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The Map is Not the Territory: How South Africa Followed the Anti-Corruption Roadmap and Got Lost Along the Way

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**THE MAP IS NOT THE TERRITORY:
HOW SOUTH AFRICA FOLLOWED
THE ANTI-CORRUPTION ROADMAP AND
GOT LOST ALONG THE WAY**

George Langendorf

ABSTRACT: The past thirty years have seen the emergence of a global consensus against corruption. Work has been done in order to quantify why corruption is harmful; countries have moved from considering bribes paid to foreign officials as tax deductible to outlawing such bribes; and non-governmental agencies have proliferated, creating widely followed measurements and indices of corruption. In short, corruption has been identified, tracked, highlighted, spoken about, agreed upon, and discussed as frequently as topics such as globalization, disease and poverty.

All this has led to the emergence of a global consensus or “roadmap” for fighting corruption. This roadmap, which finds expression in multilateral conventions and treaties, and the domestic legislation they give rise to, prescribes combating corruption with a requiem of strong anti-corruption laws, independent institutions for prosecuting and investigating, strict standards governing the behavior of public officials and the management of public funds, bi-lateral commitments to international cooperation through legal assistance and extradition, and laws protecting the right of access to information. Countries following this roadmap should, in theory, see a reduction in corruption.

Yet this has not always been the case, particularly in Sub-Saharan Africa. Despite the presence of laws and protocols, corruption seems in fact to have worsened.

This paper charts the development of the anti-corruption roadmap and considers whether it has been effective in South Africa. Part I begins with an overview of the FCPA, the first and most influential anticorruption law. Part II reviews the multilateral treaties and conventions that proliferated in the 1990s and early 2000s and that outline the contemporary anticorruption roadmap. Part III focuses on the efforts of South Africa to follow the roadmap, and reviews

the laws and institutions it established after acceding to the instruments and treaties described in Part II. Part IV looks at what happened next, summarizing four major corruption scandals that have occurred in South Africa in recent years. Part V considers those scandals through the lens of the laws and institutions designed to prevent them, and discusses why they failed to do so.

This paper does not answer the question of why corruption is so hard to eradicate. Its more modest ambition is to show that laws and institutions, standing alone, are not enough.

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I. THE U.S. FOREIGN CORRUPT PRACTICES ACT

The modern anti-corruption movement can be traced back to the passage by the United States of the Foreign Corrupt Practices Act (hereinafter, FCPA) in 1977.¹ Designed as a response to the Watergate scandal and other corrupt activities revealed in U.S. Congressional hearings in the 1970s, the FCPA outlined the basic parameters of the offense of corruption, and served as the starting point from which future laws and treaties would depart.² The FCPA was aggressively enforced not only domestically, but in foreign countries as well, against companies that sometimes had only a tenuous connection to the United States. In this way, the FCPA also brought into consideration the idea of global markets and competition that would be infused into many of the multilateral treaties and conventions.

Due to its strong, and continuing, influence, this section briefly tells the story of the FCPA, including its history, its elements and defenses, and its impact on corporate governance.

A. A Brief History

In the 1970s, two events occurred roughly contemporaneously in the United States, which highlighted the prevalence and costs of corruption. First, and more well-known, the Watergate scandal led to the impeachment and subsequent resignation of President Richard Nixon. Second, and less celebrated, the U.S. Securities and Exchange Commission (“SEC”) revealed the results of an investigation detailing widespread bribery of foreign officials by U.S. companies.³

1. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1-3, 78ff (1999).

2. *Id.* at §§ 78dd-1(a), 2(a).

In response to public outrage and cries for integrity stemming from these events, Congress passed the FCPA, broadly prohibiting the payment of anything of value to a foreign official for the purpose of influencing him or her to act improperly, and requiring companies to keep books and records that accurately reflect all payments.⁴

In the 1980s, although there had been little enforcement of the FCPA, a perception arose in the business community that the FCPA put American companies at a disadvantage vis-à-vis other companies. So, in 1988 Congress amended the FCPA to add two affirmative defenses, and directed the President to negotiate a treaty with U.S. allies that would level the playing field.⁵

These negotiations took place within the Organization for Economic Cooperation and Development (“OECD”), and led to the passage in 1997 of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (hereinafter, OECD Convention), which obliged state parties to adopt laws outlawing the bribery of foreign officials.⁶

After the passage of the OECD convention, the U.S. Department of Justice (“DOJ”) and the SEC (collectively, the “Enforcement Agencies”) began to ramp up enforcement of the FCPA.⁷ In this regard, a key development was the introduction of settlements by the DOJ in 2004, whereby companies agree to pay fines and engage in corrective actions, and the government agrees not to file criminal charges. This enabled the Enforcement Agencies to resolve

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3. U.S. DEPARTMENT OF JUSTICE AND SECURITIES EXCHANGE COMMISSION, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 3 (2012) (describing the factors that led to the enactment of the FCPA) *available at* <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.
 4. FCPA, 15 U.S.C. §§ 78m, 78dd(1-3), 78ff.
 5. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 § 5003, 102 Stat. 1107 (1988).
 6. The OECD Convention led to the adoption of anticorruption laws in all 34 OECD states, and several others, including Russia and South Africa, which constitute a large percentage of the world’s economy. *See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> [hereinafter OECD Convention Ratification Status] (last visited Oct. 22, 2013).
 7. Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 430-31 (2012) (stating that “the FCPA was rarely enforced in the 1980s and 1990s” and that “from 2006 to 2010, the federal government brought more FCPA cases than it did from 1977 to 2005 combined”).

FCPA investigations without the risk and expense associated with proving their allegations at trial, and thus to cast their nets more broadly.⁸

Since 2004, the Enforcement Agencies have collected billions of dollars in fines from some of the world's largest companies, including an \$800 million fine against Siemens for widespread corrupt practices in numerous countries, and a \$580 million penalty against Halliburton for paying bribes to secure contracts to build a liquid-to-natural-gas facility in Nigeria.⁹ More recently, in 2013 the Enforcement Agencies concluded an enforcement action against Total S.A. that requires it to pay a criminal fine of \$245 million.¹⁰

B. A Closer Look: Elements, Defenses and Jurisdiction

At a high level, the FCPA prohibits the bribery of foreign officials and requires companies to take reasonable steps to accurately reflect all payments in their books and records.¹¹ In FCPA parlance, these requirements are typically discussed separately, with the former known as “the anti- bribery provisions” and the latter the referred to as the “accounting provisions.”¹²

To violate the FCPA's anti-bribery provisions, a payment must be made “corruptly,”¹³ consist of money or “anything of value,”¹⁴ be

8. *Id.* at 431-36.

9. Plea Agreement at 5, U.S. Dep't of Justice v. Siemens Aktiengesellschaft (Bankr. D. N.Y. Dec. 15, 2008), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-15-08siemensakt-plea.pdf>; *see also* Settlement Agreement, Sec. & Exch. Comm'n v. Siemens Aktiengesellschaft (D.D.C. Dec. 15, 2008), *available at*

<http://www.sec.gov/news/press/2008/2008-294.htm>; SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* <https://www.sec.gov/news/press/2009/2009-23.htm>; Dept. of Justice Office of Pub. Affairs, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), *available at* <http://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million>.

10. Deferred Prosecution Agreement at 6, United States v. Total, S.A., (E.D. Va. May 26, 2013) *available at* <http://www.justice.gov/iso/opa/resources/9392013529103746998524.pdf>.

11. FCPA, 15 U.S.C. § 78m(a)-(b).

12. *See, e.g.*, Cort Malmberg and Alison B. Miller, *The Foreign Corrupt Practices Act*, 50 AM. CRIM. L. REV. 1077 (2013) (discussing the “accounting provisions” and the “anti-bribery” provisions).

13. FCPA, 15 U.S.C. § 78dd-1(a)(as to “issuers”).

made “in order to obtain or retain business,”¹⁵ and be made to a “foreign official.”¹⁶ The anti-bribery provisions are theoretically subject to certain exceptions or affirmative defenses. Thus, even if the above elements are met, a payment does not violate the FCPA if it is a “facilitating payment,”¹⁷ a “reasonable or bona fide expenditure,”¹⁸ or a lawful payment in terms of the laws of the foreign country.¹⁹ However, in contrast to the broad interpretations of the elements, each of these limitations or defenses has been interpreted narrowly.²⁰

The accounting provisions are violated if a company fails to keep accurate books and records, knowingly falsifies those books and records, or fails to devise and maintain an adequate system of internal accounting controls.²¹ In many cases, if it cannot be shown that executives at a parent company were involved in corruption at a subsidiary, the SEC has taken the view that the company failed to adopt sufficient protocols to prevent corruption. This had led to charges that the accounting provisions are subject to strict liability.²²

14. *Id.*

15. *Id.* at § 78dd-1(a)(1).

16. *Id.*; see also Alexander L. Harisiadis, Comment, *Foreign Official, Define Thyself: How to Define Foreign Officials and Instrumentalities in the Face of Aggressive Enforcement of the Foreign Corrupt Practices Act*, 62 CATH. UNIV. L. REV. 507 (2013).

17. FCPA, 15 U.S.C. § 78dd-1(b); for a discussion of the “facilitation payment” exception, see generally, Beverley Earle & Anita Cava, *When is a Bribe not a Bribe? A Re-examination of the FCPA in Light of Business Reality*, 23 IND. INT’L & COMP L. REV. 111 (2013); Jon Jordan, *The OECD’s Call for an End to ‘Corrosive’ Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881 (2011).

18. FCPA, 15 U.S.C. § 78dd-1(c)(2).

19. *Id.* at § 78dd-1(c)(1) (as to “issuers”).

20. See Deiter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV. 37, 46 (2013) (stating that “although the FCPA bribery liability provision has received broad interpretation, the exceptisona nd defences to liability are narrow”); Kyle P. Sheahen, *I’m Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT’L L.J. 464, 466 (2010) (stating that the FCPA’s affirmative offenses are construed so narrowly as to be “illusory”).

21. FCPA, 15 U.S.C. § 78m(b)(2).

22. Irina Sivachenko, Note, *Corporate Victims of ‘Victimless Crime’: How the FCPA’s Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance*, 54 B.C. L. REV. 393, 414 (arguing that holding a company liable for unauthorized violations of its agents constitutes “strict vicarious liability”).

The FCPA imposes jurisdiction over three types of entities: “domestic concerns,” defined as

“any individual who is a citizen, national, or resident of the U.S.” or any entity with a principal place of business in the U.S. or that is organized under U.S. law;²³ “issuers,” meaning any company that has a class of securities registered with the SEC or that is otherwise required to file reports with the SEC, and that use “the [U.S.] mails or any means or instrumentality of interstate commerce” in furtherance of the scheme;²⁴ and “other persons,” meaning any entity or person that is neither an “issuer” nor a “domestic concern” if that person uses the mails or engages in interstate commerce in furtherance of any improper payment scheme “while in the territory of the United States.”²⁵

On its face, therefore, the FCPA is a relatively straightforward prohibition of bribery of foreign public officials, which applies to U.S. entities and foreign entities making use of the U.S. mails or engaging in interstate commerce. In practice, however, the statute has been interpreted broadly and enforced aggressively.

C. Methods of Enforcement

The influence of the FCPA has everything to do with the way it has been interpreted and enforced by the Enforcement Agencies. In particular, the Enforcement Agencies have asserted broad extraterritorial jurisdiction; adopted broad interpretations of the meaning of key terms of the statute; employed aggressive theories based on agency, attempt, and conspiracy to encompass companies falling outside jurisdiction; and, perhaps most importantly, pursued settlements rather than convictions, an approach that enables these aggressive interpretations of the statute to avoid judicial scrutiny.

23. FCPA, 15 U.S.C. §§ 78dd-2(a),(h).

24. *Id.* at § 78dd-1(a). Many companies trade securities or issue depository receipts on U.S. stock exchanges. This provision brings them within the reach of the FCPA, whether or not they have a physical presence in the United States.

25. *Id.* at § 78dd-3(a). This is broader than the territorial jurisdiction that applies to issuers, because it covers not just the use of the U.S. mails or interstate commerce but also “any other act” in furtherance of the corrupt payment. *Id.*

1. Jurisdiction

In considering the reasons for the dramatic impact of the FCPA on companies worldwide, it is important to note that the Enforcement Agencies have interpreted the territorial jurisdiction applicable to “issuers” and “other persons” quite broadly, so that it is triggered by seemingly innocuous actions such as placing a call or sending an email or fax from, to or through the United States, sending a wire transfer from or to a U.S. bank, or otherwise using the U.S. banking system.

For example, JCG, a Japanese company, was part of a four-company joint venture that submitted a bid to design and build a liquefied natural gas plant on Bonny Island, Nigeria.²⁶ In order to secure the contracts, the joint venture hired agents to pay bribes to executives at the Nigerian national oil company.²⁷ The matter therefore involved a Japanese company doing business in Nigeria, and the only connection to the United States was that certain payments flowed through U.S. bank accounts, and several co-conspirators faxed or emailed information to colleagues in the United States. Nonetheless, the DOJ considered this a sufficient nexus with the United States for jurisdiction to attach, JCG eventually agreed to a settlement, including a payment of \$218 million.²⁸

Similarly, in 2006, Tenaris, a Luxembourg-based supplier of tubes and related services for the energy industry, paid an “agent” to provide it with confidential bidding information related to tenders issued by the Uzbeki state-owned oil company. Despite the fact that Tenaris was a Luxembourgian company doing business in Uzbekistan, the Enforcement Agencies asserted jurisdiction on the grounds that Tenaris traded depository receipts on the New York Stock Exchange, making it an “issuer,” and certain payments were paid via a New York bank.²⁹

26. Deferred Prosecution Agreement at Attachment A para. 2, *U.S. v. JCG Corporation* (S.D. TX. Apr. 6, 2011), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-dpa.pdf>.

27. *Id.* at para. 15.

28. *Id.* at para 6.

29. Deferred Prosecution Agreement at 1, 6(a), (m), Sec. & Exch. Comm’n v. Tenaris S.A., (May 17, 2011), *available at* <http://www.sec.gov/news/press/2011/2011-112-dpa.pdf>.

2. Interpretation

As stated above, a payment does not violate the FCPA unless it is made to a “foreign official.” The FCPA defines a “foreign official” as “any officer or employee of a foreign government,” as well as “any department, agency, or *instrumentality* thereof . . .”³⁰

The Enforcement Agencies have taken the position that state-owned entities (i.e. a national oil company, electric utility, or railroad) are “instrumentalities” of governments, and their employees are therefore “foreign officials” under the FCPA, and have aggressively prosecuted companies on this basis.³¹ Indeed, in the majority of FCPA enforcement actions, the alleged recipient of the bribe is an officer or employee of a state-owned company, rather than a member of government.³²

The Enforcement Agencies have pushed the definition of “foreign official” further still. They have taken the view that any employee within a state-run sector, such as a physician in a country where health care is nationalized, is a “foreign official” for FCPA purposes. The Enforcement Agencies recently collected \$60 million from Pfizer,³³ \$29.4 million from Eli Lilly,³⁴ and \$70 million

30. FCPA, 15 U.S.C. §78dd-2(h)(2)(A) (emphasis added).

31. See Mike Koehler, *The Façade of FCPA Enforcement*, 907 GEO. J. INT’L L. 907, 966 (2010) (“No enforcement agency interpretation contributes more to the façade of FCPA enforcement than the FCPA’s ‘foreign official’ element”).

