calling for governments to "[e]stablish conflict of interest standards for public employees").

192. *Id.* The Summit Plan of Action calls for governments to establish "effective measures against illicit enrichment, including stiff penalties for those who utilize their public position to benefit private interests."

193. *See id.* (requesting governments to "[g]ive priority to strengthening government relations and procurement, tax collection, the administration of justice and the electoral and legislative process, utilizing the support of the IDB [the Inter-American Development Bank] and other international financial institutions where appropriate").

194. *Id.* The Summit Plan of Action calls on the governments of the world "to adopt and enforce measures against bribery in all financial or commercial transactions with the Hemisphere." *Id.*

195. *See id.* (inviting the OAS "to establish a liaison with the OECD Working Group on Bribery in International Business Transactions").

196. *Id.* The Summit Plan of Action calls on governments to "[d]evelop mechanisms of cooperation in the judicial and banking areas to make possible rapid and effective response in the international investigation of corruption cases." *Id.*

development of a regional, coordinated approach to combating corruption in the form of an international agreement that would allow for extradition and prosecution for violations.¹⁹⁷

The OAS gave effect to the anti-corruption measures of its Summit Plan of Action on March 29, 1996 in Caracas, Venezuela, when it opened the Inter-American Convention Against Corruption for signature.¹⁹⁸ Twenty-three members had signed the Convention as of March 18, 1997.¹⁹⁹ The Convention is also open for non-OAS member accession.²⁰⁰ Any signatory may make reservations²⁰¹ as to any specific provision of the Convention, provided that such reservations are not incompatible with the Convention's object and purpose.²⁰² As of March 18, 1997, only Paraguay and Bolivia had ratified the Convention.²⁰³ Con-

197. See *id.* at 818-19 (calling for the development within the OAS, "with due regard to applicable treaties and national legislation, a hemispheric approach to acts of corruption in both the public and private sectors that would include extradition and prosecution of individuals so charged, through negotiation of a new hemispheric agreement or new arrangements within existing frameworks for international cooperation").

198. Convention, *supra* note 10.

199. Letter from Edwin Choy, Secretary, Department of International Law of the Secretariat for Legal Affairs, Organization of American States, to Robert H. Sutton, Staff Member, *Fordham International Law Journal* 3 (Mar. 18, 1997) (on file with the *Fordham International Law Journal*).

200. Convention, *supra* note 10, art. XXIII, at 733.

201. RESTATEMENT OF FOREIGN RELATIONS LAW § 313 (1986); see CARTER & TRIMBLE, *supra* note 103, at 139-41 (discussing reservations to treaties, generally). If a party to a treaty wishes to accept most, but not all, of the treaty's obligations, it may seek to enter a reservation to the treaty. CARTER & TRIMBLE, *supra* note 103, at 139. The party may wish to do so:

[E]ither because it does not agree with a particular provision, or because it does not wish to accept a dispute settlement provision (such as reference of disputes to the ICJ [the International Court of Justice]), or because it does not have constitutional power to accept a particular provision (e.g., a federal state may not be able to bind its constituent states or provinces).

Id. Once a party enters a reservation to a treaty, the reservation "modifies the relevant provisions of the agreement as to the relations between the reserving and accepting state parties but does not modify those provisions" as to the relations between the non-reserving parties. RESTATEMENT OF FOREIGN RELATIONS LAW § 313(3) (1986).

202. Convention, *supra* note 10, art. XXIV, at 733.

203. Letter from Edwin Choy, *supra* note 199, at 3. Paraguay and Bolivia ratified the Convention on November 29, 1996 and January 23, 1997, respectively. *Id.* Pursuant to Article XXII of the Convention, Paraguay and Bolivia deposited their instruments of ratification with the General Secretariat of the OAS on January 28 and February 4, 1997, respectively. Convention, *supra* note 10, art. XXII, at 733; letter from Edwin Choy, *supra* note 199, at 3. Given that Article XXV of the Convention states that the Convention "shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification," the Convention has been in force between Para-

sequently, it is only binding as to those two states.²⁰⁴ Taken as a whole, the Convention involves both state-level and transnational approaches, attacking individual acts of corruption and the systems which permit such acts to flourish,²⁰⁵ as well as promoting cooperation among states in a collective effort to eradicate corruption.²⁰⁶

The Convention opens with a reiteration of the harmful effects of corruption.²⁰⁷ These were effects that the OAS had recognized in the Summit Declaration and the Summit Plan of Action.²⁰⁸ The Preamble to the Convention states that corruption undermines the legitimacy of public institutions.²⁰⁹ It also declares that the proper functioning of representative democracy, which is itself essential to the region's stability and development, requires an absence of corruption.²¹⁰ Finally, the preamble notes that corruption has international dimensions, requiring coordinated regional efforts.²¹¹

On the individual party level, the Convention primarily mandates active measures for its parties.²¹² It mandates criminal-

guay and Bolivia since March 6, 1997. Convention, *supra* note 10, art. XXV, at 734; letter from Edwin Choy, *supra* note 199, at 3.

204. Convention, *supra* note 10, art. XXV, at 734; letter from Edwin Choy, *supra* note 199, at 3.

205. Convention, *supra* note 10, art. VI-IX, XI, at 729-31.

206. *Id.* art. XIII-XVI, at 731-32.

207. *Id.* pmb., at 727.

208. Compare Declaration of Principles and Plan of Action, *supra* note 179, at 810-11, (declaring OAS's commitment to promotion of representative democracy, to peaceful resolution of disputes through coordinated efforts, and to "a comprehensive attack on corruption as a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions") and *id.* at 818-19 (calling for measures for states to take in eradicating corruption), with Convention, *supra* note 10, pmb., at 727 (discussing harmful effects of corruption on economies and democratic institutions and stating that "in some cases, corruption has international dimensions, which requires coordinated action by States to fight it effectively").

