

A PROPOSAL FOR AN ANTI-CORRUPTION DIMENSION TO THE FTAA

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I. INTRODUCTION

THE JULY 2ND ELECTION of Mexican President Vicente Fox has received deserved international media attention. Not only does this mark the end of a 71-year long PRI ruling for Mexico; for international trade scholars, it also marks a new opportunity to present the issue of combating global corruption before the table at the next negotiation round of the Free Trade Area of the Americas (FTAA).

The battle against international corrupt practices was first waged by the United States with its Foreign Corrupt Practices Act (FCPA) in 1977, with an amendment to the provisions in 1998. Although an admirable initiative in creating criminal penalties for those who corrupt foreign officials, the United States was thereby placed at a competitive disadvantage with other international trading states in bidding for third party business. Accordingly, the Americans have pressed other states to also institute anti-corruption initiatives. As a result, the United Nations General Assembly has passed several resolutions calling for anti-bribery legislation to be enacted within its member states. The measures that are called for include: the adoption of accounting standards of transparency, termination of corrupt payment deductions for income tax purposes,¹ maintenance of accurate records, and state participation in international anti-bribery enforcement.² This code of conduct, passed in 1997, amounts to one of the most ambitious multilateral initiatives against the corruption of foreign officials in international business transactions,

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¹ The United Nations General Assembly's Declaration Against Corruption in International Commercial Transactions calls for an end to tax deductibility claims for monies spent on bribing public officials. See D. A. Gantz, "Globalizing Sanction Against Foreign Bribery: The Emergence of a New International Legal Consensus" (1998) 18 NW. J. of Int'l L. and Bus. 457 at 471.

² *Ibid.*

upholding five previous resolutions and seeking out the assistance of member states to develop tools to fight corruption themselves.³

In addition, the Organization for Economic Cooperation and Development (OECD) recently adopted its convention to combat corruption. This convention is open for ratification to both OECD members and non-OECD members alike, and calls for parties to enact FCPA-like legislation. Over 20 signatory states have already modified their laws in accordance with the convention.⁴

Several South American countries have also taken the initiative to place corruption on the table at future FTAA negotiations. While Mexico (among other nations) has balked at the idea in the past, newly elected President Vicente Fox has committed himself to combating corruption in Mexico and abroad as part of his political platform; transforming Mexico into a leader, rather than a naysayer in the FTAA corruption initiative.

II. APPROACHES TO CORRUPTION

THE UNDERSTANDING OF WHAT CONSTITUTES CORRUPTION tends to vary within societies, between cultures, and through time. The development of international law need not be stymied by the fact that there is not a single, global understanding of what constitutes corruption. On the contrary, international law can play a key role in building a shared understanding of what kind of public and private conduct should be regarded as unethical as well as illegal. International law can adopt reasonably clear definitions of the term "corruption," condemn it, make clear that it is illegal under the prevailing international laws and ought to be illegal under domestic law. The combination of moral condemnation and legal proscription in international agreements will, at least in the long run, tend to affect the way ordinary citizens understand and view a variety of practices. In attempting to define corruption for the purposes of international law, the framers of international agreements should seek formulations that capture conduct that is in fact socially and economically destructive, even if it is tolerated in practice in some sectors. The OECD's recent decision to exempt routine "grease payments" from its definition of prohibited practices in its convention against corruption, provides one example of legalizing such

³ B. Crutchfield George, K. A. Lacey & J. Birmele, "On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption" (1999) 32 *Vand. J. Transnat'l L.* 1 at 39.

⁴ Entered into force 15 February 1999, the OECD is an organization consisting of 34 highly-developed countries comprised of all 29 OECD members and 5 non-member countries (Argentina, Brazil, Bulgaria, Chile, Slovak Republic). "Entry into force," online: OECD Anti-Corruption Unit <<http://www.oecd.org/daf/nocorruption.index.htm>>.

destructive conduct. In turn, this decision sent the unfortunate social message that such payments do not “really” constitute bribery and are not socially reprehensible conduct.⁵