32. The question of whether an employee of state-owned entity is a “foreign official” has recently been contested and has been found to be a question of fact. See, e.g., *United States v. Aguilar, et al.*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011) (holding that the Comisión Federal de Electricidad, an electric utility that is wholly owned by the Mexican government, could be an agency or instrumentality of the Mexican government); *United States v. Carson et al.*, No. SACR 09-00077-JVS, 2011 WL 5101701, at *3 (C.D. Cal. May 18, 2011) (concluding that “ultimately the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact.”). The *Carson* court set forth a list of relevant factors that includes the foreign state’s degree of control over the state-owned entity; the purpose of the SOE’s activities; the SOE’s obligations, privileges and powers to administer its functions; and the extent of ownership or financial support provided by the state. *Id.* at *4.

33. Deferred Prosecution Agreement, *U.S. v. Pfizer H.C.P. Corporation* (D.D.C. Aug. 7, 2012), available at: <http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf> (last visited 16 January 2012); U.S. Sec. & Exch. Comm’n, SEC Files Settled FCPA Charges Against Pfizer Inc. and Wyeth LLC (Aug. 8, 2012), <https://www.sec.gov/litigation/litreleases/2012/lr22438.htm>.

34. U.S. Sec. & Exch. Comm’n, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012),

from Johnson & Johnson,³⁵ all on the theory that bribery of doctors in countries with nationalized healthcare constitutes bribery of a “foreign official” under the FCPA.

3. Legal Theories

In addition to broad interpretations of the elements and jurisdictional reach of the FCPA, the Enforcement Agencies have also employed concepts such as successor liability, subsidiary liability, and conspiracy to reach entities and schemes that would otherwise fall outside the ambit of the FCPA.

Successor liability involves holding acquirers liable for failure to uncover, or uncovering and not disclosing, corruption in an acquired company, even if the conduct took place years before the acquisition. This plays a role in a large percentage of FCPA enforcement actions. In 2011, for example, the SEC fined Diageo for improper payments that were made by employees of its subsidiaries in India, South Korea and Thailand to increase the placement and promotion of Diageo products, even though the payments were made before Diageo acquired those subsidiaries.³⁶ The DOJ’s action against Johnson & Johnson in the same year was based on corrupt practices at DePuy, a company it had recently acquired, which made corrupt payments to doctors at publicly owned hospitals in Greece, and the insufficiency of steps taken by Johnson & Johnson to halt these practices both pre- and post-acquisition.³⁷

Subsidiary liability refers to the Enforcement Agencies’ penchant for holding parent companies liable for improper conduct that occurs at the subsidiary level. In 2012, for example, over 50% of

<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487116>; U.S. Sec. and Exch. Comm’n v. Eli Lilly and Company, No. 1:12-cv-02045 (D.D.C. filed Dec. 20, 2012), *available at*: <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-273.pdf>.

35. U.S. Sec. and Exch. Comm’n v. Johnson & Johnson, No. 1:11-cv-00686 (D.D.C. Apr. 8, 2011) *available at*: U.S. Sec. & Exch. Comm’n, SEC Charges Johnson & Johnson with Foreign Bribery (Apr. 7, 2011), <https://www.sec.gov/news/press/2011/2011-87.htm>; Deferred Prosecution Agreement, U.S. Dep’t of Justice v. Johnson & Johnson (D.D.C. Apr. 6, 2011), *available at*:

<http://www.justice.gov/criminal/fraud/fcpa/cases/deputy-inc/04-08-11deputy-dpa.pdf>.

36. In the Matter of Diageo plc, Admin. Proceeding No. 3-14490, at 2-3, 9-10 (2011), *available at*: <http://www.sec.gov/litigation/admin/2011/34-64978.pdf> (last visited 22 October 2013).

37. U.S. Sec. and Exch. Comm’n v. Johnson & Johnson. *supra* note 33, at para 8, 16.

FCPA enforcement actions involved conduct that occurred in a local subsidiary of a multinational company. For example, in the enforcement action against Orthofix NV – a medical device company headquartered in the Netherlands – the SEC alleged that employees at Orthofix’s wholly- owned subsidiary in Mexico, Promeca, had bribed officials at the Instituto Mexicano del Seguro Social (IMSS), the state-owned provider of social services and health care. Neither the SEC or DOJ alleged any wrongful conduct or specific knowledge on the part of the parent company, but nonetheless Orthofix settled and agreed, among other things, to pay a fine of \$5.4 million.³⁸

The Enforcement Agencies also regularly employ the United States’ general conspiracy and aiding and abetting statutes³⁹ to charge violations of the FCPA.⁴⁰ That is to say, even if any entity is not a “domestic concern,” “issuer,” or “other person” committing improper conduct with a nexus to the United States, the Enforcement Agencies may still allege that its parent company conspired to violate the FCPA, or aided and abetted in the FCPA violation, if they are subject to FCPA jurisdiction.⁴¹

38. This creates another challenge from a corporate governance perspective, because it requires a level of supervision over distant transaction that is difficult to achieve.

39. See 18 U.S.C. § 2(a).

40. Aiding and abetting is not an independent crime, thus the government must prove that an underlying violation was committed. The Enforcement Agency Guidelines state that, in enacting the FCPA in 1977, Congress explicitly noted that “the concepts of aiding and abetting and joint participation would apply to a violation under this bill in the same manner in which those concepts have always applied in both SEC civil actions and in implied private actions brought under the securities laws generally.” Unlawful Corporate Payments Act of 1977, H.R. 3815, 95th Cong. § 6 (1st Sess. 1977).

41. In the enforcement action against Smith & Nephew PLC, a medical device maker based in the UK, for example, the Enforcement Agencies alleged that employees at the US subsidiary were bribing Greek health care providers to use their products. The subsidiary was charged with violating the FCPA, and the parent company, even without any allegation of specific knowledge, was charged with conspiracy to violate the FCPA. Deferred Prosecution Agreement, U.S. Dep’t of Justice v. Smith & Nephew PLC (D.D.C. Feb. 3, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/smith-nephew/2012-02-01-s-n-dpa.pdf>.

See also U.S. Dep’t of Just. Off. of Pub. Aff., Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), *available at* <http://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546> (where aiding

4. Settlements

It should be clear from the foregoing that the SEC and DOJ enforce the FCPA aggressively; even more importantly is the fact that the FCPA is enforced almost entirely via settlement. Indeed, it is fair to say that today in the United States, deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) have almost entirely supplanted prosecution as a method of resolving FCPA investigations. For example, in 2012 the DOJ did not convict a single company of an FCPA violation, but nonetheless collected \$126.5 million in criminal fines from companies including Pfizer, Marubeni, Data Systems, Smith & Nephew, and BizJet, all under the auspices of DPAs. Similarly, every FCPA enforcement action in 2013 has been resolved either by DPA or NPA, including a recent DPA under which Total S.A. agreed to pay a criminal fine of \$245 million.⁴²

A DPA is in essence a settlement agreement whereby the government agrees to suspend criminal prosecution for a specified period of time, normally 1-3 years, and in exchange, the organization agrees to take certain steps, such as making admissions, paying a fine, implementing a compliance program, submitting annual reports, and terminating employees. If the organization complies with the terms of the agreement, the government typically will permanently dismiss the case at the end of the term.

To understand why the introduction of DPAs is so important, it is useful to consider the position of both the prosecutors and the organizations where DPAs or other settlements are available. On one side sits the government: expected to prosecute, chronically under-resourced, and faced with an exacting standard of proof. On the other side, often, is a multinational corporation: risk averse, concerned about corporate criminal conviction, afraid of individual pros-

and abetting was used in the context of a joint venture to reach a defendant where jurisdiction might otherwise have been lacking).

42. U.S. Dep't of Just. Off. of Pub. Aff., French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme, (May 29, 2013), <http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international>. Total also entered into a settlement with the SEC requiring it to disgorge an additional \$153 million. U.S. Sec. & Exch. Comm'n, SEC Charges Total S.A. for Illegal Payments to Iranian Official (May 29, 2013), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575006>.

ecution at the leadership level, and in possession of virtually unlimited resources to forestall, delay and appeal criminal convictions. Without a settlement mechanism, the two sides stare one another down, with the specter of a criminal trial functioning like a kind of mutually assured destruction.

Introducing DPAs to the mix of available outcomes dramatically changes the picture. From an organization's standpoint, although a DPA has some disadvantages, such as the admission of wrongdoing and the payment of a substantial penalty, it allows the company to avoid the expense, uncertainty and negative publicity of a criminal trial, and eliminates the risk of collateral consequences, such as debarment, which may accompany formal conviction.⁴³ From a prosecutor's perspective, a DPA achieves much the same result as a conviction, such as disruption of the bribery scheme and disgorgement of profits, but does not require the same outlay of resources, or carry the risk of loss, thereby allowing limited resources to be utilized much more effectively.⁴⁴ Crucially, these settlements also shield the Enforcement Agency's interpretations of the law from judicial scrutiny,⁴⁵ and remove the incentive defendants would otherwise have to contest them.

In short, the availability of DPAs creates an incentive for both sides to settle rather than incur the risks and costs associated with a criminal trial, and shields Enforcement Agency interpretations from judicial scrutiny. This in turn facilitates a dramatic increase in enforcement activity.

43. Ross MacDonald, Note, *Setting Examples, Not Settling: Toward a New SEC Enforcement Paradigm*, 91 TEX. L. REV. 419, 427, 431-33 (2012) (noting that by settling instead of prosecuting, the SEC is able to extract cooperation from the defendant, maximize its resources and avoid litigation risk).

44. See Lanny A. Breuer, Address to the New York City Bar Association (Sept. 13, 2012), available at: <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html> (last visited Feb. 11, 2014).

45. John Ashcroft and John Ratliff, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J. L. ETHICS & PUB. POL'Y 25, 34 (2012) ("Because protesting such questionable interpretations in a court of law would first require a company to be criminally indicted . the company is left between the proverbial rock and a hard place with no real choice but to accept whatever fines, penalties, or other requirements prosecutors choose to impose upon it").

D. Impact on Corporate Governance

As we have seen, the wording of the FCPA is susceptible to more modest interpretations. For example, the Enforcement Agencies could have interpreted the jurisdictional requirement to call for a substantial nexus to the United States, rather than mere usage of U.S. emails or a correspondent U.S. bank. They could have interpreted “public official” to exclude employees of state-owned companies, which would have eliminated more than half of enforcement actions. Perhaps most importantly, they could have actually prosecuted companies they believed were guilty, and declined to charge where they lacked evidence, rather than employing DPAs or NPAs, an approach that in many cases imposes the burden on shareholders, rather than the perpetrators or even company management.⁴⁶

Instead, however, the Enforcement Agencies have applied the FCPA aggressively, resulting in a statute that, in practice, reaches almost any corrupt payment made by a person, company, or their agent or subsidiary, with any connection to the United States, no matter how slight, or by anyone who conspires with or aids and abets in the making of such a payment, if that payment is made to any government official, or any employee of any state-owned company, or anyone who works in a nationalized sector. Given the Hobson’s choice of either acquiescing to the Enforcement Agencies’ interpretations via settlement, or facing a criminal trial, risk-averse companies unanimously choose the former.

The aggressive enforcement of the FCPA has had a dramatic effect on corporate governance. In particular, the threat of penalties and criminal liability has motivated companies to establish anti-corruption policies and procedures, which are now key components of a modern-day corporate governance regimen.

A contemporary anti-corruption compliance policy might require that:

- (1) payments to offshore entities be restricted or subject to special approvals, particularly where a foreign government or SOE is insisting upon the payment;

46. See MacDonald, *supra* note 41, at 421-22.

- (2) contract prices and even profit margins be subject to auditing and review to ensure prices are not inflated to provide funding for slush funds or kickbacks;
- (3) agents and distributors be investigated and subjected to background and credit checks in an attempt to root out conflicts of interest and self-dealing;
- (4) interactions with government officials or employees of state-owned entities be formalized, and meetings recorded;
- (5) company contracts be modified to require both sides not to engage in any conduct that constitutes corruption;
- (6) the books and records of suppliers and distributors be reviewed to ensure all payments are properly recorded;
- (7) detailed policies be created specifying what gifts, if any, may be given to clients, and what amount of entertainment may be paid for;
- (8) contracts at the subsidiary level be routinely reviewed, with any common corruption red flags, such as payments to offshore accounts or “consultants,” receiving additional scrutiny; and
- (9) financial statements at both the subsidiary and corporate level be routinely audited to ensure payments are properly reflected.

These are merely some of the many policies and procedures that companies put in place in order to forestall corruption. Many multilateral entities and non-governmental organizations now publish guidelines and best practices regarding such procedures.⁴⁷

All this compliance comes at a high cost, to say nothing of the cost of conducting an FCPA compliance overhaul at the behest of the

47. See, e.g., OECD, *Good Practice Guidance on Internal Controls, Ethics and Compliance* (Feb. 18, 2010), available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>; TRANSPARENCY INTERNATIONAL, *BUSINESS PRINCIPLES FOR COUNTERING BRIBERY* (2nd ed. 2009), available at http://archive.transparency.org/global_priorities/private_sector/business_principles; UK MINISTRY OF JUSTICE, *THE BRIBERY ACT 2010: GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING* (Mar. 30, 2011), available at <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

Enforcement Agencies.⁴⁸ There are some who suggest that compliance costs exceed the level of deterrence actually achieved. Indeed, the requirements above have spawned an entirely new industry, sometimes derisively referred to as “FCPA Inc.,” consisting of lawyers, auditors, forensic investigators, and compliance executives whose jobs are devoted to policing compliance with the new anti-corruption regimes.

However, it is also generally conceded that the threat of enforcement actions, and indeed of criminal liability, has contributed to a dramatic rise in the level of awareness regarding corruption. Moreover, as discussed in the next section, the FCPA and the OECD Convention served as the foundation of the treaties and conventions that would create the “roadmap” for fighting corruption around the globe.

II. THE MAP: TREATIES AND CONVENTIONS FOR COMBATING CORRUPTION

While the FCPA has been the dominant anti-corruption statute over the past several decades, it is far from the only development in anti-corruption law. To the contrary, in parallel with the rise of the FCPA, the past twenty years have seen a barrage of legislation, treaties, conventions, guidelines and other instruments designed to eliminate corruption. These include *inter alia* the 1996 OAS Inter-American Convention Against Corruption; the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the 1999 Council of Europe Criminal Law and Civil Law Conventions on Corruption; the 2003 United Nations Convention Against Corruption (UNCAC); and the 2003 African Union Convention on Preventing and Combating Corruption (AU Convention) (collectively, “the Instruments”).⁴⁹

48. See Samuel Rubenfield, *Avon Begins FCPA Settlement Talks*, WALL ST. J. (Aug 1, 2012, 11:21AM) (reporting that Avon spent \$280 million investigating allegations of bribery in China and around the world) <http://blogs.wsj.com/corruption-currents/2012/08/01/avon-begins-fcpa-settlement-talks/> (last visited Feb. 11, 2014).