209. Convention, *supra* note 10, pmb., at 727.

210. *Id.*

211. *Id.*

212. *Id.* arts. V-VI, IX, at 729-30; see *id.* art. VII, at 730 (calling for parties that have not yet done so to "adopt the necessary legislative or other measures to establish as criminal offenses under their domestic law the acts of corruption described in Article VI(1) and to facilitate cooperation among themselves pursuant to this Convention"). Although the Convention opens by stating that the OAS members "have agreed" to adopt the Convention's measures, it contains no formal enforcement provisions to ensure that parties adopt the Convention's measures. *Id.* pmb., at 727. Parties may even make reservations to the Convention's specific provisions. *Id.* art. XXIV, at 733; see *supra* note 201 (discussing reservations to treaties). Parties may also submit amending proto-

izing certain specific corruption-related offenses including extortion by, or bribery of, government officials or functionaries²¹³ as well as acts related to bribery and extortion.²¹⁴ It also criminalizes transnational bribery.²¹⁵ Finally, the Convention criminalizes any significant increase in the assets of a government official that he cannot explain in relation to his lawful earnings²¹⁶ and any use of government resource by a government official or functionary for non-official purposes.²¹⁷ The Convention also commands its parties to enact sufficient jurisdictional measures to give effect to these criminalization provisions.²¹⁸ Parties also may enact broader measures than the Convention specifically enumerates.²¹⁹

The Convention calls for signatories to adopt certain regulatory schemes.²²⁰ Some of these measures contemplate an active role for the respective governments, mandating the establishment of standards of conduct for their officials and functionaries,²²¹ mechanisms for enforcing these standards,²²² and systems

cols if consistent with the Convention's purposes, and may denounce the Convention at any time. Convention, *supra* note 10, arts. XXVI-XXVII, at 734. For a party to denounce the Convention it must deposit the instrument of denunciation with the General Secretariat of the OAS. *Id.* arts. XXVI-XXVII, at 734. One year from the date of deposit, the Convention ceases to be in force for the denouncing state, but remains in force as to other parties. *Id.* arts. XXVI-XXVII, at 734.

213. Convention, *supra* note 10, art. VI ¶ 1(a)-(b), art. VII, at 729-30; *see supra* notes 38-39 and accompanying text (discussing definitions of bribery and extortion).

214. Convention, *supra* note 10, art. VI ¶ 1(c)-(e), at 729. The Convention criminalizes acts or omissions performed by government officials or functionaries for the purpose of illicitly obtaining some benefit, the fraudulent use or concealment of property obtained through such transactions, and participation as principal, instigator, accomplice, or accessory after the fact in such a transaction. *Id.* art. VI ¶ 1(c)-(e), at 729. The Convention also states that it "shall also be applicable by mutual agreement between or among two or more States Parties with respect to any other act of corruption" which it does not describe. *Id.* art. VI ¶ 1(e), at 729.

215. *Id.* art. VIII, at 730. Transnational bribery is bribery by a party's citizens or domiciliaries of the government officials or functionaries of another state. *Id.* This provision is also subject to the party's Constitution and to "the fundamental principles of its legal system." *Id.*

216. *Id.* art. IX, at 730. This provision is subject to the fundamental principles of the party's legal system and to its Constitution. *Id.*

217. *Id.* art. XI ¶ 1(a)-(d), at 730-31.

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

219. *Id.*

220. *Id.* art. III, at 728-29.

221. *Id.* art. III ¶ 1, at 728. Although the Convention does not give examples of these standards, it does state that they "shall be intended to prevent conflicts of interest and mandate the proper conservation and use of resources entrusted to government officials in the performance of their functions." *Id.* art. III ¶ 1, at 728. It also declares

for instructing their officials and functionaries regarding these standards.²²³ The Convention also calls for its parties to adopt various passive regulatory measures to promote transparency both in the actions of business investors and in those of the participating government officials and functionaries.²²⁴ Such measures include the public registration of functionaries' income,²²⁵ the promotion of openness, equity, and efficiency in government hiring and procurement,²²⁶ the use of tax collection systems in ways that discourage and even actively deter corruption,²²⁷ and the adoption of other deterrents to the bribery of domestic and foreign government officials.²²⁸ To take full advantage of the transparency these passive measures create, the Convention calls for the protection of those who report acts of corruption,²²⁹ the creation of official oversight bodies,²³⁰ and

that these standards should "establish measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions." *Id.* art. III ¶ 1, at 728. The Convention also calls for parties to undertake a "study of further preventive measures that take into account the relationship between equitable compensation and probity in public service." *Id.* art. III ¶ 12, at 729.

222. *Id.* art. III ¶ 2, at 728. The Convention gives no examples of mechanisms for enforcing standards of conduct. *Id.*

223. *Id.* art. III ¶ 3, at 728. The Convention provides no illustrations of systems of instruction. *Id.* A working document which the Office of the Secretary General of the OAS has prepared, however, entitled A Plan of Action Against Corruption ("Working Plan"), calls for "the organization of workshops, seminars, and conferences with participation of experts that can help the governments train officials responsible for preventing and punishing crimes of corruption." Office of the Secretary General of the Organization of American States, A Plan of Action Against Corruption 24 (May 1996) (working document, on file with Fordham International Law Journal) [hereinafter Working Plan].

224. Convention, *supra* note 10, art. III ¶¶ 4-11, at 728-29.

225. *Id.* art. III ¶ 4, at 728.

226. *Id.* art. III ¶ 5, at 728.

227. *Id.* art. III ¶¶ 6-7, at 728.

228. *Id.* art. III ¶ 10, at 728. By way of illustration, the Convention provides that these deterrents may include "mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, 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." *Id.* art. III ¶ 10, at 728.

229. *Id.* art. III ¶ 8, at 728. This paragraph calls for the protection of "public servants and private citizens who, in good faith, report acts of corruption". *Id.* art. III ¶ 8, at 728.

230. *Id.* art. III ¶ 9, at 728. Although the Convention does not provide details as to the structure and powers of the oversight bodies which Article III, paragraph nine, calls for, it does state that parties should create these bodies "with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts." *Id.* art. III ¶ 9, at 728. The Working Plan also discusses this provision, calling for

the encouragement of oversight by civil society.²³¹

The Convention also takes a transnational approach to combating corruption.²³² The Convention provides that all offenses criminalized under the Convention's enacting legislation are extraditable.²³³ Parties must, upon another party's request, extradite persons within their boundaries who have committed such offenses.²³⁴ The Convention's mutual assistance provisions call for mutual assistance and cooperation among parties not only in investigating and prosecuting specific acts of corruption²³⁵ but also in developing general methods of preventing, detecting, investigating, and punishing acts of corruption.²³⁶ These provisions also call for mutual assistance in identifying, tracing, freezing, seizing, and forfeiting the proceeds obtained from or used in the offenses described in the Convention.²³⁷ As an additional incentive for mutual cooperation, the Convention bars the invocation of bank secrecy as grounds for refusing assistance to a requesting state.²³⁸

The Office of the Secretary General of the OAS has prepared a working document, entitled *A Plan of Action Against Corruption* ("Working Plan"), in an effort to develop further its collective measures approach.²³⁹ The Working Plan calls for the OAS to establish information services, in the form of databases

the OAS to maintain a database on measures which parties to the Convention have taken in the creation of these bodies. Working Plan, *supra* note 223, at 15-17.

