

Note

***553 DEVELOPING COUNTRIES: INCREASING TRANSPARENCY AND OTHER METHODS
OF
ELIMINATING CORRUPTION IN THE PUBLIC PROCUREMENT PROCESS**

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***554 I. INTRODUCTION**

Corruption within procurement systems has been prevalent throughout the world and is not limited to developing countries. Discussions about corruption issues in government procurement (and especially in international transactions) was initiated when the United States began pushing for competing countries to abide by the same ethics as the United States. Although this affected mostly developed countries with an established capital market system, developing countries and countries in transition are becoming more involved in the global market. Although the term "corruption" brings to mind bribery, there are many opportunities for both government actors and contractors to engage in other forms of corruption. Developing countries face unique problems as they reform entire governments in addition to procurement systems. Regardless, the international anticorruption reforms that developed countries have used present possible solutions and may provide some guidance as to which reforms might be most effective. International and regional anticorruption treaties began developing in the early 1990s and the most recent and comprehensive treaty, the United Nations Convention Against Corruption, was completed in October 2003 and is awaiting ratification. This note will identify at which points corruption occurs during the procurement process. This note will then discuss the problems and impediments developing countries face when reforming the public procurement system. The discussion on remedies to combating corruption in public procurement will focus on preventive measures and enforcement mechanisms used by developing countries to reduce corruption and comply with international anticorruption agreements. Lastly, the author will analyze the most beneficial reforms used in the past as well as the present.

II. FACTUAL BACKGROUND

A. Corrupt Government Procurement Practices in Developing Countries

Both government purchasers and contractors may introduce corrupt practices to the procurement process. A developing government has several opportunities that are common to developing countries as well. Bribery in government procurement was once rampant throughout the world with the United States being the exception. Recent efforts and international agreements to discourage bribery throughout Europe and other regions have led to preventive measures being taken and more stringent rule enforcement when corruption is detected. Although bribery is the primary form of corruption ***555** in the procurement process, there are many more intricate corruption schemes in which government and private actors participate.

1. Corruption Before Government Contracts Are Awarded and During the Procurement Process

One opportunity for governments to engage in corrupt practices is during the invitation for bids. The government may have an illicit agreement with a supplier for a particular product and, as a result, establish such narrow specifications that no other supplier is able to meet the requirements, resulting in no other submitted bids. This may include the specific dimensions and design features of the favored supplier's product. Although the United States and other developed states publish all invitations for bids, in many developing countries, the government will "publish the notification of the bidding opportunity in the smallest, most obscure circulation source that satisfies the advertising requirements and hope that no one sees it." [FN1] This tactic reduces competition and the favored supplier is more likely to win the contract. [FN2] The private opening of bids is another information-related aspect of procurement where governments may engage in corrupt practices. For example, a government may claim that the procurement is necessary due to an emergency and that there is not enough time for competitive procedures to take place. When a government does not permit the bidders to be present for the opening of the bids, the potential that confidentiality will be breached increases. If the government provides the preferred supplier with the competing bid prices, that supplier can submit the lowest bid. Another common form of procurement corruption includes "emergency" procurements. Direct negotiations are permitted in some countries, including the United States, where direct negotiations are conducted due to claims of extreme urgency, national security, additional needs for an existing contract, or the availability of only one supplier. In these instances, the government may be justified in choosing to negotiate directly with a supplier. [FN3] Legitimate competitive negotiation differs from corrupt forms of direct negotiation. The problem arises when a government claims an exceptional reason for direct negotiations that does not exist. In this situation, corruption is likely to take place and eliminate any competition. Common pre-award supply-side corruption occurs when contractors coordinate ahead of time or offer bribes. Suppliers may coordinate with each other to fix the bid prices with pre-agreed payoffs for the losing bidders. [FN4] Sellers also may offer the government bribes or other incentives to engage in corrupt practices that favor the supplier. Additionally, suppliers may attempt *556 to interfere with the evaluation process or work of evaluators if they are well-networked.

2. Corruption After the Contract Is Awarded

The government may ignore the supplier's lower-quality products and reduced quantities after the supplier was awarded the contract for submitting too low a price to complete the work. The supplier might falsify standards certificates and provide insufficient quantities to make up for money lost in bribes given to the government during the bidding process. The enforcing officers may end up accepting more bribes to ignore the discrepancies if there is little accountability for government officials. [FN5] Government officials may divert some of the goods for resale or private use in exchange for ignoring the supplier's failure to meet the specifications of the contract. [FN6] The government officials responsible for enforcement also might seek other benefits, such as employment in the private sector after retiring from the government in exchange for ignoring a supplier's failure to satisfy the contract. [FN7] Additionally, after the contract is awarded, accountability becomes difficult to monitor and sometimes no accountability occurs. This is especially true when both sides are engaging in corrupt practices. In addition, reporting corruption to an authority in some countries is not possible because there is either no oversight mechanism or the oversight authority is not fully independent and, thus, is susceptible to pressure from outside parties.