While present in almost any country worldwide, corruption has the most severe effect in developing nations where economic and democratic advancement are hampered through decreased competition politically and economically. Corruption acts as a great resource waster – diverting government interests away from the wealth and good of the nation, elevating sources of poverty and homelessness in exchange for fast cash and cynicism. In a developed country, corruption may be confined to specific political arenas, whereas a developing nation’s poor governmental administration enables corruption to overcome the entire political and social institution.⁶ As a result, the nation suffers from economic and political stagnation, vulnerability to international disputes, drug-trafficking, money-laundering, international trade investment distortion, and a host of many other physical and social disabilities.⁷

Transparency International’s corruption index⁸ indicates that the most corrupt are amongst developing and transition economies. In other words, the index supports the perceived correlation between wealth and development and corruption. Developing countries may be subject to corruption, and in turn increased poverty, for any one of the following reasons:

- low public-sector or civil-service wages;
- poor working facilities and conditions;
- poor selection and recruitment procedures for employment (including the presence of nepotism);
- illiteracy (often coupled with poverty, increasing the ease with which officials and elected representatives may exploit state members);
- lack of public information distinguishing between corrupt and non-corrupt practices;
- unclear rules, poor commitment to rules, or inability to enforce rules by public officials (police, courts, etc.);

⁵ Alternatively, several other organizations that have implemented initiatives on combating corruption (such as the European Union or the Organization of American States) do not allow for such an exception.

⁶ P. Eigen “Message From Transparency International,” online: Corruption and Integrity Improvement Initiatives in Developing Countries <<http://www.magnet.undp.org/Docs/efa/corruption/CORRUPTI.HTM>>.

⁷ K. A. Elliott, “The Problem of Corruption: A Tale of Two Countries” (1998) 18 *Int’l L. & Bus.* 524.

⁸ Transparency International is a private non-governmental organization committed to combating corruption internationally. As part of this battle, the organization annually publishes perceived corruption rankings of nation states available online at <<http://www.usinfo.state.gov>>.

- lack of implementation of management controls for combating corruption; and
- lack of technology for monitoring the presence of corruption.⁹

While the extent and practical impact of corruption may vary among states, there is no reason why individual nations in distinct stages of economic development cannot engage in a joint effort to reduce corrupt practices. Developed countries should make a special effort to ensure that the integration of developing countries into the web of international trade agreements has the net effect of reducing corruption, rather than exacerbating it. Despite the fact that many economic associations (such as the OECD or the European Union) are confined to developed states, there are a variety of economic associations currently undergoing further development to make an inclusion for states at differing stages of economic development. The states involved in developing these associations should give serious consideration to incorporating a major anti-corruption component into the legal frameworks under which these associations operate. The proposed FTAA, covering both North and South American countries (including several extremely wealthy states and some desperately undeveloped countries as well), is particularly well-suited to act as a model in this regard. Therefore, the FTAA negotiating table provides an excellent context to study the corruption problem and experiment with the incorporation of anti-corruption provisions in regional trade regimes. In addition, such regimes are useful testing grounds for theories that may be developed in the global trade system.

III. TRADE REGIMES AS INHERENT ANTI-CORRUPTION MECHANISMS

BEFORE DETERMINING WHICH SPECIFIC anti-corruption practices should be incorporated into regional and global trade regimes (including the FTAA), it is necessary to consider the extent to which open trade regimes have the inherent tendency to reduce conditions that promote corruption.

Perhaps the most obvious, yet undisputed, source of corruption lies in nation leadership by self-serving elected representatives whose discretionary private interests take precedent over nation improvement. Limited accountability and transparency coupled with gross discretion in governmental actions leads to an erosion of private and civil sector interests as corrupt practices perpetuate disorganization and inefficiency of already weak and undeveloped economies.¹⁰

⁹ Elliott, *supra* note 7 at 527-528.

¹⁰ A. Doig & S. Riley, "Corruption and Anti-Corruption Strategies: Issues and Case Studies from Developing Countries," online: Corruption and Integrity

Research by Economist Paolo Mauro of the International Monetary Fund (IMF) indicates the existence of a direct relationship between corruption and economic governmental intervention. This finding is evidenced, for example, by subsidies and price controls, along with other allocation schemes which leave a window of opportunity for the corrupt profit-earning behaviour of administering officials.¹¹ Robert Klitgaard has even coined a formula for this reality, in which corruption is equal to the summation of monopoly and discretion, minus the presence of accountability.¹²

In its report, the Multi-Disciplinary Group on Corruption (GMC) from the Council of Europe outlined numerous contributing factors to both domestic and foreign corruption. These factors include:

- the concentration of power, wealth, and status;
- the presence of non-democratic (autocratic) regimes;
- an abundance of administrative and trade restriction practices;
- the presence of monopolies;
- the impact of patronage on a nation; and
- the presence of materialistic emphasis on success.¹³

The next stage in our analysis, therefore, will be to consider the impact of a free trade agreement like the North American Free Trade Agreement (NAFTA) or the proposed FTAA, on a nation's perceived level of corruption, with respect to each of the factors identified by the GMC. It will be seen that in general, open trade regimes tend to reduce the extent of corruption-enhancing conditions. In some limited but important respects, however, an open trade regime may exacerbate corruption. The exposure of a society to the wealth (and in some cases the mercenary or corrupt attitudes) of foreign business officials may be a source of ethical pollution, rather than a moral uplift.

A. The Concentration of Power, Wealth, and Status

Let us consider the first item on the GMC list: the influence of a select core of persons who enjoy much power, wealth, and prestige on a corrupt nation. In such nations, wealthy corporations or individuals are the big fishes in small ponds, ever increasingly aware of the upper hand advantage they possess.

Liberalization of the economy through free trade regimes broadens markets to much wider sources of competition. Exposure to outside business and public partners creates opportunities for individuals and

Improvement Initiatives in Developing Countries
<<http://www.magnet.undp.org/Docs/efa/corruption/CORRUPTI.HTM>> at 49.

¹¹ "Price of Corruption" (2 May 1997) *Financial Mail*, online: *Financial Mail* <<http://www.fm.co.za/97/0502/leaders/price.htm>>.

¹² Elliott, *supra* note 7 at 525.

¹³ *Supra* note 4.

corporations alike to circumvent local powers who may be charging relatively high prices or acting heavy handed.

B. Non-democratic (Autocratic) Regimes

As also noted by the GMC, the presence of autocratic regimes with strong authoritarian leaders living extravagant life-styles can place economic strain on a country through costly corrupt practices. While free trade agreements can (and are) made with autocratic nations,¹⁴ trade agreements tend to have a wide variety of democratizing effects. These effects result in increased transparency in policy-making, making it more difficult for elected officials to disguise their corrupt ways come election time.

Among other things, trade agreements have the effect of displacing a large part of the economy from governmental hands. Or, at the very least, trade agreements place governmental hands under much greater scrutiny and discipline.

By requiring state corporations to behave in non-discriminatory, non-trade distorting means via the umbrella of a free trade agreement, sophisticated and well-resourced foreign companies with an interest in monitoring the behaviour of the autocratic state may bring action directly or with government intervention to challenge misconduct. This may encompass corrupt practices that contravene trade norms embodied in the NAFTA, such as the government procurement norms.

Trade regimes prohibiting export subsidies tend to subject parties to complaint and countervailing tariff consequences where such subsidies damage the domestic industries of trade partners. In addition, subsidy regimes tend to transpose governmental focus from weather management (detailed economic conditions) to focusing on management of climate as a whole (long-term economic conditions). Trade regimes prohibit some forms of subsidies, such as export subsidies or subsidies on goods using domestic inputs, and may expose countervailing tariffs to other subsidies, such as those that create a price advantage that damages producers in other states. The subsidies code in the WTO excludes government benefits that are “generally available,” rather than specifically targeting particular enterprises or small sectors of the economy.¹⁵ As a result, the subsidies code encourages governments to

¹⁴ Only the European Union (EU) limits participation to democratic states.

¹⁵ Part I of the WTO Subsidies and Countervailing Measures Agreement (SCM) acknowledges only benefits “specifically provided to an enterprise or industry” or group thereof. In addition, the agreement recognizes four types of specificity, namely:

Enterprise specificity – a particular company selected by the government for subsidization;

establish programs and build infrastructures that improve the overall climate within its borders for economic development. Governments are discouraged to some extent from attempting to select particular enterprises or small sectors of the economy for subsidies, a process that offers great temptation to mispend money in the interest of granting favours to supporters.