49. OAS Inter-American Convention Against Corruption, Mar. 29, 1996, B-58; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD, Nov. 21, 1997 [hereinafter OECD Convention]; Council of Europe Criminal Law Convention on Corruption, Jan. 1, 1999, E.T.S. 173; Civil Law Convention on Corruption, Nov. 4, 1999, E.T.S. 174; United Nations Convention Against Corruption, 2349 U.N.T.S. 41 [hereinafter UNCAC]; African Union Conven-

As of 2014, these Instruments cover most of the countries in world, with many nations being party to multiple instruments. For example, UNCAC boasts 140 signatories and 170 state parties;⁵⁰ all 34 of the members of the OECD are state parties to the OECD Convention, along with six other countries that are not OECD members: Argentina, Brazil, Bulgaria, Columbia, Russia and South Africa;⁵¹ and the AU Convention has been signed by 48 African countries, and ratified by 34 of those countries.⁵²

The Instruments represent a global consensus on the ills associated with corruption and the necessary mechanisms for combating the problem. Taken together, they represent a “roadmap” for fighting corruption.

A. Anti-corruption Laws

A primary purpose of each of the Instruments, and a key aspect of the roadmap, is the definition and criminalization of the offense of “corruption.” Although the definitions of “corruption” vary slightly, they are all fundamentally similar to the offense of bribery under the FCPA: the offering, giving or receiving of anything of value in order to improperly influence the actions of another party, usually a public official.⁵³

tion on Preventing and Combating Corruption, *adopted* Jul. 11, 2003, 2860 U.N.T.S. 50008 (entered into force Aug. 5, 2006) [hereinafter AU Convention]. In addition to the treatises and conventions referenced above, there is considerable “soft law” on corruption. See WORLD BANK, WORLD BANK GROUP INTEGRITY COMPLIANCE GUIDELINES (Feb. 1, 2011), available at http://siteresources.worldbank.org/INTDOII/Resources/IntegrityComplianceGuidelines_2_1_11web.pdf; TRANSPARENCY INTERNATIONAL, *supra* note 45. There are also sector-specific initiatives. See *What is the EITI?* EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, available at <https://eiti.org/eiti>.

50. *United Nations Convention Against Corruption: Signature and Ratification Status as of 1 April 2015*, UNITED NATIONS OFFICE OF DRUGS AND CRIME [UNODC] (Apr. 1, 2015) [hereinafter Signatories to the UNCAC], <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.
51. *OECD Convention Ratification Status*, *supra* note 6.
52. *List of Countries Which have Signed, Ratified/Acceded to the OAU Convention on the Combating and Prevention of Terrorism*, AFRICAN UNION (Feb. 21, 2013), <http://www.au.int/en/sites/default/files/Convention%20on%20Terrorism.pdf> (last visited Jan. 21, 2014) [hereinafter AU Convention Signatories].
53. FCPA, 15 U.S.C. §78dd-1(a); UNCAC 2349 U.N.T.S. 41, art. 15(a), (b) (requiring signatories to adopt legislation criminalizing “the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage . . . in order that the official act

However, the Instruments broaden the scope of “corruption” significantly in comparison. For example, while the FCPA only prohibits “active” bribery – the offering or payment of bribes – the Instruments also criminalize passive bribery – the solicitation or receipt of bribes.⁵⁴ Similarly, while the FCPA applies only to bribery of public officials, the Instruments, with the exception of the OECD Convention, apply to bribery in both the public and the private sector.⁵⁵ The Instruments also require state parties to criminalize the possession, concealment, and laundering of the proceeds of corruption,⁵⁶ and create the offense of “illicit enrichment,” which puts the burden on a government official to show that his or her wealth was acquired legitimately.⁵⁷

The Instruments call for state parties to pass ancillary legislation and make modifications to criminal procedure to assist with the prosecution of corruption as well, such as the protection of witnesses from retaliation or intimidation,⁵⁸ and whistle-blowers

or refrain from acting in the exercise of his or her official duties” as well as the solicitation or acceptance by a public official of the same); AU Convention, 28600 U.N.T.S. 50008, art. 4(1)(a), (b) (prohibiting the “solicitation or acceptance . by a public official or any other person, of any goods of monetary value, or other benefit . in exchange for any act or omission in the performance of his or her public functions” as well as the offering or granting of same to a public official); OECD Convention art. 1(1).

54. *Id.*; South African Development Community Protocol Against Corruption art. 1(a), adopted Aug. 14, 2001 (entered into force July 6, 2005) [hereinafter SADC Protocol].
55. *E.g.*, AU Convention, *supra* note 47, at art 4(1)(a), (b), (e); UNCAC, *supra* note 47, art. 7, 12, 21; SADC Protocol, *supra* note 52, at art. 1(e).
56. *See, e.g.*, SADC Protocol, *supra* note 52, at art. 3(g); AU Convention, *supra* note 47, at art. 4(1)(h); UNCAC, *supra* note 47, at art. 14(1), 23(1), 52 (addressing “measures to prevent money-laundering,” prohibiting the “laundering of proceeds of crime,” and “governing the prevention and detection of transfers of proceeds of crime”).
57. *See, e.g.*, AU Convention, 28600 U.N.T.S. 50008, art. 4(1)(g); UNCAC, 2349 U.N.T.S. 41, art. 20 (providing that state parties must consider establishing illicit enrichment as a criminal offence, and defining it as “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”).
58. *See, e.g.*, UNCAC, 2349 U.N.T.S. 41, art. 32(1) (requiring each state party to “provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony”); AU Convention, *supra* note 47, at art. 5(5) (requiring state parties to undertake to “adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities”).

from reprisals.⁵⁹ State parties must also recognize inchoate crimes such as attempt, conspiracy, and aiding and abetting corruption.⁶⁰

Additionally, the Instruments provide state parties with expansive jurisdiction over corruption. For example, aside from jurisdiction over corruption committed in its territory, UNCAC also allows jurisdiction where the offense is committed by or against a state party national, or a “stateless person who has his or her habitual residence in [state party] territory.”⁶¹ The AU Convention goes further still, and permits jurisdiction “when the offence, although committed outside its jurisdiction, affects, in the view of the state concerned, its vital interests or the deleterious or harmful consequence or effects of such offences impact on the state party.”⁶² Each of the instruments also specifies that jurisdiction lies as against legal persons as well as natural persons.⁶³

B. Institutions

As a second component of the roadmap, the Instruments require state parties to establish institutions for investigating and prosecuting corruption. For instance, the AU Convention directs state parties to “establish, maintain and strengthen independent national anti-

59. *See, e.g.*, UNCAC, 2349 U.N.T.S. 41, art. 33 (providing that each state party must consider incorporating “measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds . . . any facts concerning offences established in accordance with [UNCAC]”); AU Convention, 28600 U.N.T.S. 50008, art. 5(6) (requiring state parties to “adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals”).

60. *See, e.g.*, UNCAC, 2349 U.N.T.S. 41, art. 27(1) (requiring prohibition of “participation in any capacity such as an accomplice, assistant or instigator”); SADC Protocol art. 3(1)(h) (defining “acts of corruption” to include “participation as a principal, co-principal, agent, instigator, accomplice, or accessory after the fact . . . or attempted commission of, in any collaboration or conspiracy to commit [corruption]”); AU Convention, 28600 U.N.T.S. 50008, art. 4(1)(i) (outlawing attempted corruption as well as any participation including being an agent, accomplice, instigator, co-conspirator).

61. UNCAC, 2349 U.N.T.S. 41, art. 42(2).

62. AU Convention, 28600 U.N.T.S. 50008, art. 13(1)(d).

63. *See, e.g.*, UNCAC, 2349 U.N.T.S. 41, art. 26 (requiring state parties to establish the liability of legal persons for acts of corruption).

corruption authorities or agencies.”⁶⁴ State parties may either create a single anti-corruption agency or divide the task among multiple entities; however, the institution(s) must be sufficiently independent to perform its function without fear of interference by the executive branch or legislature.⁶⁵

The Instruments also require that these institutions be given the necessary powers, including the authority to freeze and seize the fruits of corruption. For example, the AU Convention provides that each state party shall adopt measures to enable its authorities to “search, identify, trace, administer and freeze or seize the instrumentalities and proceeds of corruption pending a final judgment,” and to enable “confiscation of proceeds or property, the value of which corresponds to that of such proceeds, derived, from offences established in accordance with this convention.”⁶⁶

C. Public Administration

A third component of the roadmap requires state parties to make affirmative commitments regarding government administration. This includes agreeing to adopt a system of accounting, which tracks and accurately reflects the expenditure of public funds. The AU Convention, for instance, requires state parties to adopt legislation to “create, maintain and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts . . . and management of public goods and services.”⁶⁷

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64. *See, e.g.*, AU Convention, 28600 U.N.T.S. 50008, art. 5(3); SADC Protocol art. 4(1)(g) (requiring parties to create and maintain “institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption”); UNCAC, 2349 U.N.T.S. 41, art. 6(2) (requiring state parties to grant enforcement institutions “the necessary independence . . . to enable the body or bodies to carry out its or their functions effectively and free from any undue influence”).
65. *See, e.g.*, UNCAC, 2349 U.N.T.S. 41, art. 6(1), (2) (requiring parties to ensure the existence of a body or bodies to investigate and prosecute corruption).
66. *See, e.g.*, AU Convention, 28600 U.N.T.S. 50008, art. 16(1), (2); SADC Protocol art. 8(1) (requiring state parties to adopt measures to enable “confiscation of proceeds derived from offences established in accordance with this Protocol, or property the value of which corresponds to that of such proceeds; and its competent authorities to identify, trace and freeze or seize proceeds, property or instrumentalities for the purpose of eventual confiscation”).
67. *See, e.g.*, AU Convention, 28600 U.N.T.S. 50008, art. 5(4); UNCAC, 2349 U.N.T.S. 41, art. 9(2) (requiring that each party shall “promote transparency and accountability in the management of public finances” such as adopting a national budget, reporting on

This component also encompasses open and transparent procurement of goods and services. The UNCAC in particular emphasizes the importance of procurement, obligating state parties to “establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making,”⁶⁸ and that such systems must address distribution of information relating to tenders, conditions for participation, criteria for evaluating bids, and an effective system of review and appeal.⁶⁹

Finally, the Instruments require state parties to hold government officials to a code of conduct or other similar standards. The UNCAC states that state parties shall “endeavor to apply . . . codes or standards of conduct for the correct, honorable and proper performance of public functions,” and provides for other aspects such as disclosure of conflicts of interest and disciplinary measures for violators.⁷⁰ These codes are not set forth in the Instruments them-

revenue and expenditure, and adopting a “system of accounting and auditing standards and related oversight”).

68. See, e.g., UNCAC, 2349 U.N.T.S. 41, art. 9(1); SADC Protocol art. 4(1)(b) (stating that state parties will “create, maintain and strengthen systems of hiring and procurement of goods and services that ensure the transparency, equity and efficiency of such systems”).
69. UNCAC, 2349 U.N.T.S. 41, art. 9(1)(a)-(e). The importance of procurement is also addressed in an entirely separate set of instruments. See, e.g., OECD, *Principles for Integrity in Public Procurement* (2009), available at <http://www.oecd.org/gov/ethics/48994520.pdf>; United Nations Commission on International Trade Law (UNCITRAL), *Model Law on Public Procurement* (2014); World Trade Organization (WTO), *Agreement on Government Procurement* (1994), available at https://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf. Most jurisdictions also provide for debarment of bidders convicted of fraudulent offences. See, e.g., Council Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, art. 45, 2004 O.J. (L 134), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0018&from=EN>; World Bank, *Guidelines, Procurement of Goods, Works, and Non-Consulting Services, Under IBRD Loans and IDA Credits and Grants, by World Bank Borrowers*, art. 1.16 (2011), available at http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1308067833011/Procurement_GLs_English_Final_Jan2011.pdf; *UNCITRAL Model Law on Public Procurement*, art 21 (2014).
70. UNCAC, 2349 U.N.T.S. 41, art. 8; see also, e.g., SADC Protocol art. 4(1)(a) (providing that each party will create, maintain and strengthen “standards of conduct for the correct, honourable and proper fulfillment of public functions as well as mechanisms to enforce those standards”); AU Convention, 28600 U.N.T.S. 50008, art. 7(2) (providing

selves, but have the effect of imposing fiduciary duties on public servants vis-à-vis the state and state funds.

D. International Cooperation

The fourth key aspect of the anti-corruption roadmap is international cooperation. This reflects the fact that many crimes related to corruption are international in nature; involve multinational corporations, and offshore entities and accounts; and thus require cooperation between states.⁷¹ Accordingly, the Instruments provide that state parties will extradite persons suspected of committing corruption.

The key provisions regarding extradition are: 1) corruption is deemed an extraditable offense under any existing treaties between state parties;⁷² 2) corruption must be included as an extraditable offence in any extradition treaty concluded between state parties in the future;⁷³ 3) if a party receives a request from another state party with which it does not have an extradition treaty, the Instrument may serve as the legal basis for extradition;⁷⁴ and 4) if a state party refuses to extradite a person accused of corruption on the basis that the person is a national, it must prosecute the alleged offender itself and inform the requesting state party of the outcome.⁷⁵

State parties also agree to provide each other with legal assistance in the investigation and prosecution of corruption. This consists of a general undertaking to provide the broadest possible measure of mutual legal assistance in the investigation and prosecution of

for the creation of a committee to “establish a code of conduct and to monitor its implementation, and sensitize and train public officials on matters of ethics”).