231. Convention, *supra* note 10, art. III ¶ 11, at 729. In addition, the Working Plan calls for the OAS "together with other organizations and institutions . . . [to] move ahead in the definition of programs for strengthening the role of civil society in the prevention and control of corruption, in accordance with the provisions of the Convention and other instruments of the inter-American system that are in force." Working Plan, *supra* note 223, at 30.

232. Convention, *supra* note 10, art. XIII-XVI, at 731-32. The Convention also emphasizes the need for collective measures in its Preamble, stating that OAS members recognize that "in some cases, corruption has international dimensions, which requires coordinated action by States to fight it effectively." *Id.* pmb., at 727.

233. *Id.* art. XIII ¶¶ 1-4, 7, at 731. The extradition mandate is also subject to "the conditions provided for by the law of the Requested State or by applicable extradition treaties, including the grounds on which the Requested State may refuse extradition." *Id.* art. XIII ¶ 5, at 731.

234. *Id.* art. XIII ¶¶ 1-4, 7, at 731.

235. *Id.* art. XIV ¶ 1, at 732. The mutual assistance and cooperation mandate is subject to parties' domestic laws. *Id.* art. XIV ¶ 1, at 732.

236. *Id.* art. XIV ¶ 2, at 732.

237. *Id.* art. XV ¶ 1, at 732.

238. *Id.* art. XVI ¶ 1, at 732.

239. Working Plan, *supra* note 223, at 1-33.

of measures that parties have taken in furtherance of the Conventions' mandates, in order to facilitate a coordinated approach to combating corruption.²⁴⁰ These services would monitor and provide information to parties on such topics as effective means for giving effect to the preventive regulatory measures in Article III of the Convention,²⁴¹ legislative measures effective both in generally combating corruption and in giving effect to specific mandates of the Convention,²⁴² and current projects and research on matters related to the fight against corruption.²⁴³ The Working Plan also advocates proposing model laws to serve as guidelines for parties.²⁴⁴ These model laws would aid in creating an approach to combating corruption that is unified across the region.²⁴⁵ Finally, the Working Plan advocates cooperation with other international organizations, such as the OECD,²⁴⁶ the World Bank,²⁴⁷ the Inter-American Development Bank,²⁴⁸ the United Nations,²⁴⁹ and other international organizations and agencies,²⁵⁰ noting that there may be much to gain from their shared and complementary interests in the anti-cor-

240. *Id.* at 15-19.

241. *Id.* at 16-17. Measures for giving effect to the preventive regulatory measures in Article III of the Convention include establishing standards of conduct, establishing systems for registering income, and establishing systems of government hiring and procurement. *Id.*

242. *Id.* at 17-19.

243. *Id.* at 19.

244. *Id.* at 19-20. The Working Plan notes that "model laws have proved useful" in the past and that OAS members have recognized their value. *Id.* at 19. It suggests that "model laws could serve as a guideline and source of support and information for the countries to make the corresponding elections within the framework of their constitutional system and their individual circumstances." *Id.* at 20.

245. *Id.* at 19-20.

246. *Id.* at 26-29.

247. *Id.* at 25-26. The World Bank is an organization which, through loaning operations, strives for the promotion of "economic and social progress in developing nations, bringing poor nations to a point of self-sustaining development." CARTER & TRIMBLE, *supra* note 103, at 530. The World Bank will only loan to governments or to entities whose governments guarantee the loan. *Id.*

248. Working Plan, *supra* note 223, at 25-26. The Inter-American Development Bank is a regional development bank for Latin America modeled on the World Bank, although the Inter-American Development Bank's assets amount to substantially less than the World Bank's. CARTER & TRIMBLE, *supra* note 103, at 547. The Inter-American Development Bank functions to increase the availability of development funds, targeting them on the nations of the Americas. *Id.* at 498.

249. Working Plan, *supra* note 223, at 29.

250. *Id.* at 29. Such organizations include the Council of Europe and the European Union. *Id.*

ruption arena.²⁵¹

2. Recommendations of the Council of the Organization for Economic Cooperation and Development

On May 27, 1994, the OECD Council passed the Recommendation on Bribery in International Business Transactions ("Bribery Recommendation").²⁵² The Bribery Recommendation is primarily a collection of admonitions and recommendations as to general areas in which to take action rather than an articulation of specific measures.²⁵³ The Bribery Recommendation recognizes the pervasive nature of corruption and the problems corruption poses for both governments and commercial markets.²⁵⁴ It also advocates that its members adopt various deterrent, preventive, and combative measures in the fight against transnational bribery.²⁵⁵ These measures include domestic actions such as enacting legislative prohibitions,²⁵⁶ reformulating tax regulations in a manner that does not indirectly encourage bribery,²⁵⁷ establishing business accounting procedures that ensure the adequate recording of relevant payments,²⁵⁸ and ensuring that banks make records available for investigative purposes.²⁵⁹ Other measures include cooperative action, such as mutually aiding the investigations of other member-states by sharing information,²⁶⁰ extraditing suspects,²⁶¹ and promoting

251. *Id.* at 25.

252. *Bribery Recommendation*, *supra* note 12, at 1390-92.

253. *See id.* ¶ I, at 1390 (recommending that members "take effective measures to deter, prevent and combat bribery"); *id.* ¶ III, at 1391 (recommending that members examine certain areas of legislation and regulation and take "concrete and meaningful steps" to combat bribery, providing an open-ended list of suggestions of what such steps may include); *id.* ¶ IV(ii)-(iii), at 1391 (recommending that members "make full use of existing agreements" for mutual legal assistance or enter into new ones where necessary and ensure "that their national laws afford an adequate basis for this cooperation").

254. *Id.* pmbl., at 1390. The OECD Council Recommendation on Bribery in International Business Transactions ("Bribery Recommendation") observes that bribery in international business transactions raises "serious moral and political concerns" and is responsible for "distorting international competitive conditions". *Id.* pmbl., at 1390.

255. *Id.* ¶ I, at 1390-91.

256. *Id.* ¶ III(i)-(ii), at 1391.

257. *Id.* ¶ III(iii), at 1391. The indirect encouragement of bribery, which the Bribery Recommendation seeks to eliminate, includes classification of bribes as tax deductible. *Id.* ¶ III(iii), at 1391.