Autocratic regimes may also be exposed to democratizing effects through increased contact with commercial parties and businesses from democratic or rule of law countries. Moreover, companies from nations such as the United States or Canada may insist that their affiliates and business partners in foreign countries behave in non-corrupt means. This is due to fear of domestic legal consequences, disclosure payments, shareholder concerns, or even public embarrassment when it is made known that one is partnering with or is affiliated with corrupt enterprises abroad.¹⁶

The exposure of concentration by trade regimes to external sources of business and outside scrutiny alone, however, is by far not the solution to the prevention of corrupt practices. Outside actors may at times bring corrupt attitudes and practices to local economies, and may freshen opportunities to obtain wealth by corrupt means. While international agreements on trade liberalization operate in many ways that can reduce the extent of corruption in a society, enhanced international contact may also have negative effects. These effects are apparent when viewed from the standpoint of securing honourable conduct by public and private officials. Well-crafted and implemented anti-corruption treaties are required rather, to counteract the extent to which foreign dollars create renewed incentives and opportunities for local corruption.

Industry specificity – a particular sector selected by the government for subsidization;

- Regional specificity – a particular manufacturer in a specific area selected by the government for subsidization;
- Prohibited subsidies – export goods or goods utilizing domestic inputs (which are prohibited by the agreement generally).

See “Subsidies and Countervailing Measures: Overview,” online: World Trade Organization <http://www.wto.org/english/tratop_e/scm_e/scm.htm>.

¹⁶ Thomas Friedman, international foreign correspondent came upon one such example of this when conversing with former Donald Rice, Chief Operating Officer of Teledyne, a large public high-tech American company. Rice refused to partner with a Russian entrepreneur interested in becoming one of the company’s international subsidiaries on the basis of the Russian’s refusal to alleviate debt due to unpaid taxes for fear of this misnomer appearing on the company’s annual audit. T. Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus and Giroux, 1999) at 141-142.

C. Abundance of Administrative and Trade Restriction Practices

The GMC report also notes the ability of an abundance of administrative and trade controls to contribute to corruption. Logically, the more red tape present in a complicated and arbitrary administrative system, and the more complicated the approval process for importing, exporting, or locally marketing a product, the more opportunity there is to extract bribes and kickbacks, etc. Thus, simplified, deregulated, and transparent administrative regimes can greatly reduce the market availability for corruption.¹⁷

One example of such administrative controls concerns the non-discrimination conditions enforced upon state enterprises under both the NAFTA and GATT agreements. These anti-competition laws forbid state enterprises from discriminating against other member states when trading in goods or services. Rather, member states are to abide by regular commercial considerations when contracting, decreasing the potential for a distortion of international trade through artificial pricing or subsidization practices.

D. Monopolies

Monopolies are also cited by the GMC as increasing the potential for corrupt practices. The presence of free trade regimes provides the discipline required for decreasing this opportunity. State monopolies may subject many trade agreements to express disciplines, such as the duty not to discriminate against foreign enterprises or to act in other ways that distort trade. External governments and enterprises will have an interest in ensuring that these trade norms¹⁸ are observed, and in

¹⁷ Such a transparent administrative regime may be found in Article X of the GATT (Publication and Administration of Trade Regulations) which imposes obligations of transparency and due process on member states. With respect to transparency, Article X provides that “all laws, regulations, judicial and administrative rules and inter-governmental agreements relating to ... importation, exportation and sale of goods must be promptly published.” Regarding the due process obligations, all member states must administer their laws in a “uniform, impartial and reasonable manner.” Furthermore, member states must “maintain independent judicial, administrative or arbitral tribunals or procedures that allow for prompt review on appeal.” See J. S. Thomas & M. A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization* (Scarborough: Carswell, 1997) at 59.

¹⁸ Included among these trade norms are principles of non-discriminatory action such as NAFTA’s national treatment principle (Article 1102) and most favoured nation principle (Article 1103) or GATT Articles III and I respectively.

doing so, state enterprises will discover that they tend to have fewer opportunities to engage in corrupt practices.

E. Patronage

Patronage, as noted by the GMC, is yet another factor contributing to corruption in many, if not all, nation states. This factor may be kept in check through government restriction agreements such as the NAFTA procurement principle.¹⁹ Such agreements must limit the discretion of elected officials in their provision of subsidies, employment, or other party favours.

F. Materialistic Emphasis on Success

The GMC also lists greed (valued through society's tendency to devote the conception of success to materialistic gain) as playing a significant role in corrupt nations. While liberalized trade regimes, based on belief in the value of freely operating markets, tend to produce many economic and social benefits,²⁰ they can also lead to the creation of wealth disparities.²¹ In addition, increased exposure to foreign cultures through free trade regimes may tend to weaken traditional cultural values and bonds, leading to further reduction in moral and cultural inhibitions that limit corruption. In such environments, the temptation for corruption may be greater than ever.