71. See L. Song Richardson, *Convicting the Innocent in International Transnational Cases, a Comparative International Institutional Approach to the Problem*, 26 *BERK. J. INT’L. LAW* 62, 80-81 (2008) (discussing the difficulty of prosecuting international crime and the purpose of mutual legal assistance treaties).
72. See, e.g., UNCAC, 2349 U.N.T.S. 41, art. 44(4); AU Convention, 28600 U.N.T.S. 50008, art. 15(2); SADC Protocol art. 9(2).
73. See, e.g., UNCAC, 2349 U.N.T.S. 41, art. 44(4); AU Convention, 28600 U.N.T.S. 50008, art. 15(2); SADC Protocol, *supra* note 52, at art. 9(3).
74. See, e.g., UNCAC, 2349 U.N.T.S. 41, art. 44(5); SADC Protocol art. 9(4).
75. See, e.g., UNCAC, 2349 U.N.T.S. 41, art. 44(11); AU Convention, 28600 U.N.T.S. 50008, art. 15(6); SADC Protocol, *supra* note 52, at art. 9(7).

corruption,⁷⁶ as well as commitments to assist with specific tasks, such as service of legal documents, execution of searches and seizures, examinations of objects and sites, identification or tracing of the proceeds and instrumentalities of crimes, and provision of bank, property and governmental records.⁷⁷ State parties also agree not to invoke bank secrecy as a mechanism to resist providing information, including financial information.⁷⁸

In fact, mutual legal assistance is such an important part of the roadmap that, for any state parties to the UNCAC that do not have a such an agreement amongst themselves, the UNCAC functions as a legal basis for such assistance, and provides rules regarding *inter alia* when assistance should be rendered, the transfer of persons, and the procedures for sending and responding to requests.⁷⁹ The UNCAC also provides for cooperation with regard to asset confiscation, requiring state parties to “take such measures as may be necessary to permit its competent authorities to give effect to an order of

76. See, e.g., UNCAC, 2349 U.N.T.S. 41, art. 46(1); SADC Protocol art. 10(1) (providing that “state parties shall afford one another the widest measure of mutual assistance by processing requests from authorities that have the power to investigate or prosecute the acts of corruption described in the Protocol); AU Convention, 28600 U.N.T.S. 50008, art. 18(1) (requiring the parties to provide each other with “the greatest possible technical cooperation and assistance in dealing immediately with requests from authorities that are empowered by virtue of their national laws to prevent, detect, investigate and punish acts of corruption and related offences”).

77. See, e.g., UNCAC, 2349 U.N.T.S. 41, art. 46(3); SADC Protocol art. 10(1)-(2) (provide that state parties will assist one another to “obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption” as well as “the broadest possible measure of assistance in the identification, tracing, freeing, seizure and confiscation of property, instrumentalities or proceeds obtained, derived from or used in the commission of offences established in accordance with this protocol”).

78. See, e.g., SADC, 2349 U.N.T.S. 41, art. 8(2), (3) (providing that each state party shall “empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized and shall not invoke bank secrecy as a basis for refusal to provide assistance” [to a requesting state party]); AU Convention, 28600 U.N.T.S. 50008, art. 17(1), (3) (requiring that each state party shall adopt such measures as are necessary to “empower its courts or other competent authorities to order the confiscation or seizure of banking, financial or commercial documents with a view to implementation of this convention” and that “state parties shall not invoke banking secrecy to justify their refusal to cooperate with regard to acts of corruption and related offences by virtue of this Convention”).

79. UNCAC, 2349 U.N.T.S. 41, art. 46(9)-(29).

confiscation issued by a court of another state party,”⁸⁰ and to “take such measures as would permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting state party that provides a reasonable basis [for such action].”⁸¹

E. Access to Information

The final aspect of the roadmap goes beyond the immediate conduct of the participants in corrupt activities, and touches on the rights of members of society vis-à-vis acts of corruption. Among the most important of these is the right of access to information regarding corruption cases for citizens and the media.

In support of this right, the AU Convention provides that “each state party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offen[s]es,”⁸² and that each state party undertakes to “ensure that the Media is given access to information in cases of corruption and related offen[s]es.”⁸³ The South African Development Community Protocol (“SADC Protocol”) provides that state parties will “create, maintain and strengthen . . . mechanisms to encourage participation by the media, civil society and non-governmental organizations in efforts to prevent corruption.”⁸⁴ In addition to affording access to information for citi-

80. *Id.* at art. 54(2).

81. *Id.* The AU Convention also provides that state parties should hand over to one another any objects required by a requesting party as evidence of the offence of corruption or which has been acquired as a result of the offence for which extradition is requested and which, at the time of arrest, is found in the possession of the persons. AU Convention, 28600 U.N.T.S. 50008, art. 16(2).

82. AU Convention, 28600 U.N.T.S. 50008, art. 9. UNCAC requires that each state party will “take such measures as may be necessary to enhance transparency in its public administration” including “adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration”. UNCAC, 2349 U.N.T.S. 41, art. 10(a).

83. AU Convention, 28600 U.N.T.S. 50008, art. 12(4).

84. SADC Protocol art 4(i); *see also* UNCAC, 2349 U.N.T.S. 41, art 13(1)(b), (d) (requiring state parties to by taking measures such as “ensuring that the public has effective access to information” and “respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption”).

zens and the media, the Instruments also require state parties to take steps to encourage the involvement of civil society and non-governmental organizations in the fight against corruption.⁸⁵

The roadmap goes well beyond the FCPA's prohibition on bribery of foreign officials. By agreeing to the Instruments, state parties not only agree to criminalize bribery of foreign officials, but also to outlaw both active and passive corruption in both the public and private sectors, create politically independent enforcement institutions, manage and account for public funds appropriately, require public servants to abide by codes of ethics, protect witnesses from intimidation and whistle-blowers from reprisals, adopt transparent public procurement systems, allow access to information to citizens and the media, and cooperate with other nations in investigating and prosecuting corruption.

In short, the roadmap represents a modern consensus that, where society operates on the principles of transparency, competition, fairness, and accountability, and where those principles are embodied in the laws and institutions governing public sector business, corruption will not thrive. Given that most of the countries in the world have become parties to the Instruments, one might expect that if countries are able to successfully implement the roadmap, they will be successful in the fight against corruption.

The remainder of this paper analyzes whether this holds true, using South Africa as a lens through which to determine whether success in implementation of the anti-corruption roadmap translates to success in the fight against corruption.

III. SOUTH AFRICA FOLLOWS THE MAP

South Africa is the second largest economy in Africa, with GDP of \$400 billion. It emerged from apartheid and into independence in 1994 with the passage of a new and progressive constitution,⁸⁶ followed by a spate of generally progressive legislation de-

85. UNCAC, 2349 U.N.T.S. 41, art 13(1) (requiring state parties to "promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community based organizations, in the prevention of and the fight against corruption").

86. See Adrien Wing, *The South African Constitution as a Role Model for the United States*, 24 HARV. BLACKLETTER L.J. 73, 79 (2008) (calling for the United States to

signed to undo the apartheid legacy, and inculcate values such as freedom and transparency into the fabric of the nation. A constitutional democracy, South Africa is governed by the President, currently Jacob Zuma, and the Parliament. There are multiple political parties; however, since 1994 the African National Congress, the political party that successfully resisted and eventually ousted the apartheid regime, has dominated Parliament.

South Africa has been an avid participant in the conventions and treaties opposing corruption. It has signed and ratified a majority of the Instruments, including the UNCAC,⁸⁷ the AU Convention,⁸⁸ and the SADC Protocol.⁸⁹ It has even acceded to the OECD Convention, though it is not a member of the OECD.⁹⁰ In short, South Africa has followed the anti-corruption roadmap to the letter.

A. Criminalization of Corruption in South Africa

South Africa criminalized corruption with the passage of the Prevention and Combating of Corruption Act No. 12 of 2004 (“PCCA”). The PCCA creates the general offense of “corruption,” which consists of offering, giving or receiving gratification, or agreeing to offer, give or receive gratification, in order to act, or influence another to act, in a manner that is dishonest, an abuse of authority or a violation of legal duties.⁹¹

The PCCA also creates additional offenses, such as corruption in relation to specific persons (e.g., judges, elected officials),⁹² corruption in connection with an employment relationship,⁹³ and corruption in connection with a contract or tender.⁹⁴ Additionally,

“consider passing an amendment reinventing our equality clause along the lines of the South African equality clause”).

87. South Africa signed the UNCAC on December 9, 2003, and ratified it on November 22, 2004. *See Signatories to the UNCAC, supra* note 48.

88. South Africa signed the AU Convention in March of 2004 and ratified it in November 2005. *See AU Convention Signatories, supra* note 50.

89. SADC Protocol.

90. South Africa is not a member of the OECD, but nonetheless acceded to the OECD anticorruption convention on 19 June 2007. It is the only African country to have done so. *See OECD Convention Ratification Status, supra* note 49.

91. Prevention and Combating of Corrupt Activities Act 12 of 2004 § 3. (S. Afr.) [hereinafter PCCA].

92. *Id.* at §§ 4-9.

93. *Id.* at § 10.

94. *Id.* at § 12, 13.

persons in positions of authority who know of or suspect such offenses are required to report them to the police.⁹⁵ The scope of the PCCA is not limited to active bribery of foreign officials, but rather applies to “any person,” and includes passive bribery. It also provides that attempt, inducement, aiding and abetting, and conspiracy to commit the corruption are punishable to the same extent as the underlying offense.⁹⁶

With respect to jurisdiction, the PCCA provides that, even if the alleged offense occurred outside South Africa, South African courts have jurisdiction “if the person to be charged is a citizen, is ordinarily a resident, or was arrested in South Africa.” Furthermore, any act committed outside South Africa that is an offense under the PCCA is “deemed to have been committed also in the Republic” if it affects a public body, business, or person in the Republic, and the alleged perpetrator is in South Africa and is not extradited.⁹⁷

South Africa has also passed the requisite legislation to support and strengthen its anti-corruption efforts. This includes the Protected Disclosures Act No. 26 of 2000, which protects whistle-blowers from “occupational detriment,” such as being fired, transferred, disciplined or denied promotion; the Witness Protection Act No. 112 of 1998, which provides for the protection of witnesses who reasonably believe their safety is threatened; the Prevention of Organized Crime Act No. 121 of 1998, which provides for seizure of assets and the proceeds of criminal activity after, and in some cases before, conviction of corruption-related offences; and the Financial Intelligence Centre Act No. 38 of 2001, which provides that bank secrecy is not a valid reason to refuse to share financial records related to a criminal investigation.

B. South Africa’s Anti-corruption Institutions

As recommended by the roadmap, and required by the Instruments, South Africa has also established independent institutions to

95. *Id.* at § 32.

96. *Id.* at § 20, 21. South Africa has not separately criminalized an offense of “illicit enrichment”, but the PCCA permits the NPA to seek permission to investigate based on a showing that a person maintains a standard of living that is above his or her income or assets. *See Id.* at § 23.

97. *Id.* at §§ 35(1), (2).

enforce its anti-corruption laws. Rather than a single overarching institution, the tasks are divided amongst a number of entities.

Prosecution of corruption is handled exclusively by the National Prosecution Authority (NPA), which, per section 179 of the Constitution and the National Prosecuting Authority Act 32 of 1998 (NPA Act), is the only entity that can bring criminal proceedings.⁹⁸ The Constitution requires national legislation to ensure the NPA exercises its function “without fear, favor or prejudice,”⁹⁹ and the NPA Act accordingly provides that the head of the NPA holds office for a ten-year term,¹⁰⁰ can only be dismissed for misconduct, ill-health, incapacity or unfitness,¹⁰¹ and must be paid as much or more than a High Court Judge.¹⁰²

However, the independence of the NPA is not without limits. The Constitution also states that the head of the NPA is appointed by the President,¹⁰³ that final responsibility for the NPA lies with “the Cabinet member responsible for the administration of justice,”¹⁰⁴ and that the prosecution policy must be determined by the head of the NPA “with the concurrence of the Cabinet Member responsible for the administration of justice.”¹⁰⁵ Although the head of the NPA can only be dismissed on certain grounds, the NPA Act allows the President to provisionally suspend the head of the NPA without pay pending an inquiry into his or her alleged misconduct, ill health, incapacity or lack of fitness.¹⁰⁶

A specialized investigative unit principally carries out investigation of corruption in South Africa. Until 2007, this unit, known at the time as the Directorate for Special Operations (“DSO”) or the “Scorpions,” was situated within the NPA and mandated to combat

98. S. AFR. CONST., 1996, § 179; National Prosecuting Authority (NPA) Act 32 of 1998 sec. 2 (S. Afr.).

99. S. AFR. CONST., § 179(4).

100. NPA Act 32 of 1998 § 12(1).

101. *Id.* at § 12(8)(a)(i-ii).

102. *Id.* at § 17(1)(a).

103. S. AFR. CONST., § 179(1)(a); NPA Act 32 of 1998 § 10.

104. S. AFR. CONST., § 179(6).

105. S. AFR. CONST., § 179(5)(a).

106. NPA Act 32 of 1998 § 12(6)(a).

“top priority crime” including corruption.¹⁰⁷ However, in 2007 the Scorpions were replaced by the Directorate of Priority Crime Investigation (“DPCI”), or the “Hawks,” a unit situated within the South African Police Service (SAPS), which is also independently mandated to investigate crimes including “serious corruption.”¹⁰⁸ As a consequence, investigation of corruption now falls primarily within the ambit of SAPS.¹⁰⁹

Two other institutions, the Public Protector and the Auditor General, are also prominently involved in the fight against corruption.¹¹⁰ The Public Protector, established per section 181(a) and 182 of the Constitution, and the Public Protector Act No. 23 of 1994, operates as a kind of ombudsman; the office is competent to investigate maladministration, abuse of power, unlawful enrichment in connection with public administration, and the improper or dishonest acts or offences addressed by the PCCA.¹¹¹ The Auditor General, established per section 181(e) and 188 of the Constitution, functions as the external auditor for government institutions and accountant for public funds.¹¹² Both are constitutionally required to be “independent, and subject only to the Constitution and the law,” and to “exercise their powers and perform their functions without fear, favor or prejudice.”¹¹³

107. The DSO was established by section 7(1)(a) of the NPA Act. NPA Act 32 of 1998 § 7(1)(a); PEDRO GOMES PEREIRA, ET AL., *BASEL INST. ON GOVERNANCE, SOUTH AFRICAN ANTI-CORRUPTION ARCHITECTURE* 5, 37 (2012).

108. PEREIRA, *supra* note 105, at 5, 40. SAPS is governed by the SAPS Act 68 of 1995, the SAPS Amendment Act of 2008 and the SAPS Amendment Act of 2012, which says that SAPS can investigate crimes, including corruption. South Africa Police Service Act 68 of 1995 (S. Afr.); South Africa Police Service Act 68 of 2008 (S. Afr.); South Africa Police Service Amendment Act 10 of 2012 (S. Afr.).

109. The Hawks are overseen by a ministerial committee responsible for determining policy in terms of which they operate, identifying “priority offences,” and setting forth policy guidelines. The President appoints the National Commissioner of SAPS. South Africa Police Service Act 68 of 1995; South Africa Police Service Amendment Act 57 of 2008; South Africa Police Service Amendment Act 10 of 2012.