258. *Id.* ¶ III(iv), at 1391.

259. *Id.* ¶ III(v), at 1391.

260. *Id.* ¶ IV(i), at 1391.

261. *Id.* ¶ IV(i), at 1391.

the Bribery Recommendation's goals among non-members.²⁶² The Bribery Recommendation also specifically advocates the withholding of subsidies, licenses, government procurement contracts, and other public advantages as sanctions for infractions.²⁶³ Finally, the OECD Council's recent passage on April 11, 1996 of the Recommendation On the Tax Deductibility of Bribes To Foreign Public Officials ("Tax Recommendation")²⁶⁴ demonstrates its commitment to eradicate corruption, attacking as it does an institution that indirectly favors it, the tax system.²⁶⁵ To this end, the Tax Recommendation calls for members to re-examine their tax laws with a view to denying to corporations the possible deductibility of bribes to foreign public officials.²⁶⁶ The Tax Recommendation also calls for its promotion among non-members and for a monitoring of its implementation.²⁶⁷

3. Corporate Self-Regulation

At least one commentator has suggested that commercial entities may be best-suited to regulating corruption in international markets.²⁶⁸ This suggestion holds that codes of corporate conduct bring predictability and certainty to government-corporation relationships.²⁶⁹ It further asserts that private codes also may accomplish many of the goals that government anti-corruption

262. *Id.* ¶¶ V-VII, at 1392.

263. *Id.* ¶ III(vi), at 1391.

264. *Tax Recommendation*, *supra* note 12.

265. *Id.* at 1311-12.

266. *Id.* at 1312. The OECD Council Recommendation On the Tax Deductibility of Bribes to Foreign Public Officials ("Tax Recommendation") recommends "that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying such deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal." *Id.* at 1312.

267. *Id.* at 1312. The Tax Recommendation instructs the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, "to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-member countries and to report to the Council as appropriate." *Id.* at 1312.

268. *See* Baker, *supra* note 7, at 399-433 (arguing that corporate self-regulation offers most effective method for controlling corruption).

269. *Id.* at 414-15. Private codes:

[E]nsure that MNEs [multi-national entities] are in harmony with the national policies of the countries where they operate and also strengthen the mutual confidence between the MNE and the government of the host country. Private codes increase political stability in developing nations by increasing the host country's negotiating power with the MNE. Voluntary codes of conduct

tion schemes attain, such as stimulating economic development in certain areas,²⁷⁰ redistributing wealth to the labor class,²⁷¹ and discouraging anti-competitive and illegal behavior.²⁷² This argument notes that self-imposed codes also provide producers a certain flexibility in their operations, allowing producers to address their individual concerns²⁷³ and realize higher profits.²⁷⁴ Finally, this argument states that these codes promote goodwill between corporations, foreign governments, and foreign nationals instead of establishing an adversarial relationship.²⁷⁵

One criticism of the use of private codes of corporate conduct to combat corruption is that corporations may often circumvent these private codes quite easily.²⁷⁶ In the United States, for example, most courts will not hold private codes to be legally binding instruments.²⁷⁷ Another criticism is that the often high

can increase public trust in the business sector and bring multinational activity in line with public expectations.

Id.

270. *Id.* at 406.

271. *Id.* These private codes may accomplish such redistribution through an increase in wages to the corporations' laborers. *Id.*

272. *Id.*

273. *Id.* at 415-16. One commentator observes that, "[b]y developing individualized codes of conduct, MNEs [multi-national entities] can tailor a code to their own needs and to the needs of their customers." *Id.* at 415; *see id.* at 415-16 (noting varying concerns one corporation may face in its operations in different parts of "a diverse and ever-changing world").

274. *Id.* at 421.

275. *Id.* at 422. As one commentator notes, adherence to these codes of conduct "develops trust in the relationship between the MNE [multi-national entity] and its suppliers, host government, and customers. Suspicion historically surrounds the activities of MNEs abroad. Alleviation of this suspicion is the chief benefit of writing and adhering to an internal code." *Id.*

276. *Id.* at 416-17.

277. *Id.* at 416-17 & n.106. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1605-14 (1990) (discussing low level of protection that private codes provide corporations against civil and criminal liability). Fundamental agency principles play a large part in this lack of protection. *See* *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir.) (stating that corporations may be held criminally liable for acts of their employees if those employees "were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions."), *cert. denied*, 464 U.S. 956 (1983); *see also* *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989) (holding "[w]e agree with the District Court that Fox's compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree."), *cert. denied*, 493 U.S. 1021 (1990).

cost of negotiating private codes, even if such codes pertain to only one corporation, decrease profits for shareholders.²⁷⁸ This high cost acts as a disincentive to forming comprehensive policies.²⁷⁹

B. State-Level Approaches

A different set of proposals attacks corruption on a local level.²⁸⁰ Some of these proposals target individual components of the commercial system, advocating regulatory measures instead of criminal sanctions and focusing on the acts of individuals instead of the acts of corporations.²⁸¹ One proposal, the FCPA,²⁸² adopts both regulatory and criminalization measures and targets both individuals and corporations.²⁸³

1. Criminalization Versus Regulation

At least one commentator has suggested that controlling any aspect of corporate conduct through the criminal justice system may not be the best available approach, suggesting instead the use of regulatory measures.²⁸⁴ This school of thought argues that governments' concerns in any arena relating to regulation of conduct is to maximize the government's effect on the populace's behavior with the minimum expenditure.²⁸⁵ In this regard, the argument states, a criminalizing approach may not make the most effective use of governments' resources.²⁸⁶ This argument holds that regulatory agencies are usually able to pursue violations more economically and are usually less encumbered with burden-of-proof and motive issues.²⁸⁷ It also states that regulatory agencies often possess significant investigative powers and are able to investigate the facts of a transaction with-

278. Baker, *supra* note 7, at 417. Companies may offset the costs associated with creating a code with the potential benefits the company will gain, such as increased commercial flexibility and promotion of goodwill. *Id.* at 417-18.

279. *Id.* at 417-18.

280. 15 U.S.C. §§ 78dd-1, 78dd-2 (1988); Geis & DiMento, *supra* note 11, at 72-86; Levi, *supra* note 11, at 181-98.

281. Geis & DiMento, *supra* note 11, at 72-86; Levi, *supra* note 11, at 181-98.

282. 15 U.S.C. §§ 78a, 78m(b), 78m(d)(1), 78m(g), 78m(h), 78dd-1, 78dd-2, 78ff(a), 78ff(c) (1988).