B. Susceptibility to Corruption in Government Procurement During Transition to Democracy and Market Economy

For many developing countries, the transition to democracy and a market economy is a long-term process involving political, economic, and social changes that create an environment conducive to corrupt practices. [FN8] Establishing a sound procurement

system for countries in transition may be quicker and less burdensome than for countries reforming a procurement system because there are fewer government officials with vested interests and old habits inside the new system. [FN9] In countries transitioning out of a traditionally communist or socialist government with centralized economies, the shift to a market economy demands decentralization that gives a great deal of control to bureaucrats while attempting to maintain control over government finances. Opportunities for corruption increase in transition governments because former elites lose the monopoly over corruption and a weak central government, leaving the door open for government agencies to engage in corrupt practices. ***557** [FN10] In addition, transition to a market economy requires the creation of competition. [FN11] The challenge lies in creating a culture of competition where "there is a poor private market which gives a greater incentive for suppliers with poor alternative markets to resort to bribery of government purchasers." [FN12] Enacting effective procurement laws can help the transition by strengthening the judiciary's power to enforce the new procurement laws and reducing agent discretion. During the transition, a great deal of legislation may not be clear to agents and contactors because of lack of experience. The judicial system also will not have had the opportunity to interpret the new laws yet either. As a result, procurement actors turn to a previously corrupt system to help maneuver the new and possibly complex procurement process. [FN13] This emphasizes the need for a clear, concise, and comprehensive system. Aside from enacting public procurement laws, governments in transition need to strengthen and reform the executive, legislative, and judicial branches to prevent corruption and punish both government agents and suppliers guilty of corrupt practices. [FN14] Without the strength of a reformed government, the former corrupt procurement system remains intact.

C. The Importance of Increasing Transparency and Reducing Corruption in Developing Countries

The difficulties relating to development and transition for developing countries make corruption extremely harmful to the countries' governments and economies. An important issue for all countries to address is why corruption exists at high levels in developing countries. Corruption has global repercussions and illegitimate practices in one or two countries could have serious impact on competition. Some corruption experts argue that "the cause of corruption is not the culture of a society, but rather the result of weak enforcement of Western economic and political structures." [FN15] Although corruption might have helped facilitate trade by avoiding extensive and "cumbersome" regulations, the benefits from corruption generally exist in specific transactions while the harmful effects are far-reaching and harm the government and population as a whole. [FN16] Corruption inevitably harms the economy and the government.

***558** Preventing corruption and taking action to curb current corruption in developing countries can help eliminate damaging consequences. Specific hindrances resulting from corruption include (1) reduced investment in the country, (2) limited effectiveness of foreign aid, (3) budgetary problems, (4) distorted composition of government expenditure, (5) slow economic growth and development, and (6) reduced entrepreneurship. [FN17] For a developing country, each of these problems results in the developing nation's limited participation in the global economy and fewer benefits for its citizens. The Organization for Economic Cooperation and Development (OECD) found that corruption slows foreign direct investment and distorts the size of government expenditures and the decision-making process for public investment projects. [FN18] In addition, corruption limits development by slowing a developing nation's full participation in the global economy. [FN19]

III. LEGAL BACKGROUND

A. Problems and Obstacles Specific to Developing Countries

Developing countries are reforming and establishing public procurement systems in order to save their governments money and increase public confidence in new or reformed governments. [FN20] During the process of establishing public procurement systems, developing countries encounter a broad range of issues and difficulties that are not usually concerns for industrialized countries. Although the principles of strong and efficient procurement systems are sought in each country, the systems and details for each will inevitably differ because of "a whole series of economic, social and political considerations which prevail" in the geographic area where the procurement system is located. [FN21] Depending on the underlying culture and history, common elements and principles of a strong procurement system such as a clear legal framework, consistent policies, transparency, and the review or protest of awards are applied differently, are not implemented at all, or are faced with private-sector resistance. [FN22] The processes and obstacles each country encounters also depend on whether the procurement reforms are for national, regional, or international systems.

A common challenge faced by developing countries when implementing or reforming a procurement system is delegating authority and responsibilities. *559 When the government grants control over procurement to different departments or agencies within the government, the agency officials gain significant financial responsibilities that present new opportunities for corruption. Some procurement systems involve several levels of approval or review for government purchases, possibly leading to corruption at each step of the way if the officials at each level are not honest and well-trained.

[FN23] For countries in which corruption exists in the delegation of authority, it is necessary to have clear procurement rules and practices that will be enforced by some or all of the following means: (1) prosecution of violations, (2) dismissal of corrupt government officials, and (3) consequences such as fines or blacklisting for corrupt bidders. [FN24] A clear delegation of authority to competent and honest government agents permits the government to maintain control over the general political environment. If the atmosphere in which procurement takes place is controlled such that corrupt practices are not tolerated, the general political, social, and economic framework of the government is more effectively maintained, leading to a strengthening of the government and its procurement practices. [FN25]

The delegation problem is indicative of a lack of political will in many countries. In most developing countries, politicians, business cartels, and private businesses may benefit from the corrupt procurement system and are reluctant to lose their existing benefits.