¹⁹ The purpose of the government procurement principle is to protect employment in industries that are declining, protect strategic defence goods, and support up and coming technologically advanced industry. These three objectives may be attained through "domestic preference policies" that outline the use of overt discriminatory practices against foreign suppliers (i.e. granting only domestic firms an invitation to bid on tender) or more subtly through exclusionary tactics such as selective tendering practices which refrain from utilizing foreign competition. While the government procurement principle may serve to reduce the temptation to commit corrupt practices amongst governing bodies, the principle also has the potential to distort trade. This is due to gross governmental expenditure for the promotion of political agendas in a common law jurisdiction that enforces the same contract principles governmentally as it does privately. See M. J. Trebilcock & R. Howse, *The Regulation of International Trade* (London: Routledge, 1995) at 134-135.

²⁰ These regimes tend to enhance the dynamism of economies, encourage policy makers and ordinary citizens to be more committed to using and accepting market outcomes, and create more opportunities for wealth enhancement.

²¹ Whatever the actual positive effects of international trade regimes in this regard, there is no denying that the "turbo-capitalism" promoted by international trade regimes is likely to have at least some effect in promoting value systems that emphasize material success. See generally E. Luttwak *Turbo-Capitalism: Winners and Losers in the Global Economy* (New York: HarperCollins, 1999) c. 1.

To a modest extent, participation in international trade regimes may have some positive effect on promoting non-materialistic values, at least among the governments that participate in them. Officials from states that do not operate according to the rule of law may benefit from being part of a trade regime that is supposed to be rule-based. These officials may also be inspired, to a certain degree by exposure to trade negotiators from particular states or to international bureaucrats who appear to be genuinely dedicated to serving the public interest of their own societies, or of the international community generally.

The task of reducing corruption must include methods of enhancing the loyalty and professionalism of public servants. Part of this solution may involve increasing the wages of public officials. Such a proposal is extremely costly, however, and may never be the complete solution as governments can only afford a moderate pay scale increase, while the temptation for achieving greater wealth, prestige, and power by engaging in corrupt practices remains just as high. In addition, IMF researchers have found that several countries, including El Salvador, continue to experience problems of corruption despite paying their bureaucrats much more than the average factory worker. In fact, some governments have chosen to deliberately refrain from increasing the wages of public officials, taking into account the supplementation of earnings with corrupt practices such as facilitation payments or bribes.²²

IV. APPROACHES TO CONTROLLING CORRUPTION: CREATION OF CRIMINAL OR QUASI-CRIMINAL REGIMES

ONE APPROACH TO REDUCING corruption is to create international agreements that dedicate member states to eliminating corruption, and cooperating internationally to reduce the corruptive effects of their own nationals on the economies of other states. A variety of regional agreements specifically directed at the reduction of corrupt practices are now “on the books” of international law.

The following table details the efforts of governmental and non-governmental, public and private organizations alike in their work to combat corruption.

²² “Corruption and Officials’ Pay,” online: National Center for Policy Analysis Idea House <<http://www.ncpa.org/~ncpa/pd/pdint176.html>>.

**FIGURE 1
APPROACHES TO COMBATING CORRUPTION²³**

Organization / Nation	Title	Date Completed	Countries Eligible to Join	Features	Corruption Sector: Private Public	Monitoring Mechanism	Other Comments
United States	International Anti-Bribery and Fair Competition Act of 1998 (*amendment to Foreign Corrupt Practices Act)	10 November 1998	N/A	-excludes grease payments for routine government actions -2 affirmative defences: of legality payment under host country's laws; payment for travel and lodging for	•	None	-not apply to foreign subsidiaries or affiliates of U.S. firms -applies extra-territorially through Constitutiona 1 Commerce Clause

²³ See Appendix 1 for additional approaches to combating corruption.

				promotional activities to obtain business			
European Union	Convention Against Corruption	May 1997	EU member countries only		•	None	-not effective until all member states ratify
Organization of American States	Inter-American Convention Against Corruption	29 March 1996	Any state	-criminalizes foreign bribery -encourages local government to curb domestic corruption	•	None	-wider in scope than any previous agreement -reluctance of some key members to promptly ratify ²⁴

²⁴ These member states include Canada, United States, and Brazil.