283. *Id.*

284. Levi, *supra* note 11, at 181-98.

285. *Id.* at 181.

286. *Id.* at 184-85.

287. *Id.*

out the constraints that hinder other law-enforcement agencies.²⁸⁸

A counterargument to the use of regulatory measures to combat corruption states that the scope of prosecutorial investigative powers tends to be broader than that which regulatory agencies typically possess.²⁸⁹ According to this counterargument, a criminalizing approach would allow for more thorough examinations of the alleged transactions in question.²⁹⁰ An additional counterargument states that the adverse publicity arising through a criminal prosecution does not exist to the same extent in a purely regulatory investigation.²⁹¹ The social stigma that accompanies action society defines as criminal is often absent, or at least much weaker, with actions society deems to be mere regulatory infractions.²⁹² Other commentators disagree with this assertion, however, noting that the adverse effects to a corporation flowing from publicity of criminal prosecutions are short-lived and the resulting deterrent effect minimal.²⁹³

2. Targeting Individuals versus Targeting Corporations

Other commentators suggest that governments may control corporate actions more effectively by attacking the individuals involved in the transactions in question as opposed to attacking the corporations for which these individuals work.²⁹⁴ These commentators suggest that, although a corporation's actions are an amalgam of numerous individual decisions and contributions, it is often possible, albeit time-consuming, to identify individual acts and isolate the blame.²⁹⁵ They argue that pursuing

288. *Id.* Professor Levi notes that, in recent years, courts have manifested an "increasingly critical approach to the use of powers by the police". *Id.* at 187.

289. *See id.* at 186-88 (discussing powers available to prosecutorial investigators of white-collar crime in England, such as absence of bank secrecy and right to silence as bars to inquiry).

290. *Id.*

291. *Id.* at 181, 188-89. Publicity in a criminal investigation often draws public scrutiny and shame upon the corrupt individual or entity currently under investigation, thereby providing a cost-effective means of deterring future corrupt transactions. *Id.*

292. *Id.*

293. *See* JACOBY ET AL., *supra* note 3, at 51-57 (concluding from 30-day studies of five companies' stock prices that investors do not make "any significant disposal of their stocks on learning of the overseas political payments by the managements" of companies studied).

294. Geis & DiMento, *supra* note 11, at 72-86.

295. *Id.* at 77.

individuals instead of corporations may increase deterrents to illicit behavior.²⁹⁶ They note that individuals are more likely to take steps to protect themselves by avoiding the breaking of laws than they are to protect the corporations for which they work, taking advantage of the individuals' inclination to self-interest.²⁹⁷

These commentators also suggest that common prosecutorial practices in pursuing corporations²⁹⁸ and individuals' awareness of these practices generally reduce pressures on employees to obey the law, thereby perpetuating the system that allows such acts to persist.²⁹⁹ They note that, even if prosecutors have the option to pursue an individual as opposed to the corporation he or she works for, it is often less complicated for the prosecutor to establish general corporate guilt than it is to identify responsible individuals.³⁰⁰ This effect removes some of the fear that prosecutors may target them in their individual capacities.³⁰¹ For example, investigators can usually uncover the paper trail more easily when corporations are the target of the investigation because corporations, unlike individuals, have no privilege against self-incrimination in the United States.³⁰² These commentators recognize that individuals are often more willing to sacrifice their corporation than themselves.³⁰³ They also observe that the common practice in the United States of offering immunity to individuals who testify against the corporation further erodes the fears an individual may have of being pursued in his personal capacity.³⁰⁴ Finally, they remark that a corporation is more likely than an individual to have the funds available to repair the harm flowing from the criminal transaction in question, making them the natural deep pocket in the eyes of the prosecutor.³⁰⁵

A critique of this approach notes that court sanctions are

296. *Id.* at 79-80.

297. *Id.*

298. *Id.* at 79.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Bellis v. United States*, 417 U.S. 85, 90 (1974) (holding that "no artificial organization may utilize the personal privilege against compulsory self-incrimination"); *Geis & DiMento*, *supra* note 11, at 81-82.

303. *Geis & DiMento*, *supra* note 11, at 81-82.

304. *Id.*

305. *Id.* at 82-83.

capable of redesigning corporations with relative ease, given that corporations are artificially created entities existing largely in paper form.³⁰⁶ Individuals, by contrast, are much less amenable to rehabilitation.³⁰⁷ In addition, there are fewer complications in establishing corporate, as opposed to individual, guilt.³⁰⁸ Finally, this critique notes that there may be a greater potential for correcting the harm flowing from criminal transactions if investigators pursue corporations as opposed to individuals, because a corporation's vast collective assets make it the deep pocket of choice when compared to an individual's relatively meager holdings.³⁰⁹

3. The U.S. Foreign Corrupt Practices Act

The FCPA adopts a combination of approaches to combating corruption by taking criminalizing as well as regulatory approaches³¹⁰ and by targeting individuals as well as corporations.³¹¹ The FCPA criminalizes corrupt payments that any agent of a publicly-held U.S. corporation may make to any foreign official, foreign political party, or candidate for foreign office.³¹² This provision applies if the agent makes the payment

306. *Id.* at 80-81.

307. *Id.*

308. *Id.* at 81-82; see *supra* notes 298-305 and accompanying text (discussing prosecutors' incentives to pursue corporations in lieu of individuals).

309. Geis & DiMento, *supra* note 11, at 82-83; see *supra* notes 298-305 and accompanying text (discussing inclination of prosecutors to focus efforts on corporations not individuals).

310. 15 U.S.C. §§ 78a, 78m(b), 78m(d)(1), 78m(g), 78m(h), 78dd-1, 78dd-2, 78ff(a), 78ff(c) (1988).

311. 15 U.S.C. §§ 78dd-1, 78dd-2 (1988).

312. 15 U.S.C. §§ 78dd-1(a)(1), 78dd-1(a)(2), 78dd-1(a)(3) (1988). These Sections provide:

(a) It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, 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—(1) any foreign official . . . (2) any foreign political party or official thereof or any candidate for foreign political office . . . (3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office.

directly or through an intermediary.³¹³ Additionally, the FCPA criminalizes any payments that individual citizens, nationals, or residents of the United States who are not publicly-held entities may make to these same foreign persons.³¹⁴ The FCPA also adopts some regulatory measures, mandating accurate book-keeping practices that adequately disclose the nature of an entity's expenditures.³¹⁵ Finally, the FCPA deliberately exempts from its coverage the most pervasive form of corrupt payments, the facilitating payment.³¹⁶ The statute lists as an affirmative de-

Id.