110. S. AFR. CONST., §181(1)(a), (e).

111. Public Protector Act 23 of 1994 § 6(4)(i)-(iv) (S. Afr.).

112. S. AFR. CONST., §188.

113. S. AFR. CONST., §181(2).

South Africa further has a bevy of commissions and other bodies that are also tasked with combating corruption in one manner or another. These include:

(1) *the Special Investigation Unit (SIU)*, a body that conducts investigations into corruption and has the power to search, seize, interrogate and issue subpoenas, but only when mandated to do so by Presidential Proclamation;¹¹⁴

(2) *the Asset Forfeiture Unit (AFU)*, a body within the NPA that is charged with enforcing the provisions of the Prevention of Organized Crime Act No. 121 of 1998, which permit the seizure of the proceeds of unlawful activity;

(3) *the National Anti-Corruption Forum (NACF)*, an entity that includes representatives from both government and civil society and that evaluates progress and challenges in the fight against corruption;¹¹⁵

(4) *the Special Anti-Corruption Unit (SACU)*, a body established to assist with the fight against corruption in the public service;¹¹⁶

(5) *the Anti-Corruption Coordinating Committee (ACCC)*, a body created by the legislature and tasked with implementing the “Public Service Anti-Corruption Strategy” adopted by the Cabinet in 2002;¹¹⁷

(6) *the Anti-Corruption Inter-Ministerial Committee (ACIMC)*, an entity established in 2010 and tasked with ensuring coordination of the various efforts to combat corruption;¹¹⁸ and

(7) *the Anti-Corruption Task Team (ACTT)*, which is an advisory team whose members include representatives from

114. See Prevention of Organized Crime Act 121 of 1998 (S. Afr.).

115. See Memorandum of Understanding: Establishment of the National Anti-Corruption Forum 1999, available at <http://www.nacf.org.za/about-nacf/index.html>.

116. See *DPSA in the Media: Launch of the Special Anti-Corruption Unit*, DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION, REPUBLIC OF SOUTH AFRICA (Jan. 26, 2011).

117. *Government: Perspectives on Anti-Corruption Initiatives in South Africa*, NATIONAL ANTI-CORRUPTION FORUM [NACF], <http://nacf.org.za/government/index.html>.

118. *Statement on the Cabinet Meeting Held on 18 November 2009 in Pretoria*, INT’L RELATIONS AND COOPERATION (Nov. 18, 2009), <http://www.dfa.gov.za/docs/2009/cabinet1120.html>

other anticorruption entities, including SARS, the NPA, and the SIU.¹¹⁹

Although the presence of so many commissions, units and committees with overlapping mandates can be bewildering, it cannot be said that South Africa lacks the requisite institutions to enforce its anti-corruption laws.

C. Public Administration in South Africa

In keeping with the third component of the roadmap, South Africa has passed legislation designed to regulate and ensure transparency in the administration of public affairs.¹²⁰ The principal piece of legislation is the Public Finance Management Act No. 1 of 1999 (PFMA).¹²¹ Passed to give effect to sections 213 through 219 of the Constitution, which deal with the management of national finances, the PFMA is designed to ensure that revenue, expenditure, assets and liabilities are managed efficiently; to set out the responsibilities of persons in government entrusted with financial management; and to codify corporate governance principles, such as transparency and accountability.¹²²

In particular, the PFMA provides that each governmental agency or entity must have an “accounting officer”¹²³ responsible for risk management, auditing, procurement, evaluation of major capital projects, revenue collection, prevention of irregular and fruitless and wasteful expenditure, safeguarding of public assets, and employee discipline.¹²⁴ The accounting officer is also required to submit projections for revenue, expenditure and borrowing, keep

119. For an overview of South Africa’s anticorruption efforts, see the Conference of the State Parties to the United Nations Convention on Corruption, Implementation Review Group, Fourth Session, 27-31 May 2013. For a review of the various committees and task forces, see the Basil Institute on Governance, *South Africa Anti-Corruption Architecture* (2012), at paragraph 4.3.

120. Pub. Protector Act 23 of 1994 § 6(g) (S.Afr.).

121. Pub. Fin. Mgmt. Act 1 of 1999 (S. Afr.).

122. Pub. Fin. Mmt. Act (PFMA) 1 of 1999 § 2 (stating that the objective of the Act is to “secure transparency, accountability, and sound management of the revenue, expenditures, assets and liabilities of the institutions to which this Act applies”).

123. For “public entities,” including state-owned companies, the “accounting officer” is referred to as the “accounting authority,” and the role is filled by the board of directors. *Id.* a § 36, 49.

124. *Id.* at §§ 38(1)(a)(i-iv), 38(1)(c)(i), 31(1)(c)(ii), 38(1)(d), 39(1)(h).

proper financial records, and prepare financial statements and submit those statements and an annual report to the Auditor General and Treasury.¹²⁵ The PFMA also creates the offense of financial misconduct, requiring persons in positions of authority with knowledge of any such offense to report it to the Auditor General and National Treasury.¹²⁶

Public procurement in South Africa, as per the constitution, must be carried out in accordance with a system that is “fair, equitable, transparent, competitive and cost-effective.”¹²⁷ The PFMA empowers the National Treasury to promulgate a regulatory framework for a “procurement and provisioning system” that reflects those values,¹²⁸ and Treasury in turn has issued regulations requiring the use of a competitive bidding process for most contracts and permitting other procurement methods only in limited circumstances.¹²⁹ South Africa allows for debarment of contractors convicted of corruption,¹³⁰ and requires Treasury approval for all aspects of procurement involved in public-private partnerships.¹³¹

Finally, the Constitution of South Africa states that “a high standard of ethics must be promoted and maintained” in the public services,¹³² and establishes the Public Service Commission (PSC) for this purpose.¹³³ The PSC is empowered to investigate, “monitor and evaluate the organi[z]ation and administration and the personnel practices of the public service,”¹³⁴ and is required to “exercise its powers

125. *Id.* at § 40.

126. *Id.* at §§ 81, 85(1).

127. S. AFR. CONST., § 217(1).

128. PFMA § 76(4)(c). The PFMA also contains freestanding rules about procurement, such as requiring Ministerial approval before a public entity can acquire a “significant” asset, and requiring public entities to ensure that their procurement systems reflect the constitutional principles. *Id.* at §§ 51, 54.

129. Treasury Practice Note 8 of 2007/2008, at 3.4.1 (requiring accounting officers / authorities to obtain competitive bids for all procurement above R 500 000); South Africa also requires that public procurement be used to address past injustices in terms of the Preferential Procurement Policy Framework Act 5 of 2000 and implementing regulations.

130. PCCA section 28(1)(a) and Treasury Regulation 16A9.1 to the PFMA.

131. Treasury Reg.: Issued in Terms of the Pub. Fin. Mgmt. Act of 2001 § 16.6 (2001) (S. Afr.) (requiring Treasury approval of procurement documents for any PPP).

132. S. AFR. CONST., §§ 195(1)(a), 196(1).

133. *Id.* at §196(1).

134. *Id.* at § 196(4)(b).

and perform its functions without fear, favor or prejudice.”¹³⁵ The PSC was officially established under the Public Service Laws Amendment Act No. 47 of 1997, which promulgated the Code of Ethics in Public Service. The Code sets forth standards of conduct for public officials, providing, for example, that public employees will put the public first and be faithful to the Republic and Constitution. With regard to corruption, the Code provides that a public employee “will recuse himself or herself from any official action or decision-making process which may result in improper personal gain . . . [and] shall report instances of fraud, corruption, nepotism, and maladministration prejudicial to the public interest to the appropriate authorities.”¹³⁶ There is also an Executive Ethics Code, published in the Executive Members’ Ethics Act No. 82 of 1998, which applies to Cabinet Members and Deputy Ministers, and prevents them from acting in any way that is inconsistent with their position or “using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.”¹³⁷

D. South Africa’s International Cooperation Commitments

South Africa also has legislation in place addressing the fourth component of the roadmap: international cooperation with respect to corruption and related activity.

Extradition is governed by the Extradition Act No. 67 of 1962, as amended by the Extradition Amendment Act No. 77 of 1996, which defines an extraditable offense as any offense that is punishable with a sentence of imprisonment for six months or more, both in South Africa and the requesting state.¹³⁸ It empowers the President to enter into extradition agreements with other states, and provides that persons may be surrendered in accordance with terms of any such agreement, or in the absence of such an agreement, with Presidential consent. South Africa has executed extradition agreements with a number of states, including the United States, China, India, and Australia. It is also a party to the SADC Protocol on Extradition, a multilateral agreement obliging state parties to ex-

135. *Id.* at §196(2).

136. Pub. Serv. Comm’n Code of Conduct § 3.4 (S. Afr.).

137. Executive Members’ Ethics Bill § 2(2)(b)(iv) (1998) (S. Afr.).

138. Extradition Act 67 of 1962, § 1 (S. Afr.).

tradite any person within its jurisdiction wanted for an extraditable offense, defined as “offen[s]es that are punishable under the laws of both state parties by imprisonment . . . for a period of at least one year, or by a more severe penalty.”¹³⁹

In terms of legal assistance, South Africa has passed the International Cooperation in Criminal Matters Act No. 75 of 1996, which provides the framework for legal assistance, such as confiscation of the proceeds of crime and the transfer of evidence.¹⁴⁰ It has executed bilateral mutual legal assistance treaties with several countries, including the United States, Canada, Nigeria, France, India, China and Mozambique, and is party to multilateral agreements such as the SADC Protocol on Mutual Legal Assistance.¹⁴¹ Moreover, where South Africa does not have a mutual legal assistance agreement in place, the UNCAC itself may serve this function.¹⁴²

E. Access to Information in South Africa

The last component of the roadmap, the right to information, is addressed in section 32 of the Constitution, which states that “everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights.”¹⁴³ Legislation giving effect to this constitutional decree was passed in the form of the Promotion of Access to Information Act No. 2 of 2000 (PAIA), the stated purpose of which is to “foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information,” and to “actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.”¹⁴⁴ Under PAIA, if a request for information complies with the proce-

139. S. Afr. Dev. Cmty. Protocol on Extraditions §§ 2, 3.

140. Int’l Cooperation in Criminal Matters Act 75 of 1996 (S. Afr.).

141. S. Afr. Dev. Cmty. Protocol on Mutual Legal Assistance in Criminal Matters 2002 §§ 2, 3.

142. UNCAC 2349 U.N.T.S. 41.

143. S. AFR. CONST., § 32.

144. Promotion of Access to Info. Act (PAIA) 2 of 2000, Preamble (S. Afr.).

dural requirements, and does not fall under certain limited exemptions, the public body must provide the requested information.¹⁴⁵

PAIA has been successfully invoked in South Africa to compel recalcitrant government entities to provide information. For example, in *SA Metal & Machinery Co v Transnet*,¹⁴⁶ the applicant sought records related to tender proceedings, and Transnet, the state-owned company responsible for transportation infrastructure, resisted on the basis that such information contained confidential and commercially sensitive information. The court rejected those arguments, ordering the production of the records. Similarly, in *De Lange et al v Eskom*,¹⁴⁷ the applicant sought documents relating to the pricing formulas contained in long-term bulk electricity purchase agreements between Eskom, the state-owned electric utility, and Billiton.¹⁴⁸ The court agreed that Eskom could normally withhold certain commercial information for fear of harm from disclosure, but nonetheless ordered the production of records as being in the public interest, an exception permitted in section 46 of PAIA.¹⁴⁹

From even this cursory review of South Africa's legal framework for combating corruption, it is clear that South Africa has complied with the roadmap. It has a thorough and far-reaching anti-corruption statute in the PCCA, as well as the requisite ancillary laws and procedural rules; it has a comprehensive set of institutions focused on fighting corruption; it requires public entities to manage funds and procure goods and services in an open and transparent manner; it demonstrates commitment to cooperation at the international level with its efforts in terms of extradition and mutual legal assistance; and it guarantees the public the right of access to infor-

145. Per section 50 of the PAIA, private bodies must also provide information upon request, if that information is necessary for the exercise or protection of any right. *Id.* at § 50.

146. *SA Metal & Machinery Co (Pty) Ltd v Transnet Ltd*, [2003] 1 All SA 335 (W) (S. Afr.).

147. *De Lange and Another v Eskom Holdings Ltd and Others*, [2012] (5) BCLR 502 (GSJ) (S. Afr.).

148. *Id.*

149. See also *Mittalsteel SA v Hlatshwayo*, [2006] SCA 94 (RSA). In this case, Mittalsteel declined to produce records relating to labor relations when it was a state-owned enterprise (Isacor). The court ordered disclosure of the records, reasoning that because Isacor was established by proclamation, controlled by state-appointed directors, and subject to regulation in terms of dividend and share issuance, it was subject to the State's control and was thus a public body required to provide the requested information in terms of PAIA. *Id.* at para. 24.

mation. Indeed, a many of the key components of the roadmap—management of public finances, procurement, codes of ethics, the right to information—are constitutionally protected values, fleshed out by implementing legislation.

With all this sound and fury, one might expect that South Africa would have an extensive record of prosecuting corrupt officials, or would at least be a country on an upward trajectory in the fight against corruption. Yet this has not proven to be the case.

IV. THE TERRITORY: CORRUPTION IN SOUTH AFRICA FROM 1999 - 2014

As detailed above, South Africa took immediate steps to combat corruption upon its emergence from apartheid in 1994. Indeed, many of the key aspects of the anti-corruption roadmap, such as the right to information and open and competitive public procurement, were enshrined in South Africa's new Constitution. The country also passed a spate of laws in the late 1990s to give substance to these rights, such as the Protected Disclosures Act, the Witness Protection Act, the National Prosecution Act, and the Promotion of Access to Information Act. In the early 2000s, South Africa signed the UNCAC, passed a comprehensive statute outlawing corruption, the PCCA.

Given all the attention devoted to the issue of corruption, and the implementation of the anti-corruption roadmap, one would have expected South Africa to be a leader in the fight against corruption. In fact the opposite has occurred. The Transparency International Corruption Perceptions Index ("CPI"), which measures perceptions of corruption in the public sector in various countries, ranked South Africa 38th out of all countries surveyed in 2001, and 73rd in 2013. Some of this decline is due to an increase in the number of countries surveyed but since 2010, when the number of countries leveled off at about 175, South Africa saw a steady decline from 54th in 2010, to 64th in 2011, 69th in 2012, and 73rd in 2013. The absolute corruption score given to South Africa has also declined from a high of 4.9 in 2008 to 4.1 in 2013, meaning that corruption in South Africa is perceived to have increased both in comparison to other countries, and absolutely.

A closer look reveals that at the very same time South Africa was making its many commitments to combat corruption, the country was wrought by a number of interrelated corruption scandals. These

scandals led to vicious political infighting that resulted in, among other things, the forced resignation of then-deputy president Jacob Zuma, the suspension and ultimate dismissal of the head of the NPA, the conviction of the chief of police on charges of corruption, the disbanding of the specialized anti-corruption unit within the NPA, and relocation of that function to the South African Police Service.

To contextualize these outcomes, it is necessary to briefly review the facts and circumstances surrounding four corruption-related controversies in South Africa, with an eye toward the role and performance of the various anti-corruption institutions, and the effectiveness of the anti-corruption roadmap.