Organization/ Nation	Title	Date Completed	Countries Eligible to Join	Features	Corruption Sector: Private Public	Monitoring Mechanism	Other Comments
Organization of Economic and Commercial Development	Convention on Combating Bribery of Foreign Officials in International Business Transactions	21 November 1997	OECD members only	-criminalizes bribery of foreign public officials (not require criminalization of bribery of domestic officials) -provides for the adoption of criminal sanctions for such behaviour	<ul style="list-style-type: none"> • 	Yes	-most significant effort to combat corruption because members are major capital exporting and importing nations and the organization is home to most multinational corporations

<p>Canada</p>	<p>Corruption of Foreign Public Officials Act</p>	<p>7 December 1998</p>	<p>N/A</p>	<p>-3 main parts to the act cover bribing foreign officials, possession of property or proceeds flowing from bribes, laundering property or proceeds from bribes -act contains several statutory defences with which to avoid criminal sanction (i.e. foreign bribery, reasonable expenses of foreign officials, facilitation payments)</p>	<ul style="list-style-type: none"> • 	<p>None</p>	<p>-not cover bribery of private organizations (i.e. political parties) -act does not define term “possession” yet covers a wide ambit of act -act operates retroactively -not clear whether act is extraterritorial</p>
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As indicated above, the United States was the pioneer in the fight against foreign corruption in 1977 with its FCPA. Due to decreased ability to compete in trade internationally, the Americans pressed other nation states to follow suit and implement similar anti-corruption criminal regimes in which those found guilty of committing corruption abroad would be held responsible for their actions. The Organization of American States (OAS), responded with 22 member nations ratifying the Inter-American Convention on 29 March 1996. While this agreement is wider in scope than any other international agreement (due to its encouragement of local governments to place a damper on domestic corruption), it lacks implementation of highly significant monitoring mechanisms.

Next came response from the OECD with its public sector Convention on Combating Bribery of Foreign Officials in Public Transactions and the implementation of a rigorous multilateral monitoring system.²⁵ While the OECD is, to put it bluntly, a “rich countries club,”²⁶ non-member states may ratify the convention and thereby modify their laws in accordance with its requirements. One disadvantage the convention brings, however, to the international fight against corruption, is that it provides an allowance for routine “grease payments” facilitating day-to-day interactions with public foreign officials.

May 1997 brought effort by the EU, with its draft directive against corruption. Once again expanding on previous international agreements, the EU convention attempts to criminalize not only public sector corruption, but also private sector corruption. The downfall of this convention rests in its restricted applicability to the EU.²⁷

Canada’s experience with ratifying the OECD convention has brought the passage of the Corruption of Foreign Public Officials Act in 1998. However, by limiting the act’s applicability to domestic (not private) practices and profits from foreign corrupt practices, the effect of these provisions on the Canadian economy is truly limited.

²⁵ The OECD convention was signed in 1997, and came into effect in February of 1999. While it has been stressed that the OECD convention on corruption will indeed maintain a regular monitoring scheme, the specifics of the mechanism have not as of yet been decided.

²⁶ Only highly-developed nations comprise this organization.

²⁷ Recall that the union’s corruption convention applies only to EU members.

V. LIMITATIONS OF CRIMINAL OR QUASI-CRIMINAL REGIMES: THE NEED TO PROMOTE ETHICAL, AS WELL AS LEGAL REFORMATION

THERE ARE SEVERAL LIMITATIONS to combating corruption with private arms. For instance, as history has proven time and time again, criminalization of an act or behaviour does not necessarily suppress the act or behaviour in practice. Indeed, illegalizing behaviour or inflicting harsh penalties may, in some contexts, create more problems than it resolves. The prohibition of alcohol in the 1920s,²⁸ and perhaps even the current prohibition on soft drugs each provide an example of this. The result of the latter has been the creation of enormous black market opportunities, corruption of officials by traffickers, disrespect for drug laws selectively enforced, dislocation of families as a result of jailing users and traffickers, etc. In turn, such an extreme hard-line approach to corruption may create a similar underground market, raising the stakes of this illegal activity even higher as the corrupt strive harder to cover tracks, and are more ruthless with intimidation tactics, even injuring or killing informants or potential informants at times. One need only imagine the precautions taken by corrupt Chinese officials who face the prospect of death by firing squad if their actions are discovered and brought to judicial head.