313. *Id.*

314. *Id.* These Sections provide:

(a) It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, 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—(1) any foreign official . . . (2) any foreign political party or official thereof or any candidate for foreign political office . . . (3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office.

Id.

315. 15 U.S.C. § 78m(b)(2) (1988). This Section provides:

Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—(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 general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific 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.

15 U.S.C. § 78m(b)(2) (1988).

316. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b) (1988); *see* JACOBY ET AL., *supra* note 3, at 113 (stating that facilitating payments are most common form of corrupt payment). Both Section 78dd-1(b) and Section 78dd-2(b) exempt facilitating or expediting payments from prohibition. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b) (1988). These Sections each exempt any payment "to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official." 15 U.S.C. §§ 78dd-1(b),

fense the fact that the payment in question was to secure performance of a routine governmental action such as obtaining a permit, processing a visa, or providing mail service.³¹⁷

III. *ADVOCATING THE OAS APPROACH*

The Convention clearly poses the most effective of existing solutions to the problems that corruption poses.³¹⁸ Given corruption's pervasive and universally harmful nature, combating corruption requires a collective approach.³¹⁹ As such, the Convention provides an effective means for combating corruption.³²⁰ Although other approaches to combating corruption do possess some advantages, they are less effective than the Convention.³²¹ In addition, the OAS approach combines the advantages that these other existing approaches possess.³²² Finally, the OAS approach is more specific in its provisions than other existing approaches, allowing for the necessary coordination of efforts among states.³²³

78dd-2(b) (1988). Sections 78dd-1(f)(3) and 78dd-2(h)(4) each define "routine governmental action" as:

[A]n action which is ordinarily and commonly performed by a foreign official in—(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up, and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.

15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4).

317. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b) (1988).

318. *See supra* notes 198-238 and accompanying text (examining provisions of Convention).

319. *See supra* notes 53-63, 88-95 and accompanying text (explaining pervasiveness and political effects of corruption).

320. *See supra* notes 118-48 and accompanying text (examining purposes of OAS which corruption adversely affects); *see supra* notes 198-238 and accompanying text (discussing measures Convention proposes for combating corruption).

321. *See supra* notes 252-317 and accompanying text (reviewing OECD Council Recommendations, corporate self-regulation, regulatory measures, and targeting individuals who engage in corrupt practices as alternate approaches capable of combating corruption).

322. *See supra* notes 212-38 and accompanying text (discussing Convention's anti-corruption measures, including criminalization and regulation of corrupt activities and international cooperative provisions).

323. *See supra* notes 212-38 and accompanying text (commenting on measures

A. *Combating Corruption Requires a Collective Approach*

The prevalence of corruption necessitates a collective approach to combating it.³²⁴ Corruption's often long existence and its reinforcement by local social structures has led to its entrenchment in the practices of both commercial and government actors the world over.³²⁵ Consequently, the entity seeking to eradicate corruption from a given location must have a certain degree of independence from the location in question.³²⁶ Such independence allows the correcting entity the necessary separation from the corrupt influences, influences that would perhaps corrupt the correcting entity itself.³²⁷ A collective approach thus fulfills this need for separation from the source of the corruption.³²⁸

The kinds of problems corruption poses also requires a collective approach.³²⁹ As commentators have noted, a prevalence of corrupt payments poses additional and numerous costs on participants in corrupt markets.³³⁰ Although corruption hinders the efficient functioning of individual markets,³³¹ the ultimate damage is not limited to the individual markets in question.³³² The resulting slowdown in economic development and political destabilization affects the host state and neighboring states

Convention proposes for combating corruption, such as criminalization and regulation of corrupt activities and international cooperative provisions).

324. See *supra* notes 53-63 and accompanying text (explaining corruption's existence throughout history and throughout world).

325. See *supra* notes 53-63 and accompanying text (discussing pervasive and lengthy existence of corruption).

326. See *supra* notes 33-52 and accompanying text (referring to prevalence of corruption in international business transactions).

327. See *supra* notes 33-52 and accompanying text (explaining corruption's pervasive existence in international business transactions).

328. See *supra* notes 198-251 (discussing Convention's anti-corruption measures); see *supra* notes 252-67 (presenting OECD Council recommendations' measures for combating corruption); see *supra* notes 268-79 and accompanying text (reviewing combating corruption through private codes of corporate conduct).

329. See *supra* notes 88-95 and accompanying text (discussing political effects of corruption including discouraging infrastructure development and engendering political instability).

330. See *supra* notes 79-87 and accompanying text (explaining corruption's harmful economic effects such as wasted resources and increased transaction costs).

331. See *supra* notes 79-87 and accompanying text (discussing corruption as type of transactional barrier).

332. See *supra* notes 88-95 and accompanying text (discussing corruption's political effects including political destabilization and decrease in development of infrastructure).

alike.³³³ Given corruption's universally harmful nature, the need for collective action to combat it is clearly apparent.³³⁴

B. *The OAS Approach Provides an Effective Means for Combating Corruption*

The organization and goals of the OAS make the OAS well-suited to addressing corruption and its effects on the states of the Western Hemisphere.³³⁵ The OAS has pledged to further the region's socioeconomic development and ensure its stability, the very things corruption endangers.³³⁶ The OAS also places heavy emphasis on the importance of cooperative action, especially as such action relates to furthering regional economic development and stability.³³⁷ The OAS is, therefore, an appropriate source to turn to in seeking a solution to the problems corruption poses.³³⁸

The Convention is an effective means of putting the OAS's anti-corruption measures into effect.³³⁹ Given that corruption poses state-level problems with transnational effects,³⁴⁰ it is fitting that the Convention should apply its state-level provisions in a transnational approach, thereby allowing for comprehensive treatment.³⁴¹ The Convention's state-level provisions actively attack specifically-enumerated occurrences of corruption and regulate specific, corruption-prone aspects of commercial mar-

333. See *supra* notes 88-95 and accompanying text (reviewing political effects of corruption).

334. See *supra* notes 53-95 and accompanying text (discussing corruption's history and harmful effects).

335. See *supra* notes 99-148 and accompanying text (discussing OAS's organization and goals).

336. See *supra* notes 137-148 and accompanying text (addressing OAS's commitment to fostering regional socioeconomic development through cooperative efforts).