[FN26] Another problem tied to the delegation of authority situation is public and widespread knowledge of good substantive procurement practices in addition to the knowledge and competence of the government employees. Knowledgeable government staff is important in both the creation of procurement procedures and their implementation. [FN27]

1. Creating a Procurement System

Another difficult problem that developing countries face in the procurement reform process is the creation of a clear legal framework, including the model, the organization, and laws for enforcement. The framework should be easily identifiable within the nation's laws so that government officials and the private sector understand the procurement system's rules. [FN28] The legislation establishing the procurement framework should take into consideration the country's political, social, and economic realities to make the system effective. [FN29] Clear and effective legislation that specifies who will write implementing regulations and/or legislation and who will draft the model contracts and terms should be included. [FN30] Although many countries choose to use the *560 UNCITRAL procurement model because it provides extensive guidance on procurement, developing countries may need additional help in addressing particular issues. For countries with new market economies, following the UNCITRAL model may be more difficult because the market does not exist or is only beginning to

develop. The UNCITRAL model is a good starting point for countries forming a completely new system and for those seeking to establish more competitive measures. However, other sources and treaties may be more helpful to developing countries for issues such as development and aid-funded procurement.

Other important steps governments have found to be effective in creating a procurement system include publicity about the advantages and disadvantages of the new procurement system, government cooperation with the private sector, and a central procurement office. [FN31] Although many of these objectives work well in developed countries, the transferability of these principles to developing and transitioning countries may pose a challenge during implementation due to each country's (1) history and unique political and social characteristics, (2) type of government or level of democracy developed, or (3) the condition of the market economy. [FN32] For example, cultures in which gift-giving and loyalty to family and friends are central may find the criminalizing of these practices to be cultural imperialism [FN33] and "an affront to the international principle of territorial sovereignty." These considerations signify the importance of having local attorneys and consultants directly involved in the creation or reforming of legislation and the implementation of procurement procedures. Extensive dependence on Western lawyers and consultants to develop reforms may lead to gaps in important issues that are unique to each country.

2. Challenges in the International Realm

Several problems arise when developing countries sign anticorruption treaties at the international and regional level including issues of sovereignty, international accountability for local officials, and jurisdiction. [FN34] It is extremely important for developing countries to guard their sovereignty and protect themselves from being overrun by neighboring or developed countries. Sovereignty concerns relate to the question of jurisdiction for these countries once they have signed and ratified international treaties. Dispute settlement provisions and international oversight mechanisms should be framed in a way that avoids possible infringement on national sovereignty but at the same time addresses extradition issues and ensures that local government officials will be held accountable internationally.

***561 B. Preventive Measures, Enforcement, and Criminal Punishment**

Preventive measures are a common mechanism included in regional and international treaties on corruption. These measures help establish a standard to be met by both the government and the suppliers. Preventive measures include transparency, regulatory mechanisms, ethical guidelines, cooperation with suppliers and other countries, increased competition, and a free media. Each country's political and economic background should be taken into consideration when considering and analyzing preventive measures because the public procurement system is often integrated into the government. For example, if a government is unstable, corrupt, or unable to control procurement officers, then certain preventive mechanisms will not be effective. After both preventive measures and a criminal punishment system are established within the legal system, enforcement is necessary to ensure that the procurement system functions properly and with integrity. Although preventive measures provide an important framework for the procurement process, strong and effective enforcement procedures are even more important because problems with enforcement can lead to widespread corruption. Although enforcement is often a problem, it presents the opportunity for governments to integrate the public procurement system into their general administrative systems. A strong enforcement mechanism is also the most visible aspect of the procurement system so that other individuals and companies participating or planning to participate in public procurement will be more likely to comply with the proper procurement laws and procedures. Enforcement mechanisms are also important to ensure that bidders have the opportunity to present complaints to an oversight or judicial body.

1. U.N. Convention Against Corruption: Preventive Measures

After seven negotiation sessions beginning in January 2002, the United Nations Convention Against Corruption (U.N. Convention) was adopted by the General Assembly on October 31, 2003, by Resolution 58/4. The U.N. Convention is the most recent effort to combat corruption throughout the world. Article 9 of the Convention addresses public procurement and management of public finances. The U.N. Convention requires each party to

take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption. [FN35]

Furthermore, the procurement systems are required to address (a) the public distribution of procurement procedures and invitations to bid, (b) conditions for participation such as selection and award criteria, (c) the use of objective and predetermined criteria for the correct application of procurement procedures, (d) a domestic review system to ensure legal recourse and remedies, *562 and (e) measures to regulate procurement personnel such as screening and training. [FN36] The U.N. Convention takes each country's characteristics into consideration by noting that certain measures, such as the regulation of procurement personnel, should be applied where appropriate. In addition, Article 9, section 2 places the requirements for promoting transparency and accountability within the framework of each State's fundamental legal principles. [FN37] Lastly, section 3 also places the civil and administrative measures aimed at preserving the integrity of public expenditure documents within the realm of each State's domestic law. As a result, Article 9 permits flexibility for each state to apply the U.N. Convention's principles effectively. [FN38]