A. The Arms Deal

The so-called “arms deal” refers to a package of defense-related purchases, also known as the Strategic Defense Procurement Packages, made by South Africa in 1999.¹⁵⁰ Pursuant to the deal, South Africa acquired several submarines and frigates from a consortium led by the German firm Ferrostaal, thirty helicopters from the Italian manufacturer Agusta, twenty-four Hawk aircraft, twenty-eight Grip fighter jets from U.K. aerospace giant BAE, and other armaments, for a total purchase price of R 30 billion, although the actual price was later reported to be much higher. The cost of the procurement was to be recouped, however, by a purported R100 billion in “offsets,” which were commitments by the successful bidders to invest in South Africa.¹⁵¹ The South African government also estimated that the arms deal would create 65,000 jobs.¹⁵²

150. See CATHERINE COURTNEY, TRANSPARENCY INTERNATIONAL, CORRUPTION IN THE OFFICIAL ARMS TRADE at 4(e) (2002), available at <http://archive.transparency.org/publications/702-corruption-in-the-official-arms-trade>.

151. Offsets are well known in the arms industry as a mechanism for concealing bribes. Transparency International has recommended that they be banned on the basis that “importing governments can use the offset package to justify awarding contracts to companies paying the largest bribes” and “complicated offset provisions can also conceal commissions as payments are channeled through local firms, which can be chosen for their political connections.” *Id.*

152. The actual cost ended up being much higher. See Glynnis Underhill, *Another Arms Deal Commission Resignation Over “Second Agenda,”* MAIL & GUARDIAN, Aug. 2, 2013, available at <http://mg.co.za/article/2013-08-02-arms-deal-commission-lawyer-resigned-over-second-agenda> (last visited Feb. 11, 2014) (stating that the arms deal cost between R40 billion and R70 billion).

The deal was controversial at the time, given the seeming low priority of arms for a new country that had little fear of invasion, especially compared to what were perceived as more critical measures for economic development, such as housing and infrastructure. It became even more controversial in September of 1999, when Patricia de Lille, then a member of Parliament, alleged that the deal was tainted by corruption, and moved for a commission of inquiry.¹⁵³

An initial investigation by the Auditor General concluded that there had been “material deviations from accepted procurement practice,” and that the guarantees underlying the offsets were insufficient.¹⁵⁴ A parallel inquiry by the parliamentary Standing Committee on Public Accounts (“SCOPA”) found that the cost of the arms deal had already risen to R 43 billion, that the “offsets” could be avoided by a payment of 10% of the nominal value of the offset, and that the selection of the prime contractors was flawed, such as a decision that “led to the choice of a contractor who would not otherwise have been afforded the contract.”¹⁵⁵

The SCOPA report recommended that a formal investigation be launched under the auspices of a joint team consisting of the Auditor General, the SIU, the Public Protector, the Investigating Directorate for Serious Economic Offences, and the National Prosecuting Authority.¹⁵⁶ However, then-President Mbeki declined to issue a Presidential Proclamation necessary for the SIU to act, and therefore the investigation was undertaken by the other three entities only.¹⁵⁷ These entities collectively would come to be known as the

153. SPECIAL REVIEW BY THE AUDITOR GENERAL OF THE SELECTION PROCESS OF THE STRATEGIC DEFENCE PACKAGES FOR THE ACQUISITION OF ARMAMENTS AT THE DEPARTMENT OF DEFENCE para. 6 (Sept. 16, 2000), *available at* http://www.armsdeal-vpo.co.za/special_items/reports/ag_review.pdf.

154. *Id.*

155. STANDING COMMITTEE ON PUBLIC ACCOUNTS, SPECIAL REVIEW OF STRATEGIC ARMS PURCHASES pars.a 2-5 (Oct. 30, 2000), *available at* http://www.armsdeal-vpo.co.za/special_items/reports/SCOPA14thReport-01.pdf (additionally noting that “the government had no influence regarding the appointment of the subcontractors.”)

156. *Id.* at para. 7.

157. *See* AUDITOR-GENERAL, NATIONAL PROSECUTING AUTHORITY, AND PUBLIC PROTECTOR, STRATEGIC DEFENCE PACKAGES JOINT REPORT para. 1.1.6.6 (Nov. 14, 2001) [hereinafter JIT REPORT]. The exclusion of the SIU was controversial and is alleged to have been part of an attempt by the executive to squash the investigation; however the SIU at the time was headed by Judge Heath, and the Constitutional Court had recently ruled

Joint Investigating Team, and published their report (the “JIT Report”) in November of 2001.¹⁵⁸

The JIT Report revealed evidence of conflicts of interest at the highest levels. For example, it related that the Chief of Acquisitions for the Department of Defense, Chippy Shaik, who was “in control of policy matters and planning related to all acquisition matters,” participated in the awarding of a number of contracts to the German Frigate Consortium (GFC), African Defense Systems (ADS), and Thompson-CSF – companies that his brother Shabir Shaik owned, or had interests in.¹⁵⁹ The report also detailed persistent failures to follow procurement policies,¹⁶⁰ and stated cryptically that “certain allegations in connection with the involvement of the former Minister of Defen[s]e, in a company that was to benefit from the SDP procurement, came to the attention of the investigation teams,” but that “this matter was not investigated during the public and forensic phases of the investigation.”¹⁶¹

In spite of these and other conclusions that appeared to point to misconduct,¹⁶² the JIT Report contained as one of its “key findings”

in *South African Association of Personal Injury Lawyers v Heath et al*, that a Constitutional Court Judge could not head the SIU because the functions of an SIU-head are executive in nature, and incompatible with judicial office). *South African Association of Personal Injury Lawyers v Heath et al* (CCT27/00) [2000], 2001 (1) BCLR 77 (28 Nov 2000).

158. *Id.*

159. JIT REPORT, *supra* note 164, at paras. 7.3.5.4(h), 10.2.3, 10.4.1.1, 10.4.2.1, 10.4.4.1. (stating that Shabir Shaik is the brother of Chippy Shaik, and listing companies that Shabir Shaik owns interests in, including Africa Defence Systems and Thompson-CSF); 10.2.3 (confirming that African Defence Systems was considered a primary contractor, and part of the successful German Frigate Consortium); 10.4.4.1 (stating that African Defence Systems was awarded the contract to build the Combat Suite for the Corvettes, and other contracts, and that it in turn awarded certain subcontracts to Thompson-CSF); 7.3.5.4(h) (stating that GFC was selected on the basis of its non-industrial offset component of its bid, even though another bidder scored higher in terms of the critical minimum criteria, military value, price, and defence-related industrial participation, and even though the non-industrial offsets themselves were “not ascertainable in terms of achievability”).

160. *Id.* at paras. 10.2.3.3, 10.2.4.4.

161. *Id.* at paras. 10.4.5.8, 5.

162. *Id.* at para. 11.8.2.1 (concluding that the process that led to the awarding of the System Management System of the Combat Suite to ADS “indicates how a procurement system can be manipulated”).

that “no evidence was found of any improper or unlawful conduct by government” and that “any irregularities and improprieties . . . cannot be ascribed to the President or the Ministers involved in their capacity as members of the Ministers’ Committee or Cabinet.”¹⁶³

The South African government then issued a statement that the report “should lay to rest all kinds of allegations that were made against government,” and that “we are confident that the same enthusiasm that was shown in making these allegations, now found to lack substance, will manifest itself in ensuring that the public is informed of the actual state of affairs.”¹⁶⁴

Not only was the “key finding” nonsensical on its face, evidence was mounting that other prominent politicians involved with the arms deal had either been engaged in corruption or had serious conflicts of interest.¹⁶⁵ For example, Tony Yengeni, the chairman of the Parliamentary Standing Committee on Defense – the committee charged with evaluating the arms deal – had been arrested in October of 2001 and charged with corruption for improperly accepting benefits, in the form of a 50% discount on a Mercedes 4x4, from one of the successful contractors.¹⁶⁶ As a result, the JIT Report was widely discredited and viewed as a “whitewash,” or an effort to close the door on the investigation.¹⁶⁷

Nor was that the end of the matter. In the years that followed, further developments, and in particular the results of international investigations into the multinational companies involved in the arms deal, repeatedly arose. These developments and investigations indicated that corruption had in fact occurred on a much larger scale than had initially been suspected, and rendered

163. *Id.* at paras. 14.1.1 (emphasis added).

164. Statement of the South African Government on the Joint Investigation Report into the Strategic Defence Procurement Packages para. 7 (Nov. 15, 2001), available at http://www.armsdeal-vpo.co.za/special_items/statements/sa-gov_report.html (last visited Feb. 14, 2014).

165. *Id.*

166. See Erika Gibson, Yengeni Arrest Sparks Panic, News24 (Oct. 3, 2001), available at: <http://www.news24.com/SouthAfrica/Yengenis-arrest-sparks-panic-20011003> (last visited Feb. 5, 2014).

167. Indeed, it has been asserted that the JIT Report itself was doctored at the behest of the executive to include the “key findings.” See PATRICK LAURENCE, DRAFT REPORTS IGNITE SMOLDERING EMBERS (2005), available at: <http://hsf.org.za/resource-centre/focus/issue-37-first-quarter-2005/draft-reports-ignite-smouldering-embers> (last visited Feb. 11, 2014).

the “key finding” of the JIT Report increasingly farfetched. They include:

- (1) The conviction of Schabir Shaik, financial advisor to Jacob Zuma, in June 2005 in the Durban High Court for accepting payments on behalf of Zuma in exchange for influence. One example was an agreement with the arms deal contractor Thint to pay R 500,000 per year to Zuma in exchange for protection from the arms deal inquiry.¹⁶⁸
- (2) A 2007 investigation by the British Serious Fraud Office into BAE, which revealed that BAE employees had paid £ 115 million in “commission” on the South African Deal, including tens of millions to Fana Hlongwane, the adviser to Defense Minister Joe Modise.¹⁶⁹
- (3) An investigation into BAE by the U.S. State Department for violations of arms export laws; the charging letter from the US State department described BAE’s incorporation of an offshore company called “Red Diamond Trading,” the purpose of which was to make payments to “brokers” who in turn used the payments to influence decision-makers in the various foreign countries. The letter stated that Red Diamond had made payments in connection with the sale of jets to South Africa.¹⁷⁰

168. Shaik v the State [2006] 1 SCA 134 (RSA) (affd. on appeal). Schabir Shaik owns interests in ADS, and Thompson-CSF, the companies that were awarded arms deal contracts while Schabir’s brother Chippy was the head of procurement for the Department of Defence.

169. Evelyn Groenink, *Who Got R 1 billion in Pay-Offs?*, MAIL & GARDEN (Jan. 12, 2007), available at: <http://mg.co.za/article/2007-01-12-arms-deal-who-got-r1bn-in-pay-offs> (last visited Feb. 11, 2014); see also, e.g., Stefaans Brummer & Sam Sole, *How the Arms Bribes Were Paid* MAIL & GARDEN (Dec. 5, 2008), available at: <http://mg.co.za/article/2008-12-05-how-arms-deal-bribes-were-paid> (last visited Feb. 11, 2014); David Leigh & Rob Evans, *BAE’s Secret Money Machine*, THE GUARDIAN, available at: <http://www.theguardian.com/baefiles/page/0,,2095840,00.html> (last visited Feb. 11, 2014).

170. U.S. State Department, Proposed Charging Letter re: Investigation into BAE Systems at 6, 10 (May 2011), available at: http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/BAES_PCL.pdf (last visited 11 Feb 2014). It is worth noting that neither the United States nor the U.K. has the high ground with respect to the investigation into BAE. In the UK, the Prime Minister intervened on grounds of national security to quash an investigation into alleged BAE bribery of public officials in Saudi Arabia. In the United States, the En-

(4) In 2011, forensic investigations conducted in connection with a German investigation into the company Ferrostaal, indicating that bribes were paid to ensure the success of the German Consortium for the frigate and submarine contracts in South Africa.¹⁷¹

(5) In 2012, Swedish television reported that Saab, a participant in the BAE bid for the Gripen fighters, had paid bribes to the National Union of Metalworkers of South Africa for its backing on the arms deal.¹⁷²

(6) In 2013, German detectives reported that a raid on the offices of ThyssenKrupp, the German company that sold patrol corvettes to South Africa, reportedly revealed documents showing that Tony Yengeni signed a bribe agreement for R 6 billion.¹⁷³

In light of all this, in 2011, advocate Terry Crawford-Browne filed suit seeking to compel the government to launch a judicial commission of inquiry into the arms deal.¹⁷⁴ Before the Court could rule, however, President Zuma announced that an inquiry would be instituted by a three-judge panel, to be headed by Judge Willie Seriti.¹⁷⁵

The Seriti Commission has itself been beset with by controversies and delays. In January of 2013, Judge Moabi stated that there is a “second agenda” at work in the Commission and that “I came to the Commission to serve with integrity, dignity, and truthfulness” and “I

forcement Agencies meticulously avoided charging BAE with violation of the FCPA, and instead alleged only technical violations of arms exportation treaties, in order to avoid having to debar BAE, a major defence contractor to the U.S. government.

171. *Revealed: Yengeni's R6 million 'Kickback' Agreement*, MAIL & GUARDIAN (June 14, 2013), <http://mg.co.za/article/2013-06-14-00-revealed-yengenis-r6-million-kickback-agreement>.

172. *Saab Admits R 24 Million Bribe Paid to Clinch Arms Deal*, MAIL & GUARDIAN (June 16, 2011), available at: <http://mg.co.za/article/2011-06-16-saab-admits-r24million-bribe-paid-to-clinch-arms-deal> (last visited Jan. 27, 2014).

173. *Revealed: Yengeni's R6 million 'Kickback' Agreement*, MAIL & GUARDIAN (June 14, 2013), available at: <http://mg.co.za/article/2013-06-14-00-revealed-yengenis-r6-million-kickback-agreement> (last visited Jan. 27, 2014).

174. Complaint, *In re Crawford-Browne and the President of the Republic of South Africa*, (2012), Const. Ct. S. Afr., available at <http://www.politicsweb.co.za/opinion/understanding-the-arms-deal—terry-crawfordbrowne> (last visited Feb. 11, 2014).

175. *Id.*

cannot with a clear conscience pretend to be blind to what is going on at the Commission.”¹⁷⁶ Moabi’s resignation was followed by the departure of researcher Kate Painting in March of 2013, who had been assisting the Commission and who stated that the independence of the Commission had been compromised,¹⁷⁷ and then the unexplained resignation of Judge Francis Legodi in July 2013.¹⁷⁸

B. The Glenister Case

Even as the arms deal controversy was unfolding, a separate struggle ensued regarding whether South Africa’s specialized anticorruption investigation unit should continue to be situated within the National Prosecuting Authority, or whether it should be relocated to South African Police Service.

As described above, pursuant to the NPA Act, No. 32 of 1998, the Scorpions had been established and situated within the NPA, which is required to operate “without fear, favor or prejudice” according to section 179(4) of the Constitution.¹⁷⁹ The Scorpions initiated a number of high profile investigations that resulted in criminal convictions for corruption, including those into Tony Yengeni, described above, and Schabir Shaik and Jackie Selebi, discussed below. The resulting prosecutions caused outrage among some members of the ANC.¹⁸⁰ On April 1, 2005, President Mbeki appointed Justice Sisi Khampepe to investigate and report on the role and location of the DSO.¹⁸¹

176. Letter from Hon. Norman Moabi to Hon. Willie Sereti (Jan. 7, 2013), *available at*: <http://www.sahistory.org.za/archive/norman-moabis-resignation-letter-judge-willie-sereti> (lasted visited Jan. 24, 2014).