337. See *supra* notes 137-148 and accompanying text (explaining OAS's developmental goals including collective promotion of socioeconomic development).

338. See *supra* notes 99-148 and accompanying text (examining organization and goals of OAS).

339. See *supra* notes 198-238 and accompanying text (commenting on Convention's anti-corruption measures).

340. See *supra* notes 64-95 and accompanying text (explaining state-level and transnational problems corruption poses, such as discouraging development and engendering political instability).

341. See *supra* notes 212-38 and accompanying text (describing Convention's state-level and transnational approaches to combating corruption).

kets.³⁴² The Convention's state-level provisions also establish measures by which states may passively monitor corrupt activity.³⁴³ The Convention's transnational provisions provide a harmonizing effect by calling for cooperation in investigation, prosecution, and extradition, transforming a series of specific but independent efforts by individual states into a regional movement.³⁴⁴ Finally, the Convention's transnational cooperative measures do not violate the OAS's or United Nations' tenets of non-intervention.³⁴⁵ Accession to the Convention is voluntary and any party may make reservations as to any specific provision, meaning that any measures that a state takes in furtherance of its obligations are self-imposed.³⁴⁶ Through the Convention, the OAS thus proposes an effective vehicle for implementing the reforms necessary to eradicate corruption in North and South America.³⁴⁷

C. Other Approaches Are Less Effective

Other approaches to combating corruption possess shortcomings that make them less viable options for combating corruption.³⁴⁸ A purely criminalizing approach does not usually use resources as effectively as a purely regulatory approach, but the former is able to achieve deterrence more effectively than the latter.³⁴⁹ An approach that focuses purely on pursuing corporations does not always achieve the same degree of deterrence that an approach focusing purely on pursuing individuals achieves, but the former can often be a more efficient use of resources

342. See *supra* notes 212-31 and accompanying text (reviewing Convention's state-level approach).

343. See *supra* notes 212-31 and accompanying text (discussing state-level efforts of Convention).

344. See *supra* notes 232-38 and accompanying text (describing Convention's transnational provisions).

345. See *supra* notes 201-02 and accompanying text (explaining Convention's Reservation provisions).

346. See *supra* notes 201-02 and accompanying text (addressing Convention's provisions regarding entry of reservations).

347. See *supra* notes 198-238 and accompanying text (discussing anti-corruption measures of Convention).

348. See *supra* notes 252-317 and accompanying text (discussing alternate approaches to combating corruption).

349. See *supra* notes 284-93 and accompanying text (discussing criminalization versus regulation).

than the latter.³⁵⁰ Even the FCPA, a hybrid approach that combines both criminalization and regulatory approaches and targets both individuals and corporations, has its drawbacks.³⁵¹ The affirmative defense which the FCPA provides for facilitating payments allows the persistence of increased barriers to trade that such additional payments create.³⁵² The existence of these barriers to trade blocks potential suppliers from the market,³⁵³ prevents foreign consumers from obtaining a better product for a better price,³⁵⁴ hampers infrastructure development,³⁵⁵ and adds to the region's general instability.³⁵⁶

In the end, any purely state-level approach will prove ineffective in combating corruption because it will not be able to coordinate measures across a region.³⁵⁷ This inability to coordinate measures may allow corruption to persist, even flourish, in a neighboring state.³⁵⁸ Existence of corruption in a state encourages an outflow of capital and other mobile resources from the corrupted state, making these resources less accessible to neighboring states as well.³⁵⁹ As resources flow out of a region, fewer resources are available to aid the region's socioeconomic development.³⁶⁰ In addition, the rehabilitative efforts necessary to correct the injuries corruption inflicts on a state will drain national resources, diverting them from other, more valuable de-

350. See *supra* notes 294-309 and accompanying text (addressing pursuing corporations versus pursuing individuals).

351. See *supra* notes 310-17 and accompanying text (reviewing FCPA's anti-corruption measures).

352. See *supra* notes 316-17 and accompanying text (explaining FCPA's affirmative defense for facilitating payments).

353. See *supra* notes 72-78 and accompanying text (addressing bribery and other barriers to trade).

354. See *supra* notes 82-85 and accompanying text (reviewing economically inefficient effects of bribery).

355. See *supra* notes 91-95 and accompanying text (explaining problems bribery poses to infrastructure development).

356. See *supra* notes 88-95 and accompanying text (describing political destabilizing effects that bribery causes).

357. See *supra* notes 137-148, 169-71 and accompanying text (discussing OAS and OECD Charters' collective provisions).

358. See *supra* notes 29-52 and accompanying text (explaining why corruption occurs in international business transactions).

359. See *supra* notes 90-95 and accompanying text (addressing corruption's inducement of outflow of resources from regions).

360. See *supra* notes 90-95 and accompanying text (describing how corruption existence in region leads to resources' exodus from that region).

velopmental uses.³⁶¹ This acts as a further retardant to local and regional development.³⁶² Finally, the mere existence of such corruption often erodes public confidence, both domestically and abroad, in the integrity of the government whose actors receive these payments.³⁶³ Such a loss of faith and public support may lead to a general instability of the corrupted state, which may also affect the stability of neighboring states.³⁶⁴ It is thus apparent that a purely state-level approach will not prove effective in combating corruption.³⁶⁵

Not all transnational approaches to combating corruption offer effective solutions either.³⁶⁶ Although the Bribery Recommendation calls for OECD members to adopt a variety of measures, its provisions are little more than general admonitions with little specific direction.³⁶⁷ This permits adherents to the Bribery Recommendation to follow its words while enacting vastly different measures, preventing a harmonized approach and permitting corruption to persist in certain forms and in certain areas.³⁶⁸ The Bribery Recommendation's advocacy of the withholding of certain public advantages as sanctions for infractions is somewhat more specific, and is thus less likely to lead to an uneven application, than its other provisions.³⁶⁹ It is insufficient, however, to ensure a uniform application of the document as a whole.³⁷⁰ The Tax Recommendation is also specific in the

361. See *supra* notes 64-95 and accompanying text (reviewing harmful effects of corruption).

362. See *supra* notes 64-95 and accompanying text (enumerating damage corruption is capable of perpetrating).

363. See *supra* notes 88-95 and accompanying text (explaining how corruption can lead to political destabilization).

364. See *supra* notes 88-95 and accompanying text (referring to corruption as cause of political destabilization).

365. See *supra* notes 280-317 and accompanying text (discussing state-level approaches to combating corruption).

366. See *supra* notes 252-79 (reviewing OECD Council recommendations and private codes of corporate conduct as other transnational measures for combating corruption).