The U.N. Anti-Corruption Toolkit (U.N. Toolkit) discusses situational prevention and explains that "[p]rocurement requirements, rules and decision-making criteria should be readily accessible to all potential suppliers and contractors," preferably being announced as part of the invitation to bid. [FN39] In addition, the U.N. emphasizes efficiency, accountability, competence, and integrity so that States may prevent corrupt acts, and it outlines key principles for preventing corruption: (1) create public awareness, (2) criminalize bribery, (3) unify the procurement code, (4) establish transparent procedures and practices, (5) open bids publicly, and (6) delegate authority appropriately. [FN40] The U.N. also relies on Transparency International's "islands of integrity" theory, which states that, if a government agency is not corrupt, bidding parties are assured that they will not lose any advantage by following the correct procedures and rules. [FN41] Addressing local corruption within specific agencies and specific groups reduces corruption directly and helps "restore healthy public norms, to reverse the perception of what constitutes normality." [FN42] Once corruption is no longer the norm, all participating actors will adapt to transparent practices.

The U.N. recommends creating an international authority that would monitor important contracts and transactions to ensure that they are free from corruption. Such authority would review and validate transactions, identify corrupt transactions, and recommend anticorruption reforms. [FN43] In 1998, the U.N. Center for International Crime Prevention and the World Bank first discussed an international authority called the International Anti-Corruption Forum (IACF) to help implement multilateral anti-bribery conventions. Specifically, the IACF would review the terms of government contracts as well as *563 the preparation and selection processes. [FN44] To ensure transparency, the IACF would publish annual reports explaining what would help ensure transparency. The U.N. and World Bank concluded that the IACF would increase accountability internationally, improve transparency, and result in more effective international transactions. [FN45]

2. U.N. Convention Against Corruption: Criminal Punishment for Engaging in Corruption

The U.N. Convention text on procurement in Article 9 provides extensive flexibility for states to take corrective action. Section 2(e) states that each state should take

accountability and transparency measures that are consistent with the principles of its legal system. Those measures shall encompass "corrective action in the case of failure to comply with the requirements established." [FN46] Although Article 9 provides flexibility, Chapter III (Articles 15 through 42) addresses specific measures for criminalization and law enforcement of anti-corruption measures. The measures in Chapter III are general enforcement measures to be incorporated into a nation's criminal law rather than tailored to public procurement. Nevertheless, corruption in procurement can be prosecuted successfully because the enforcement mechanisms detailed in Chapter III address common violations in procurement such as bribery of public officials and private sector actors, embezzlement and misappropriation, illicit enrichment, and abuse of public functions. [FN47] Article 28 outlines the elements of an offense and Articles 29 and 30 provide the procedural and legal framework for prosecuting corruption. Chapter III also provides additional measures necessary for enforcement to function properly and efficiently by addressing how money should be confiscated, how witnesses and victims should be protected, how jurisdiction compensation should be determined, and how authorities should cooperate. [FN48] Each area also is addressed more extensively in separate chapters in the Convention.

3. The Inter-American Convention Against Corruption

In Latin America, government reforms in the 1980s did not stop abuse of power by public officials, resulting in limitations to economic growth and slow poverty reduction. [FN49] In several Latin American countries, the transition from military dictatorship to democracy produced too much legislation with too little clarity. Both private and public actors created an informal system of bribery to avoid the complex and expensive formal legal system. [FN50] During the *564 Summit of the Americas in 1996, the twenty-one members of the Organization of American States signed the Inter-American Convention Against Corruption (Inter-American Convention) to modernize by building "more responsive, transparent, and accountable governments" in addition to strengthening democracy. [FN51] Article III of the Inter-American Convention provides recommendations for public procurement reform.

Article III of the Inter-American Convention provides twelve optional preventive measures along with specific goals and measures for States that focus on administrative action to eliminate impunity by public officials and increase transparency in the public sector. [FN52] Article III first establishes that State Parties should consider applying standards for government officials to prevent conflicts of interest and report acts of corruption. The article is intended to eliminate "impunity by public officials at all levels, and increase transparency in the public sector." [FN53] The remainder of Article III recommends regulations that are applicable to private concerns, oversight and regulatory measures, systems for registering and hiring public officials, the maintaining of accurate records for publicly held companies, and the encouraging of civil society participation. [FN54]