Part of this solution may lie in the building of morale and morality of the civil servant, with adherence, for example to their sense of professionalism. As previously mentioned, while governments may not ever be capable of meting out adequate pay scales to reduce all incentive to corruption, they are capable of functioning in terms of the “moral equivalent of money.”²⁹ This mind-frame would involve focusing on duplicating the response to why people enjoy wealth, and how life in the public service may be structured to produce the benefits of financial comfort. It requires consideration of at least four factors that lead people to value material wealth:

- wealth brings a sense of security;
- wealthy people have a sense of being accepted by, and belonging to, an important and respected social group;

²⁸ The National Women’s Christian Temperance Union made its most profound mark on the United States with the adoption of the Volstead Act on 10 October 1919 by the Wilson government. It was this act that led to over one decade-long period of “drying out” for the Americans, beginning at midnight on 19 January 1920. See E. Behr, *Prohibition: Thirteen Years That Changed America* (New York: Arcade Publishing 1996) at 78-80.

²⁹ This phrase is a reflection of William James’ essay “The Moral Equivalent of War,” online: Emory Education <<http://www.emory.edu/EDUCATION/mfp/moral/html>>.

- wealth is often interpreted, by both the wealthy and the rest of us, as an indication of individual merit; material success may be interpreted as an affirmation of a person's talent and perseverance; and
- wealth can be measured quite easily, and can confer upon people a sense that they have a precise and exalted status in the social hierarchy.

How can membership in the public service substitute for some of the benefits of wealth?

If membership in the public service involves some form of tenure, it can confer a sense of security on those who hold it, even if their salaries are modest.

If a public service is respected for its honest, efficient, and meritocratic system of appointments and promotions, then members may feel that they are part of an important and worthy club. In such a public service, being hired or promoted will also provide affirmation of an individual's ability and diligence.

The desire to know with numerical clarity how we rank in a pecking order, and to rise up within that order, seems to be felt by many people, and with some intensity. Even in recreational activities, like bridge and chess, one sees many people obsessed with their personal ranking or rating. Wealthy people may have a precise sense of how much money they have, and where they rank in this respect. Within a public service, there may be many opportunities for people to obtain titles, to progress upward in the hierarchy, and to obtain a ranking that is both precise and prestigious. Anti-corruption efforts might usefully provide public servants with some precise indication of how well they are doing with respect to the specific issue of clean government. Transparency International produces a "corruption index" in which states are assigned a numerical ranking. One can imagine a similar system being worked out for units within the bureaucracy of a single state.

Other means of limiting corruption include the distribution of government benefits by methods that eliminate the opportunity for corrupt exercise of discretion. For instance, it is more feasible, in terms of limiting corruption, to distribute training vouchers to the young than to dole out select government job creation grants to employers or individuals on a case by case basis. Moreover, the implementation of negative tax regimes may prove more promising than discretionary welfare spending – payments that are dispensed to individuals at the discretion of bureaucrats or politicians.

Technology also provides a means of reducing corruption. The Office of the Inspector General in Columbus, Ohio, responsible for investigating allegations of potential fraud, abuse, and corruption, is providing citizens with the opportunity to contact central administrations directly through the internet in order to file a complaint, rather than having to proceed through a lengthy chain of corrupt junior officials.

Historically, proper administration does not seem to be solely the

product of a punitive environment, as evidenced by the administration of the British civil service. Despite the ever-present temptations for corruption offered to these service providers,³⁰ the British civil sector was known to be non-corrupt in the management of empire affairs. Perhaps temptations were overcome by the overwhelming sense of professionalism, morality, commitment, or esprit. Nonetheless, history has clearly provided one token example of the ability to successfully combat corruption without the use of punitive sanctions or an unaffordable wage increase.

Moreover, oftentimes correcting a deep-rooted public sore requires forgiveness of the past in exchange for coming to terms with present-day realities. Perhaps highly corrupt nations need to consider a period of amnesty for persons who bring forth admissions of corrupt behaviour, insisting that they will sin no longer.³¹ Admittedly, while it is useful to formulate general approaches, theorizing alone is clearly insufficient. The only way to determine what successfully combats foreign corruption on an international level is to undertake a detailed account of various practicing anti-corruption campaigns – successful or not – and discover the most appropriate method of implementation.