367. See *supra* note 253 and accompanying text (referring to non-specific nature of Bribery Recommendation's admonitions).

368. See *supra* note 253 and accompanying text (discussing generality of Bribery Recommendation's provisions).

369. See *supra* note 263 and accompanying text (addressing Bribery Recommendation's provision regarding withholding of certain public advantages as sanctions for infractions).

370. See *supra* note 263 and accompanying text (discussing provision of Bribery

measures it advocates and is a step in the right direction, but it only addresses one area of governmental administration that allows corruption to flourish.³⁷¹ The eradication of corruption requires more.³⁷² Finally, private codes of corporate conduct, although potentially capable of combating corruption through transnational efforts, pose problems in terms of compliance.³⁷³ The cost of establishing them may also make it unlikely that corporations will spend the time and resources necessary to create codes comprehensive enough to be effective.³⁷⁴ The other existing transnational approaches to combating corruption are, therefore, unsatisfactory.³⁷⁵

D. *The OAS Approach Combines Advantages of Other Existing Approaches*

The Convention draws considerable strength from the combination of measures that it adopts, incorporating many of the more effective elements of the various state-level and transnational approaches that others have advocated.³⁷⁶ The Convention recognizes the benefits of a regulatory approach to combating corruption by presenting a cost-effective and expedient means of regulatory control.³⁷⁷ The Convention also relies heavily on criminalization measures with their attendant broadened investigatory powers and stigmatizing effects.³⁷⁸ Additionally, the Convention seizes on the advantages inherent in pursuing individuals for their roles in corrupt transactions, taking advantage of their natural inclinations to self-interest, while simultane-

Recommendation concerning withholding of certain public advantages as sanctions for infractions).

371. See *supra* notes 264-67 and accompanying text (presenting Tax Recommendation's provisions for denying tax-deductibility of bribes).

372. See *supra* notes 264-67 and accompanying text (commenting on Tax Recommendation anti-bribery provisions).

373. See *supra* notes 268-79 and accompanying text (describing private codes of corporate conduct).

374. See *supra* notes 278-79 and accompanying text (enumerating costs to corporations of designing private codes).

375. See *supra* notes 252-79 and accompanying text (discussing Council recommendations of the OECD and private codes of corporate conduct).

376. See *supra* notes 212-38 and accompanying text (commenting on Convention's anti-corruption measures).

377. See *supra* notes 220-31 and accompanying text (describing Convention's regulatory provisions).

378. See *supra* notes 212-19 and accompanying text (discussing Convention's criminalization provisions).

ously pursuing corporations, thereby allowing for less complicated investigations and deeper pockets.³⁷⁹ The combination of measures that the Convention adopts thus allows for a broad and efficient treatment.³⁸⁰

E. The OAS Approach is More Specific than Other Existing Approaches

It is the Convention's specificity that is its greatest strength.³⁸¹ The Convention's principles are well-delineated, listing specific acts to criminalize, regulations to enact, and measures to pursue, not merely general categories in which to act.³⁸² For a transnational approach to be effective, it must be specific in its provisions, allowing for the approach's adherents to harmonize their actions.³⁸³ The ability of parties to follow closely this specific plan will permit the region to attack corruption in a forceful and coordinated manner, while minimizing the possibility that full compliance could still lead to uneven results.³⁸⁴ Finally, the possibility of uneven results is further minimized by the fact that the parties involved may fully enact all the measures it proposes, subject only to provisions of their constitutions and the fundamental principles of their legal systems.³⁸⁵ The Convention is, therefore, more than just a well-intentioned

379. See *supra* notes 212-31, 294-309 and accompanying text (describing Convention's provisions targeting individuals). While there is the possibility that prosecutors may continue to be drawn to pursue a corporation as opposed to an individual for a given transaction, the individual may still be prosecuted for his participation. See *supra* note 214 and accompanying text (addressing Convention's provisions regarding prosecution of individuals for participation as "principal, coprinciple, instigator, accomplice or accessory after the fact"). This result thereby preserves some of the deterrent effect. See *supra* note 214 and accompanying text (discussing provisions of Convention calling for prosecution of individuals for participation in any capacity).

380. See *supra* notes 212-38 and accompanying text (discussing Convention's anti-corruption measures).

381. See *supra* notes 212-38 and accompanying text (describing measures Convention proposes for combating corruption).

382. See *supra* notes 212-38 and accompanying text (describing Convention's anti-corruption provisions); see also *supra* notes 252-67 and accompanying text (referring to Bribery and Tax Recommendations' anti-corruption provisions).

383. See *supra* notes 198-238 and accompanying text (discussing Convention's anti-corruption provisions).

384. See *supra* notes 212-38 and accompanying text (discussing Convention's anti-corruption provisions).

385. See *supra* notes 215-16, 235 and accompanying text (addressing Convention's caveats regarding parties' legal principles and constitutional provisions).

suggestion.³⁸⁶ It is a comprehensive and coordinated attack that attempts to level the playing field for all commercial actors, putting no one at a competitive disadvantage.³⁸⁷

CONCLUSION

The members of the OAS should ratify the Convention and give full effect to the measures it proposes. The OAS approach to combating corruption clearly offers more benefits to more people than does any of the existing alternative approaches. Active government involvement in corruption-related regulations and criminal prosecutions is more likely to open markets to more investors than any less-involved approach. Although this increased regulation and interference may initially seem to pose barriers to investment, these measures will actually create more investment opportunities than previously existed by eliminating the existing corruption-related barriers to entry and allowing markets to develop. These results will become more noticeable as they in turn effect an increase in the strength of regional infrastructure and stability. The well-articulated transnational approach that the Convention embodies will do much to protect the inhabitants of the Americas from the ravages of corruption. Such a dramatic effect in this hemisphere may even have repercussions elsewhere in the world, perhaps acting as a catalyst for change in other regions. The Convention thus presents a tremendous opportunity, one that states cannot afford to miss.

386. See *supra* notes 212-38 and accompanying text (enumerating provisions Convention calls for in eradication of corruption); see also *supra* notes 252-67 and accompanying text (explaining anti-corruption provisions of Bribery and Tax Recommendations).

387. See *supra* notes 212-38 and accompanying text (discussing measures Convention calls for in eradication of corruption); see also *supra* notes 252-267 and accompanying text (describing measures Bribery and Tax Recommendations advocate).