The Inter-American Convention requires parties to criminalize domestic and foreign bribery for both the offeror and recipient. [FN55] Article VI defines acts of corruption as (1) the soliciting or accepting of any article of value or benefit in exchange for any act or omission in the performance of public functions; (2) the offering or granting of any article of value or benefit in exchange for any act or omission in the performance of public functions; (3) any act or omission by a public official for a bribe; (4) fraudulent use or concealment of property derived from any corrupt act; and (5) conspiracy to commit an act of bribery. [FN56] Article VII requires State Parties to establish acts of corruption as criminal offenses in domestic law [FN57] and Article VIII requires each State Party to prohibit transnational bribery in order to promote "transparency, freedom, and fairness in international transactions." [FN58] Article VIII is especially important because, at the time the Inter-American Convention was signed, it was one of the only legislative initiatives, aside from the United States Foreign Corrupt Practices Act of 1977, requiring the punishment of transnational bribery. [FN59] Moreover, transnational bribery is more serious than local bribery because the contracts involve

higher amounts, foreign residency *565 facilitates impunity, and it leads to enrichment of some countries at the expense of others. [FN60] The Inter-American Convention does not require harmonization of sentencing approaches like the other Conventions. The Inter-American Convention's unique characteristics are important for developing countries in Latin America because it permits flexibility for each country. This is especially important in Latin America because many countries are transitioning to a market economy or are attempting to move past military dictatorships by developing democracies. Without flexibility in an international corruption treaty, many Latin American countries would not be able to satisfy the requirements of a unilateral convention and might end up making little or no effort to combat corruption.

4. Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention

The Organization for Economic Cooperation and Development (OECD) issued the first multilateral consensus against the bribery of foreign officials in 1994 and by 1997, thirty-four states had adopted the Convention on Combating Bribery of Foreign Officials in International Business Transactions (Anti-Bribery Convention). [FN61] The OECD sought to establish anti-bribery measures because scandals and economic crises demonstrated that "corruption distorts competition, undermines development, and destabilizes democracy." [FN62] The Anti-Bribery Act criminalizes bribery of foreign officials as well as complicity conspiracy and through domestic law. [FN63] The Anti-Bribery Convention provides a broad definition of "foreign official" because it includes officials of international organizations such as the World Bank and International Monetary Fund. [FN64] However, the Anti-Bribery Convention does not include political party officials in the "foreign official" definition and does not consider under the definition of bribery small facilitating payments to induce public officials to perform public functions. [FN65] Foreign subsidiaries of companies incorporated in signatory states also are not covered by the Anti-Bribery Convention. [FN66] Article 12 of the Anti-Bribery Convention provides a systematic monitoring program for implementation of the Convention. [FN67] Signatories are required to make bribery of foreign public officials an extraditable offense and provide effective legal assistance to states requesting assistance with criminal investigations and criminal or noncriminal proceedings. [FN68] The Anti-Bribery *566 Convention was narrowed in 1996 when the OECD recommended the "prohibition of tax deductibility of bribes to foreign officials," thereby reducing incentives for corruption by suppliers. [FN69] The OECD Working Group on Bribery monitors implementation of the Anti-Bribery Convention and compliance. Implementation assistance under the Anti-Bribery Convention includes regular reviews of steps taken by signatories to implement the OECD recommendations, receipt of notifications and other information submitted by participating states, and proposals to assist participating states in implementation of the OECD Anti-Bribery Convention. [FN70] Reviews are based on self-evaluation and mutual evaluation by participating countries while the working group recommendations address specific bribery issues and provide information to the public. [FN71]

IV. ANALYSIS

A. Effectiveness and Benefits of Preventive Measures

A legal framework that emphasizes transparency and provides clear rules and procedures helps ensure that both the government and the suppliers will follow the proper procedures, participate in true competition, and avoid corrupt practices. One of the most significant and effective preventive measures to correct corruption in public procurement is transparency. Transparency provides extensive benefits for government such as (1) economic benefits, (2) an enhanced confidence in the public procurement system, and (3) increased government integrity. [FN72]

Transparent procurement results in increased economic benefits for the government as

well as suppliers. First, increased government disclosure on bidding opportunities and increased information about the bid requirements lead to improved bids and more supplier confidence. In addition, the public also may develop increased confidence in the government. Transparency requires active disclosure of opportunities and results as opposed to passive disclosure. Active disclosure entails government effort to publicize and provide the media with bidding opportunities and results. Otherwise, passive disclosure may require suppliers, the media, and the public to search for hidden opportunities and contract recipients. The predictability that results from an open procurement system and consistent evaluation processes helps the government purchase good products and services and, as a result, improves taxpayers' support as citizens become aware that practices are legitimate and the government is getting the best deal for its money. [FN73]

***567** Transparent procedures also contribute to more efficient resource allocation "through increased competition and budgetary savings for governments." [FN74] Transparency increases competition by making the bid evaluation process clear, especially with respect to the bid announcements and evaluation criteria. The bid criteria should be clear and an impartial review authority should be established so that suppliers have the opportunity to "raise objections in advance if they consider that the criteria are not appropriate." [FN75] A high level of clarity leads to real competition and higher-quality bids, benefiting the government and society in general. For example, Guatemala reported 43 percent savings in medicine purchases after eliminating specifications favoring certain suppliers, and Nicaragua reduced its pharmaceutical budget by \$8 million after establishing a transparent procurement agency. [FN76] Another method of creating transparency and enhancing public confidence is establishing a review board or tribunal for disappointed bidders. Opportunity for review increases transparency and ensures compliance with the new procurement system because government officials and suppliers are aware that their actions may be reviewed by an independent entity. Providing a place for bidders and the government to go when a dispute arises helps keep the system transparent by addressing problems and identifying corrupt actors.