VI. RECOMMENDATIONS

- **The FTAA immediately encompass in its negotiation agenda the corruption issue, focusing on implementing mechanisms by which to successfully reduce and perhaps even entirely eliminate public and private sector corruption.** The agenda could focus on implementing a previous regime modified to achieve specific objectives, or attempt to draft an altogether innovative agreement. For example, the OAS Inter-American Convention on Corruption which has already been actively advanced by several South American countries, refrains from legitimizing “grease payments,” an initiative not undertaken by the OECD and other anti-corruption initiatives.

The FTAA negotiators may wish to consider whether a measure should be taken to criminalize such payments. In addition the

³⁰ Because British civil servants were paid poorly, the only way to get ahead of the game was to engage in corrupt practices.

³¹ This process is analogous to the truth and reconciliation commissions with a mandate to uncover past wrongdoing adopted by countries such as South America and South Africa post-equal-voter democratization. Offenders would come forward to offer testified commission of criminal offences and apologies on the condition of amnesty from criminal punishment. See generally C. Villa-Vicencio, “Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court Truth Commissions Meet” (2000) Emory L. J. 205; J. M. Swartz, “South Africa’s Truth and Reconciliation Commission: A Functional Equivalent to Prosecution” (1997) 3 DePaul Gid. Int’l L. 13.

negotiation rounds may focus attention on the OECD convention on corruption, which is the only agreement to date that implements a monitoring mechanism for corrupt behaviour. The negotiations could then focus on implementing adaptations to the agreement in an effort to continue curbing corruption.

Similarly, the FTAA table may wish to consider efforts that have been advanced for curbing private sector corruption, such as that of the European Union, and whether it should also undertake such an initiative.

- **Require all parties to the FTAA to adopt the OAS convention on corruption.** Every party of the FTAA should be required, as part of the overall FTAA package, to adopt the OAS convention, which would be supplemented by an agreement that would institute a monitoring mechanism similar in scope to that of the OECD initiative. An agenda establishing the arrangement of further negotiations concerning an anti-corruption regime for the private sector would also be developed. Just as NAFTA was accompanied by side-agreements on labour and the environment, the OAS could implement a side-agreement on corruption. Alternatively the regime could be constructed into the text of the FTAA agreement.

- **Add to the OAS convention an ongoing monitoring scheme and educational institute to publish corruption percentile rankings similar to the TI research, and distribute information on successful anti-corruption regimes.**

- **Require all FTAA parties to commit to a negotiating treaty on private sector corruption within 5-10 years of the ratification of the FTAA.**

Appendix A
FIGURE 1
ADDITIONAL APPROACHES TO COMBATING CORRUPTION

Organization/ Nation	Title	Date Completed	Countries Eligible to Join	Features	Corruption Sector: Private Public	Monitoring Mechanism	Other Comments
International Bank for Reconstruction and Development (World Bank) and International Monetary Fund	N/A	N/A	N/A	-discourages use of bank funds for corrupt practices by rejecting and canceling loans and awards to those engaging in corrupt practices	<ul style="list-style-type: none"> • 	-inspects accounts and records of performance, audits etc.	-focuses only on foreign bribery
	International Code of Conduct for Public Officials; United Nations Declaration Against Corruption in Commercial Transactions	1996; 1996	any state	-bans corrupt transactions -recommends member states adopt code; -pursues enforcement of laws prohibiting bribery and corrupt practices	<ul style="list-style-type: none"> • 	None	-broad international condemnation of corruption -calls upon public and private corporations to promote declaration

Organization/ Nation	Title	Date Completed	Countries Eligible to Join	Features	Corruption Sector: Private Public	Monitoring Mechanism	Other Comments
Transparen- cy International	N/A	1993	N/A	-offices in more than 50 countries with established anti-corruption programs -annual publication of Corruption Index	•	None	-desire to combat private sector corruption in future -heightened awareness of foreign corruption
	Code of Conduct Review	1996	N/A	-encourages enactment of preventative and control measures -encourages private companies to adopt rules -prohibits extortion and bribery	•	None	-encourages WTO to concern itself with corruption -encourages cooperation between governments inter-nationally