177. Glynnis Underhill, *Legodi Resigns From Arms Commission on Eve of Hearings*, MAIL & GUARDIAN (July 31, 2013), *available at*: <http://mg.co.za/article/2013-07-31-legodi-resigns-from-arms-commission-on-eve-of-hearings> (last visited Jan. 27, 2014).

178. Glynnis Underhill, *Another Arms Deal Resignation Over Second Agenda*, MAIL & GUARDIAN (Aug. 2, 2013), *available at*: <http://mg.co.za/article/2013-08-02-arms-deal-commission-lawyer-resigned-over-second-agenda> (last visited Jan. 27, 2014).

179. S. Afr. Const. 1996 §179(4).

180. *ANCYL Wants Scorpions Probed*, Mail & Guardian (Oct. 15, 2007), *available at*: <http://mg.co.za/article/2007-10-15-ancyl-wants-scorpions-probed> (last visited Jan. 27, 2014) (alleging that the DSO had a “political agenda” and accusing it of abusing its power).

181. Khampepe Commission of Inquiry Into the Mandate and Location of the Directorate of Special Operations, Final Report (Feb. 2006), *available at*

Justice Khampepe considered the basis for situating the DSO within the NPA rather than SAPS. She concluded that the DSO had been placed within the NPA for four reasons: 1) SAPS was unable to deal with high-level crime; 2) SAPS was perceived to be illegitimate in light of its apartheid-era past; 3) the need to recruit top-level persons to the anti-corruption unit; and 4) the threat of corruption within SAPS itself.¹⁸² Khampepe concluded that this justification was “as valid today as it was at conception.”¹⁸³ Khampepe rejected SAPS’ argument that section 199(1) of the Constitution, which says that South Africa should have a “single police force,” meant putting the DSO in the NPA was unconstitutional.¹⁸⁴ To the contrary, he found that putting the DSO within the NPA was “constitutionally and jurisprudentially sound.”¹⁸⁵

Nonetheless, at a conference held by the ANC in Polokwane in 2007 – the same conference where Mbeki was ousted as leader of the party – the ANC adopted a resolution that “the DSO (Scorpions) be dissolved” and that the “members of the DSO performing policing functions must fall under the South African Police Services.”¹⁸⁶ Shortly thereafter, the National Prosecuting Authority Amendment Act was passed, which removed the DSO from the NPA, along with the National Prosecuting Authority Amendment Act of 2008, which relocated it within SAPS and rechristened it as the DPCI (the “Hawks”).¹⁸⁷

Cape Town businessman Hugh Glenister challenged the legislation. The Constitutional Court upheld the challenge, ruling that the government was obliged, both by the Constitution and the international agreements to which South Africa is a party (such as the UNCAC, the AU Convention, and the SADC Protocol), to establish

<http://www.thepresidency.gov.za/docs/reports/khampepe/part1.pdf> (last visited 27 Jan 2014) [hereinafter Khampepe Report].

182. *Id.* at para. 8.2.

183. *Id.* at para. 10.2.

184. *Id.* at para.12.1.

185. *Id.* at Executive Summary.

186. See Afr. Nat’l Cong. [ANC], 52nd Nat’l Conf. Res., *Peace at Stability*, paras 8-9 (Dec. 20, 2007), available at: <http://www.anc.org.za/show.php?id=2536> (last visited Jan. 27, 2014).

187. South African Police Service Amendment Act 57 of 2008; National Prosecuting Authority Amendment Act 56 of 2008 (S. Afr.).

and maintain an independent corruption-fighting agency.¹⁸⁸ It then analyzed the structure of the newly minted DPCI and found the structural considerations rendered it vulnerable to political influence.¹⁸⁹

In particular, the Glenister Court registered its concern regarding remuneration and security of tenure of members of the DPCI, and also noted its “[grave] disquiet” stemming from the fact that the policy guidelines for the Hawks and the selection of national priority offenses would be determined by “a Ministerial Committee, which must include at least the Ministers for Police, Finance, Home Affairs, Intelligence and Justice, and may include any other Minister designated from time to time by the President.”¹⁹⁰ Such a structure, the Court said, creates “a plain risk of executive and political influence on investigations and on the entity’s functioning.”¹⁹¹ Moreover, the Court noted that the Ministers themselves could also be the subject of investigation, meaning that they “oversee an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function.”¹⁹² It further found that the government is bound to take reasonable steps to promote and fulfill the Bill of Rights, and that establishing a non-independent anticorruption investigation unit would be unreasonable.¹⁹³

For these reasons the Glenister court declared the SAPSA Act to be unconstitutional.¹⁹⁴ It suspended its order for eighteen months, however, on the grounds that there are many possible ways that a corruption-fighting unit could be structured within the constitutional mandate, and that as long as the unit is given the

188. *Glenister v. the President of the Republic of South Africa*, (2011) (3) SA 347 (CC), (7) BCLR 651 (CC) (S. Afr.).

189. *Id.* at para. 208.

190. *Id.* at para. 228.

191. *Id.* at para. 229.

192. *Id.* at para. 232.

193. *Id.* at para. 232 (reasoning that, because section 231(2) of the Constitution provides that international agreements ratified by Parliament “bind the Republic,” it is unreasonable for the state in terms of section 7(2) of the Constitution to create an anti-corruption institution that is not independent).

194. *Id.* at para. 251.

necessary independence, the method chosen is a policy choice that can be made by the legislature.¹⁹⁵

The decision was lauded as a victory for the rule of law and judicial independence.¹⁹⁶ However, in September of 2012, new legislation was passed that kept the Hawks within SAPS. While the day-to-day control by the minister was made more circumspect, it retained certain aspects of the original non-independent structure. For example, it provided that the head of the Hawks would be appointed by the Minister.¹⁹⁷ Mr. Glenister has challenged the 2012 Act on the basis that the changes are only superficial and the potential for undue political influence remains. As of this writing, the ruling on this case is still pending.¹⁹⁸

C. The Corruption Case against Jacob Zuma

In 2003, the head of the National Prosecuting Authority, Beletani Ngcuka, announced that it would prosecute Schabir Shaik, brother of Chippy Shaik and financial advisor to Jacob Zuma, for corruption, but not Zuma himself, because even though there was “prima facie case” against Zuma, the NPA was not confident it would win.¹⁹⁹ Ngcuka would later explain in an affidavit that his statement was designed to explain why he was not prosecuting

195. *Id.* at paras. 65-67.

196. Edwin Cameron, *Annual Herbert L. Bernstein Lecture in International and Comparative Law: Constitutionalism, Rights and International Law: the Glenister Decision*, 23 DUKE J. COMP. & INT’L L. 389, 407-08 (2013) (describing the implication of the decision on South Africa’s “rule of law, democratic institutions and the separation of powers”).

197. South Africa Police Service Amendment Act 10 of 2012 (retaining the DPCI within SAPS and making only modest modifications to address the security of tenure and remuneration of the members of the unit).

198. *Glenister* has been hailed as a transcendent decision and as one that upholds the rule-of-law in South Africa. See, e.g., Cameron, *supra* note 201 (describing the decision as “one of the most significant decisions on government accountability in post-apartheid South Africa”). However, the legislation has merely been amended again, and meanwhile the anti-corruption unit has been in limbo for six years.

199. See Empangeni Muji, *Ngcuka Can’t Have it Both Ways*, SUNDAY TIMES, Aug. 31, 2003, available at http://www.armsdeal-vpo.co.za/articles04/both_ways.html (arguing that “if his investigation establishes a prima facie case, he must prosecute Zuma. If the case cannot be won, then there is no prima facie case against Zuma”).

Zuma despite the comprehensive evidence that would emerge against him in the course of the trial against Schabir Shaik.²⁰⁰

At the time, however, Ngcuka's statement, which came before Schaik was convicted, was perceived as a political ploy to discredit Zuma, who in his capacity as Deputy President would be a threat to then-President Mbeki.²⁰¹ Zuma responded by threatening to bring charges in defense of his reputation, and the Public Protector issued a report stating that the allegations against Zuma violated his right to human dignity.²⁰² Parliament adopted the Public Protector's report, and Ngcuka resigned.²⁰³

However, the investigation against Schabir Shaik continued,²⁰⁴ and he was ultimately convicted of corruption, and specifically for

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200. Affidavit of Mr. Ngcuka at para 8, *State v. Zuma*, (2005) Case No. 358 / 2005 (CC), available at http://www.armsdealvpo.co.za/special_items/jacob_zuma_trial/affidavit_ngcuka.html (“At the time when I prepared my announcement, I was in possession of a draft indictment against, *inter alia*, Schabir Shaik. In this indictment, reference was of necessity made to his relationship with [Zuma] and the bribe agreement with Thetard. This indictment spelled out, far more eloquently than my statement, what was clearly a prima facie case of corruption against Accused No 1. I knew that this document would be in the public domain when the draft charge sheet was served on Shaik on the following Monday. What I felt obliged to explain to the public, therefore, was the reason why, despite the prima facie case disclosed by the indictment, I had nevertheless come to the conclusion that I was not able to prosecute [Zuma].”)
201. Andre Koopman, *Zuma up in Arms Over Scorpion Sting*, INDEP. ONLINE (July 28, 2003) <http://www.iol.co.za/news/politics/zuma-up-in-arms-over-scorpions-sting-1.110288#.VTrAHmRViko>.
202. African Nat'l Cong., *ANC Sends Letter of Complaint Against NPA to Public Protector* (Nov. 20, 2008), available at <http://www.anc.org.za/show.php?id=5819>.
203. Anele ka Nene, *Ngcuka Resignation a Pity*, INDEP. ONLINE (July 25, 2004) <http://www.iol.co.za/news/politics/ngcuka-resignation-a-pity-da-1.217994#.VTrCzWRViko>.
204. Shortly after the charges were filed against Shaik, a complaint was filed by Mac Maharaj and Schabir Shaik alleging that the head of the NPA (Ngcuka) had been a spy for the former apartheid government. This was duly investigated by the Hefer Commission of Enquiry, which found that “Messrs Maharaj and Shaik’s allegations of spying have not been established. Mr Ngcuka probably never acted as an agent for the pre-1994 government.”
- JJF HEFER, COMMISSION OF INQUIRY INTO ALLEGATIONS OF SPYING AGAINST THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS, MR BT NGCUKA, para. 88 (Jan. 7, 2004), available at http://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf.

accepting bribes on behalf of Zuma.²⁰⁵ In particular, the trial court judgment (subsequently affirmed on appeal) states that Shaik “gratuitously made some 238 separate payments of money, either directly to or for the benefit of Mr. Jacob Zuma, who held high political office throughout this period”²⁰⁶ and that,

[A] total sum of R1 340 078 was so paid to Jacob Zuma, and the State claims that this was done corruptly, the object being to influence Zuma to use his name and political influence for the benefit of Shaik’s business enterprises or as an ongoing reward for having done so from time to time.²⁰⁷

After the decision, in February 2005, President Mbeki asked for Zuma’s resignation, which Zuma then tendered.²⁰⁸ Charges were filed against Zuma, but in 2006 the court struck the case from the rolls on the basis that the prosecution was unprepared.²⁰⁹ In 2007, at the Polokwane conference, Zuma was elected head of the ANC,²¹⁰ and on December 28 of the same year, he was indicted for corruption.²¹¹ These charges were dismissed in August of 2008, and then reinstated on appeal in January of 2009.²¹²

Finally, on April 6, 2009, the acting head of the NPA, Mokededi Mpshe, released a statement that charges against Zuma would be dropped.²¹³ Somewhat bizarrely, it quickly emerged that large por-

205. *State v. Shaik*, (2005), Case No. 27/04 (CC), para. 5 (transcript of judgment read by Judge Squires
<https://www.nelsonmandela.org/omalley/cis/omalley/OMalleyWeb/031v03445/041v04015/051v04148/061v04149.htm>); aff’d (2007) 2 All SA 9.

206. *Id.*

207. *Id.* at para. 5.

208. Department of Foreign Affairs, *Statement by the Honourable Jacob Zuma on the Decision Taken by the President of the Republic*,
<http://www.dfa.gov.za/docs/speeches/2005/zuma0614.htm> (last updated Jun. 14, 2005).

209. Laurie Gauring, *Corruption Case Ends for S. Africa Politician*, CHI. TRIB. (Sept. 21, 2006), http://articles.chicagotribune.com/2006-09-21/news/0609210106_1_jacob-zuma-deputy-president-south-africa.

210. Barry Bearak, *South Africa Drops Charges Against Leading Presidential Contender*, N.Y. TIMES (Apr. 6, 2009),
<http://www.nytimes.com/2009/04/07/world/africa/07safrica.html>.

211. *Id.*

212. *Id.*

213. *Id.*

tions of Mpshe's statement were copied from a 2002 judgment issued by a Hong Kong court, which itself had been overturned.²¹⁴ This was followed by an entirely separate legal proceeding in which the opposition party, the DA, challenged the dropping of the charges, and the government argued that the DA lacked standing and that the decision was non-reviewable.²¹⁵

D. Conviction of Jackie Selebi / Dismissal of Vusi Pikoli

In 2006, the head of the National Prosecuting Authority, Vusi Pikoli opened an investigation into the National Commissioner of Police, Jackie Selebi, on the grounds that he had passed on to members of an organized crime syndicate certain information related to a murder investigation.²¹⁶ The investigation required access to documents and material in the custody of SAPS, which SAPS refused to provide to the DSO,²¹⁷ in part because the DSO refused to disclose "what, and with respect to whom, the investigation relate[d]."²¹⁸ Unable to secure the documents in this way, Pikoli obtained an arrest warrant for Selebi on September 10, 2007, and a search and seizure warrant on September 14, 2007.²¹⁹

Pikoli informed then-President Mbeki that the warrants had been issued. Mbeki responded by instructing the Minister of Justice by letter to "obtain the necessary information from [Pikoli] regarding the intended arrest and prosecution of [Selebi]."²²⁰ The next day, the Minister sent a letter to Pikoli demanding that he turn over "all of the information on which you rely to take the legal steps to effect the arrest of and the preference of charges against the National Commissioner of the police services," and "until I have satisfied

214. James Myburgh, *Did Mpshe Plagiarise a Hong Kong Judge*, POLITICSWEB (Apr. 14, 2009), <http://www.politicsweb.co.za/news-and-analysis/did-mpshe-plagiarise-a-hong-kong-judge>.

215. Pretoria News, *Rule of Law at Risk in Zuma Spy Tapes Fight*, INDEP. ONLINE (Nov. 9, 2012), <http://www.iol.co.za/pretoria-news/rule-of-law-at-risk-in-zuma-spy-tapes-fight-1.1420300> (last visited Feb. 10, 2014).

216. FRENE GINWALA, REPORT OF THE ENQUIRY INTO THE FITNESS OF VP PIKOLI TO HOLD THE OFFICE OF NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS para. 244 (Nov. 4, 2008) [hereinafter GINWALA REPORT].