Another extremely important preventive measure is political will. Political will is essential to effective government and involves politicians as well as the private sector, civil society, and other individuals and groups. [FN77] Building political will involves increasing public awareness to create political consciousness about reform efforts and creating compliance and auditing agencies. [FN78] Using these methods creatively can be very effective in building long-term political will. For example, Thailand has used street theatre, musical performances, and local discussion groups, and nongovernmental organizations (NGOs) in Papua New Guinea published surveys on the public's political views. [FN79]

International organizations can help build political will through donations to key groups that are effectively fighting corruption and providing resources. One such organization is the World Bank's anticorruption course in seven African countries. [FN80] Another important aspect to building political will involves timing reform efforts to coincide with key political moments such as elections or leadership changes. At these times, government actors, especially politicians, seek to gain public support by advocating anticorruption reform. [FN81] After political platforms bring corruption and reform issues to the forefront ***568** of the political culture, it becomes difficult to hide corruption and set reform efforts aside, especially with a free and vigilant media. One of the most powerful tools in preventing corruption and cleaning up government is a free press. An independent media can open up communication channels and make the public aware of the government's actions and uncover corruption schemes. Freedom of the press is essential for civil society to help provide oversight and let the procurement actors know that corrupt practices will not be tolerated and that the press will not protect government corruption. The press is also important for increasing access to bidding and contract award information.

B. Effectiveness and Benefits of Criminal Measures in Procurement

Criminalizing corruption is very important for developed countries, and attempting to level the playing field creates a new standard among competing nations. Developing countries might not be respected at the international level if the new legal and judicial structures are not enforced. Although preventive measures build a more transparent procurement system, the problem in developing countries often arises in the enforcement area. Enforcement measures should be designed to identify corruption and provide methods of penalizing the actors.

Penalizing corrupt actors in the procurement arena requires methods of detecting corruption and a system for effectively punishing corrupt government and private sector actors. An auditing agency or other reviewing entity is the most effective mechanism for identifying corruption and providing the foundation for criminal prosecution. A reviewing entity should not only detect corruption, but also have the power to link the detection to punishment. [FN82] The auditing agency should be responsible for document retention to make the reporting and review process more efficient and less time-consuming. This can be done by circulating the auditing agency's investigative reports to the enforcement authorities.

Enforcement measures can be established within the criminal justice system or within the procurement system. Regardless of the system chosen, enforcement measures should be connected to the overall government reform and political environment. [FN83] The enforcement measures should be linked to the overall public management system. For example, when the government budget planning, procurement procedures, and enforcement measures are all connected, the government's steps are easier to track. [FN84] When procurement is taken into account within the government's overall budget planning, corruption becomes difficult to hide. Integrating the payment system for government contracts also will make corruption easier to detect and prosecute because it helps ensure on-time payments. [FN85] In many developing countries, ***569** delays in payments are used so that suppliers will pay bribes to the government officials to receive payment.

The criminal laws themselves are especially important because they will dictate how anticorruption measures will be enforced. Specific criminal law reforms should be drafted in accordance with sound legal principles that complement international law as well as the country's general legal reforms. These principles include (1) compliance with international human rights standards and international law; (2) nonrepressive and fair laws; (3) clear sentencing guidelines; (4) criminal laws that address all forms of corruption, including bribery; (5) periodic reviews and appropriate revisions of criminal laws; (6) adequate evidentiary laws to ensure the reviewing courts or boards can obtain evidence from individuals as well as companies; and (7) methods for the government to obtain the misallocated funds. [FN86] The global nature of government procurement and corruption requires adherence to international standards when reforming or establishing procurement law in a developing country. Balancing interests such as the right to privacy and criminal laws is a delicate matter and human rights principles should be considered throughout the drafting process. Additionally, international cooperation is an important aspect to procurement for developing countries for ensuring support for new reforms. Therefore, having in place the proper mechanisms for compliance with international treaties and extradition agreements is essential for international enforcement to take place. [FN87] Adherence to international norms and treaties also helps developing countries with repatriation of assets routed to other countries by corrupt officials or contractors. [FN88] This is especially important in large-scale corruption schemes that require more direct cooperation between senior officials in different countries. [FN89]

Law enforcement officials should be trained to investigate effectively to make responses to corruption more effective. Ensuring that enforcement officials operate independently, whether it be judicial or nonjudicial actors, is also important. This helps reduce opportunities for corrupt officials to "tamper with the investigation [and ensures] that the evidence will be credible when used in criminal or disciplinary proceedings." [FN90]

Prosecutorial independence is also effective when prosecutors have clear guidelines for deciding whether to continue with the prosecution or dispose of the case. Three instances in which criminal prosecutions might not be desirable are when (1) the conduct might not be a crime, (2) the evidence does not support prosecution, and (3) prosecution is not in the public interest. [FN91] The decision not to prosecute under these circumstances must be transparent and well documented so that other actors in the public procurement sector are not encouraged to ***570** engage in corrupt acts. [FN92] Informed prosecutorial decisions will encourage a more efficient enforcement system by avoiding unfruitful prosecutions and effectively identifying corrupt behavior.

C. Significance of the International Organizations and Conventions

1. Inter-American Convention

The Inter-American Convention was created with the intent to provide a comprehensive, sustained, practical, and unambiguous push to eliminate corruption in the Americas. The Inter-American Convention is considered a pioneering effort due to its comprehensive scope and multilateral participation. [FN93] The Organization of American States (OAS) put anticorruption efforts on its agenda as early as 1992 and, through a series of meetings and contribution from member states, developed the Inter-American Convention. The OAS and the Inter-American Convention have added efforts to fight corruption by approving the Inter-American Program for Co-operation in the Fight against Corruption to prepare model anticorruption legislation. [FN94] The mandatory assistance and cooperation between states is especially significant because it "is not contingent upon petitions from judges or the filing of a legal proceeding." [FN95] This helps both preventive and enforcement measures function seamlessly. The most important aspect of the Inter-American Convention is the specific implementation process to guarantee the Inter-American Convention's enforcement and effectiveness against fighting corruption. The Inter-American Convention's structure is effective because it provides for unilateral measures, regional cooperation, and criminalization of corruption. This structure is important for regional efforts to strengthen democracy and modernize participating governments. [FN96] For the procurement sector, general changes and support structure can help integrate the procurement system more effectively into the government so that review, auditing, and enforcement efforts are more cohesive. Without any meaningful institutions or mechanisms to implement the policies and requirements set forth in the Inter-American Convention, it would be impossible to harmonize their integration and would prevent government officials from effectively applying the treaty. [FN97]

2. OECD Anti-Bribery Convention

The 1997 OECD Convention is important because it has been at the forefront of anticorruption efforts in developing countries. The OECD Convention ***571** is especially important because it requires members to ratify national laws against bribery of foreign government officials. [FN98] Another important aspect of the OECD Convention is that several of its provisions are similar to the U.S. Foreign Corrupt Practices Act (FCPA) such as the definition and elements of bribery of foreign officials. The significant influence of the FCPA in the OECD Convention reflects the United States' efforts to level the playing field in international transactions because most non-U.S. officials relied on bribes. [FN99] The OECD Convention, like the FCPA, provides an exception for "facilitating payments." [FN100] Another potential problem with the OECD Convention is that it does not resolve issues other than conduct on the supply side of the transaction, such as the conduct of the bribe taker, thus resulting in the need for a more varied approach to address corruption concerns. [FN101] Another possible improvement for the OECD Convention would be to include anticorruption provisions or recommendations for aid-funded procurement (e.g., the World Bank) to ensure a comprehensive procurement system in developing countries. [FN102] The substantial similarities between the OECD Convention and the FCPA are significant

because it will help indicate which aspects of Western anticorruption and transparency regulations and norms will be most effective in countries such as Brazil, Mexico, and Turkey. As of December 2003, Brazil had passed several laws in the Criminal Code and a law providing the necessary definitions for the criminal laws. [FN103] In 2003, Mexico passed laws to increase transparency through increased access to information in addition to amendments designed to prevent corruption at the domestic level. [FN104] Both Brazil and Mexico published the text of the OECD Convention and ratified the Inter-American Convention. Throughout 2003, Turkey passed legislation providing definitions of corrupt offenses in its criminal law. [FN105]

3. U.N. Convention Against Corruption

The U.N. Convention Against Corruption is an especially important step for implementing reforms and building solid foundations for public procurement systems in developing countries. The U.N. Convention's comprehensive approach to fighting corruption incorporates lessons learned from regional and international anticorruption treaties and domestic legislation since *572 the 1990s. As of March 2005, there are 118 signatories to the U.N. Convention and 18 parties. [FN106] The Convention is not in effect yet because Article 68 requires the convention to enter into force ninety days after the thirtieth ratification is deposited. At this time, only Algeria, Iran, South Africa, Tunisia, and Vietnam have deposited reservations to the U.N. Convention. All five reservations are for Article 66, paragraph 2, which sets forth the dispute settlement procedures requiring negotiation, arbitration, and referral of the dispute to the International Court of Justice. As the U.N. Convention is signed by more parties and eventually ratified, it will become apparent whether the comprehensive approach to corruption with a flexible approach to procurement is effective in developing countries.

V. CONCLUSION AND RECOMMENDATIONS

Several opportunities for developing countries to reform procurement procedures exist and the U.N. Convention might be a key instrument over the next decade because it is the culmination of several years of anticorruption efforts. Cooperation among developing countries and with developed countries will be essential to creating fair competition at the international level. It is imperative for developing countries to establish transparency with the first procurement reforms and with overall governmental reforms. Otherwise, past corrupt practices will continue and the international treaties discussed will have been signed in vain. The most important steps for developing countries to take when attempting to eliminate corruption in the procurement process are establishing a transparent system in each part of the procurement process, adhering to the requirements and recommendations of international anticorruption treaties, and signing the U.N. Convention. With increased transparency and efficient procurement mechanisms in place, developing countries create the opportunity to improve their own governments as well as international competition for public procurement.

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[FN4]. Id. at 209.

[FN5]. Id. at 210.

[FN6]. Id.

[FN7]. Id.

[FN8]. RAJESH CHOUDREE, PREVENTING AND FIGHTING CORRUPTION AT THE GLOBAL LEVEL: INTERNATIONAL INSTRUMENTS, THE ROLES OF STATES AND CIVIL SOCIETY 5 (2002).

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[FN10]. John Linarelli, Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspectives, in PUBLIC PROCUREMENT: GLOBAL REVOLUTIONS 125, 128 (Sue Arrowsmith & Arwel Davies eds., 1998).

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[FN13]. Nancy Zucker Boswell, Combating Corruption: Focus on Latin America, 3 SW. J. L. & TRADE AM. 179, 183 (1996).

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[FN15]. Andrea D. Bontrager Unzicker, Note, From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery, 7 IND. J. GLOBAL LEGAL STUD. 655, 656 (2000).

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[FN17]. Brian C. Harms, Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption, 33 CORNELL INT'L L.J. 159, 165-66 (2000); see also Linarelli, supra note 10, at 128.

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[FN21]. Trepte, supra note 11, at 111.

[FN22]. Hunja, supra note 20, at 15.

[FN23]. POPE, supra note 1, at 214; see also Trepte, supra note 11, at 112- 13.

[FN24]. POPE, supra note 1, at 214.

[FN25]. Interview with Robert Hunja, supra note 9.

[FN26]. Hunja, *supra* note 20, at 17.

[FN27]. *Id.* at 18.

[FN28]. *Id.* at 18-19.

[FN29]. Cynthia Walker, *Setting up a Public Procurement System: The Six Step Method*, in *PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION 3* (Sue Arrowsmith & Martin Trybus eds., 2003).

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[FN31]. *Id.* at 3. The complete six-step method proposed by Cynthia Walker previously discussed in this section also includes support from highest political levels and good procurement training.

[FN32]. Joshua Schwartz, *On Globalization and Government Procurement*, in *PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION 23, 24-25* (Sue Arrowsmith & Martin Trybus eds., 2003).

[FN33]. Harms, *supra* note 17, at 185-87.

[FN34]. *Id.* at 188-92.

[FN35]. U.N. Convention Against Corruption, Oct. 31, 2003, art. 9, § 1, available at www.unodc.org/pdf/crime/convention-corruption/signing/Convention-e.pdf.

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[FN40]. *Id.* at 261-65.

[FN41]. *Id.* at 267.

[FN42]. Hors, *supra* note 19, at 163.

[FN43]. U.N. OFFICE ON DRUGS & CRIME, *supra* note 39, at 254.

[FN44]. *Id.* at 255.

[FN45]. *Id.* at 256-59. Case Study #17 provides examples of international monitoring authorities. See *id.* at 403-04.

[FN46]. U.N. Convention against Corruption, Oct. 31, 2003, art. 9, § 2(e), available at www.unodc.org/pdf/crime/convention-corruption/signing/Convention-e.pdf.

[FN47]. *Id.* arts. 15-27.

[FN48]. Id. arts. 30-42.

[FN49]. Zucker Boswell, supra note 13, at 180.

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[FN54]. Id. at 19-20.

[FN55]. Zagaris & Ohri, supra note 51, at 55-56.

[FN56]. MANFRONI, supra note 52, at 37-38.

[FN57]. Id. at 50.

[FN58]. Id. at 56.

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[FN62]. Barbara Crutchfield George et al., The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions, 37 AM. BUS. L.J. 485, 491-92 (2000).

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[FN64]. Id. at 501.

[FN65]. Zagaris & Ohri, supra note 51, at 69.

[FN66]. CHOUDREE, supra note 8, at 5-6.

[FN67]. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 LL.M. 1, 7.

[FN68]. Zagaris & Ohri, supra note 51, at 72.

[FN69]. Harms, supra note 17, at 176.

[FN70]. Zagaris & Ohri, supra note 51, at 73-74 (senior legal experts from all signatory states are part of the Working Group).

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[FN75]. POPE, supra note 1, at 213.

[FN76]. WORKING PARTY OF THE TRADE COMM., supra note 72, at 8.

[FN77]. POPE, supra note 1, at 41.

[FN78]. Id. at 42-44.

[FN79]. Id. at 42.

[FN80]. Id. at 45.

[FN81]. Id. at 46.

[FN82]. Hors, supra note 19, at 164.

[FN83]. Interview with Robert Hunja, supra note 9.

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[FN85]. Id.

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[FN88]. Id. at 382.

[FN89]. Id.

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[FN93]. Enrique Lagos, Foreward to CARLOS A. MANFRONI, THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION: ANNOTATED WITH COMMENTARY ix, ix (Michael Ford trans., Lexington Books 2003).

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[FN96]. Boswell, supra note 13, at 189-90.

[FN97]. Zagaris & Ohri, supra note 51, at 66.

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