217. *Id.* at para. 249.

218. *Id.* at para. 255.

219. *Id.* at para. 260.

220. *Id.* at para. 264.

myself that sufficient information and evidence does exist . . . *you shall not pursue the route that you have taken steps to pursue.*²²¹

Pikoli responded with a letter stating that, if it were taken literally, the Minister's letter would be an instruction not to proceed with a prosecution, and therefore an unconstitutional violation of the independence of the NPA.²²² He qualified this, however, by stating that "from my interaction with you I am confident that this is not your intention . . . I would urge that we meet urgently to discuss this matter and to clarify it."²²³ The Minister responded by reiterating her request for a full report, which Pikoli then provided.²²⁴ On September 23, Pikoli met separately with both the Minister and President Mbeki, each of whom requested his resignation, which he refused to provide.²²⁵ On September 24, 2007, President Mbeki suspended Pikoli on the basis that the relationship between Pikoli and Minister Mabandla has irretrievably broken down.²²⁶

As described above, however, in terms of the NPA Act 32 of 1998, the President can only "provisionally" suspend the NPA, pending an inquiry into his or her fitness, and only then for misconduct, ill-health, incapacity to carry out the duties of the office efficiently, or if he or she is "no longer a fit and proper person to hold the office."²²⁷ Accordingly, on September 28, 2007, President Mbeki appointed Frene Ginwala, a former speaker of the National Assembly, to head a commission of inquiry into Pikoli's fitness to hold office.²²⁸

The terms of reference for the Ginwala commission were to investigate and determine whether Pikoli was a "fit and proper person" to be entrusted with office of head of the NPA, in light of the alleged

221. *Id.* at para. 266 (emphasis added).

222. *Id.* at para. 268.

223. *Id.* at paras. 268, 286.

224. *Id.* at para. 269.

225. *Id.* at para. 274-75.

226. *Id.* at para. 277. The letter of suspension also alleged that Pikoli should not have entered into plea bargains with members of organised crime syndicates. *Id.*

227. NPA Act 32 of 1998 § 12(6)(a) (S. Afr.). The NPA Act also protects the head of the NPA by providing for a ten-year tenure, ensuring that his or her salary must be no lower than the that of a High Court judge, and making it a criminal offence to hinder the NPA in the performance of its duties. *Id.*

228. GINWALA REPORT, *supra* note 221, at para. 3.

breakdown in his relationship with the Minister.²²⁹ However, the government's submission contained a number of additional allegations, including that Pikoli should not have entered into certain other plea bargains, that he should not have sought to have the DSO treated as a "public entity" under the PFMA, and that he failed to account to the DGs for Justice and Constitutional Development to the extent required.²³⁰

In December 2008, after conducting eleven days of hearings and collecting documentary evidence, Ginwala issued a 218-page report, which concluded that the allegations against Pikoli were unfounded and that there was no basis for the suspension.²³¹ The report is largely a vindication of Pikoli, and states on multiple occasions that Ginwala found him to be a man of "unimpeachable integrity."²³² The report concludes, *inter alia*, that the government had failed to support the basis for his suspension,²³³ that there was no irretrievable breakdown in the relationship between Pikoli and Minister,²³⁴ and that the letter to Pikoli from the Director General of Justice, Menzi Simelane, instructing him not to arrest Selebi was unlawful.²³⁵ The Ginwala Report also goes out of its way, in multiple places, to criticize Simelane for being untruthful, making spurious and unfounded allegations against Pikoli, and for showing "disregard and lack of appreciation and respect of the import of an Enquiry established by the President."²³⁶

The report did conclude, however, that Pikoli should have acceded to a request from the President to wait an additional two weeks before proceeding to obtain the warrants, for the purposes of avoiding a national crisis.²³⁷ On that basis, President Motlanthe, having succeeded Mbeki after Mbeki's "recall" by the ANC and subsequent resignation in 2008, declined to reinstate Pikoli, a deci-

229. *Id.* at para. 305.

230. *Id.* at paras. 11.5, 109, 161.

231. *Id.* at para. 160.

232. *Id.* at paras. 95, 296.

233. *Id.* at para. 349.

234. *Id.* at paras. 14, 96, 311.

235. *Id.* at para. 289.

236. *Id.* at para. 322.

237. *Id.* at paras. 301, 356.

sion endorsed by Parliament in February of 2009.²³⁸ Pikoli launched a legal challenge seeking reinstatement, and on August 11, 2009, he was granted an interdict preventing Zuma from appointing a successor.²³⁹ Shortly thereafter, Pikoli settled with the government for R 7.5 million.²⁴⁰

The postscript to the Selebi / Pikoï affair is telling. In November of 2009, President Zuma appointed Simelane, the Director General of Justice criticized in the Ginwala Report, as the new head of the NPA.²⁴¹ (The appointment was challenged in court, and Constitutional Court would subsequently rule that he was unfit for the post.) In July 2010, Selebi was in fact convicted of corruption and sentenced to fifteen years' imprisonment.²⁴²

V. HOW THE ROADMAP FAILED IN SOUTH AFRICA

What is remarkable about the events described in Part IV is that they occurred in parallel with the erection of the framework for combating corruption prescribed by the anti-corruption roadmap discussed in Part III. That is to say, the laws and institutions discussed in Part III should have prevented the corruption scandals described in Part IV, or at least dealt with them much more effectively. To understand why this did not occur, this section considers these events through the lens of the anti-corruption roadmap.

238. *Pikoli Removed from Office, Vows to Fight Back*, MAIL & GUARDIAN (Feb. 17, 2009), <http://mg.co.za/article/2009-02-17-pikoli-removed-from-office-vows-to-fight-back>.

239. Pearlie Joubert, *ANC Interference Prompts Pikoli Sacking*, MAIL & GUARDIAN (May 25, 2012), <http://mg.co.za/article/2012-05-24-anc-forces-pikoli-sacking>.

240. Pierre de Vos, *Pikoli, the NPA, and the R7.5 Million*, CONSTITUTIONALLY SPEAKING (Nov. 24, 2009), <http://constitutionallyspeaking.co.za/pikoli-the-npa-and-the-r7-5-million/>.

241. Murray Williams, *Concourt Throws Out Zuma's Choice*, IOL NEWS (Oct. 5, 2012), <http://www.iol.co.za/news/politics/concourt-throws-out-zuma-s-choice-1.1397360#.VScx7lw0Pww>.

242. Both Selebi and Schaik were subsequently paroled for medical reasons after serving a fraction of their sentences. See *Concern Raised Over Selebi Medical Parole*, MAIL & GUARDIAN (Oct. 7, 2013), <http://mg.co.za/article/2013-10-07-concern-raised-over-selebis-medical-parole> (noting that Selebi was paroled for medical reasons after serving 229 days of a 15-year sentence); Mandy Rossouw and Mmanaledi Mataboge, *Shaik's Medical Miracle*, MAIL & GUARDIAN (Jan. 15, 2010), <http://mg.co.za/article/2010-01-15-shaiks-medical-miracle>.

A. Anticorruption Law – Not Applied

With respect to the first aspect of the roadmap, the anti-corruption law itself, it is apparent that the PCCA was underused, if not disregarded altogether. For example, the PCCA specifically defines the offense of “corrupt activities relating to agents” as being committed by any person who “accepts...any gratification from an agent in order to act in any manner that is improper or that amounts to the abuse of authority or violation of trust.”²⁴³ The conviction of Schabir Shaik for collecting corrupt payments as the agent of Jacob Zuma would appear to be proof of Zuma’s commission of this offense; yet no prosecution occurred.²⁴⁴

In addition, as described in Part III, the PCCA calls for the debarment of companies involved in corrupt activities²⁴⁵ and allows for the cancellation of contracts affected by fraud and corruption.²⁴⁶ Yet despite ample evidence of such activities, none of the major contractors that participated in the arms deal were blacklisted, nor were any of the large contracts cancelled.²⁴⁷

B. Anticorruption Institutions – Not Independent

Turning to the second component of the roadmap, independent enforcement institution, it appears that neither the NPA, responsible for prosecution, nor the Scorpions, responsible for execution, were able to remain independent and above the political fray.

The treatment and track records of the various heads of the NPA are illustrative: the first head of the of the NPA, Ngcuka, was forced to resign after stating that a “prima facie” case existed against Zuma, even though Zuma’s adviser was convicted of accepting bribes on his behalf;²⁴⁸ the second head of the NPA, Pikoli, was suspended

243. PCCA § 6(b).

244. The Shaik conviction would lead to a presumption that Zuma accepted the payments for improper purposes, and at a bare minimum would have supported charges of accessory or conspiracy in terms of sections 20 and 21, respectively. *See* PCCA §§ 20, 21, 24.

245. *Id.* at § 28(3)(a)(iii).

246. *Id.* at § 28(3)(a)(i).

247. Clare Louise Thomas, *30 Civil Society Organisations Call for an End to Seriti Commission*, ARMS DEAL FACTS (Oct. 3, 2014), <http://armsdealfacts.com/30-civil-society-organisations-call-for-an-end-to-seriti-commission/#more-120>.

248. *See supra* Part IV.C

after obtaining warrants to search and arrest the National Commissioner of Police, and was not reinstated even though the Ginwala commission of inquiry vindicated him, and the Police Commissioner was in fact convicted of corruption;²⁴⁹ the third head of the NPA (Mpshe) announced, two weeks before the presidential election, that charges against Zuma would be dropped, in a decision that turned out to be largely plagiarized from a judgment from a court in Hong Kong;²⁵⁰ the fourth head of the NPA, Simelane, was found unfit to serve by the Constitutional Court.

The anti-corruption investigative unit fared no better. As described above, South Africa had initially determined to situate the Scorpions within the NPA, and when this decision was challenged it was fully supported by the Khampepe commission of inquiry.²⁵¹ Nonetheless, the unit was disbanded pursuant to an ANC resolution and replaced with the Hawks, who were situated within the Police.²⁵² The fact that the Constitutional Court barred this maneuver under *Glenister* is laudable, and a point for the rule of law and judicial independence. However the most recently proposed amendment makes few changes, and whatever the ultimate outcome, the unit has been effectively situated within the police for the last seven years.

Other institutions also failed to function effectively. The SIU, for example, was removed from the arms deal investigation and, unable to act without a Presidential proclamation, never participated in the investigation of the arms deal.²⁵³ The Public Protector and Auditor General both participated in the JIT Report, thus appearing to take the position that there was no improper conduct on the part of government; neither has seen fit to launch an independent investigation.²⁵⁴ Moreover, none of the commissions, task forces, ministerial committees, or other groups played a serious role in combating corruption on the ground.

249. See supra Part IV.D

250. See supra Part IV.C

251. See supra Part IV.B

252. See supra Part IV.B

253. See supra Part IV.A

254. See supra Part IV.A

C. Administration of Public Entities and Funds – Not Effective

The South African law provisions governing the administration of public funds and the behavior of public officials have also proven insufficient in dealing with corruption, particularly with the arms deal.

First, with respect to procurement, the arms deal was far from “fair, equitable and transparent,” as required by the Constitution and the legislation described above.²⁵⁵ To the contrary, it appears the procurement process was manipulated, in that the need for the arms in the first place was not well established; various bidders were included despite not meeting the minimum qualifications, and were later selected even though they were more expensive; subcontracts were not put out to tender; “offsets” were used as the basis for selection in spite of the absence of any guarantee that the promised benefits would materialize; and, the cost of the deal itself was dramatically understated.²⁵⁶

The Public Service Commission and its Code of Ethics also failed to impact the conduct of the public servants involved. Certainly none of these public servants – Selebi, the Commissioner of Police, Modise, the Minister of Defense, Yengeni, a member of Parliament, and Zuma, the Deputy-President (Zuma) – can be said to have satisfied the Code of Ethics, nor did the Public Service Commission effectively investigate any of the matters described above.

D. International Cooperation – Assistance Not Requested

As discussed above, numerous other jurisdictions launched investigations that ultimately shed light on corrupt activities in South Africa, including investigations by the United Kingdom and the United States into BAE, by German authorities into Ferrostaal, and by Swedish authorities regarding Saab.²⁵⁷ Further, in terms of the

255. Paul Hoffman, *The Genie is Out of the Bottle*, ACCOUNTABILITY NOW (Nov. 9 2010), <http://accountabilitynow.org.za/genie-bottle-south-african-arms-deal/>.

256. See *supra* Part III (discussing Art 46 of the UNCAC); see also, generally Paul Holden, *THE ARMS DEAL IN YOUR POCKET* (Jonathan Bal Pub., 2008) (exploring the procurement processes and scoring systems employed in the arms deal procurements).

257. See *supra* Part IV.A

UNCAC, state parties – including all of the states implicated above: South Africa, the United States, the United Kingdom, Germany and Sweden – are obliged to provide the broadest possible mutual legal assistance to one another regarding cases of corruption.²⁵⁸ Each of these states is also a party to the OECD Convention, and each is thereby bound to assist one another “to the fullest extent possible,” and to provide “prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning [corruption].”²⁵⁹

Yet South Africa does not appear to have made any formal requests for legal assistance to Germany, Sweden, the United Kingdom, or the United States, each of which had conducted extensive independent investigations and compiled substantial evidence. Instead, the arms deal investigation was halted, not by the head of the NPA, which normally would determine this, but by the head of the Hawks (now sitting within the Police, not the NPA) on the basis that the Germany would not cooperate.²⁶⁰ The arms deal investigation is precisely the type of case, involving multinational companies and offshore special purpose vehicles, that the mutual legal assistance agreements and laws related to asset seizure and money laundering are designed to address. Nonetheless, South Africa did not invoke them.

E. Access to Information – Good, But Not Enough

The criterion of “access to information” is the aspect under which South Africa performed the best. Although the government occasionally resisted or delayed releasing a given report or document, the information largely seems to have made its way into the public domain, allowing for a relatively public discourse about all of the above topics.

258. See supra Part III (discussing article 46 of UNCAC).

259. See supra Part III (discussing article 9 of the OECD Convention); South Africa has also acceded to the EU Convention on Extradition, and could have sought to extradite witnesses on that basis.

260. Stefaans Brummer et. al., *Arms Deal Probe 2000 – 2010*, MAIL & GUARDIAN (Oct. 15, 2010), <http://mg.co.za/article/2010-10-15-arms-deal-probe-20002010>; Anna Majaju, *Fury Over Halt of Arms Deal Probe*, SOWETAN LIVE (Oct, 15, 2010) available at: <http://www.sowetanlive.co.za/news/2010/10/15/fury-over-halt-of-arms-deal-probe>.

The arms deal, for example, was the subject of extensive media coverage and there have been several books on the issue. Indeed, many of the sources cited in this article are publicly available from the government or on the Internet, including the various reports issued by commissions of inquiry, and articles published by media sources such as the Mail & Guardian.

VI. CONCLUSION

South Africa's experience over the past twenty years show that mere passage of laws and establishments of institutions – that is, mere adherence to the letter of the anti-corruption roadmap – is insufficient to eradicate corruption. Of course, this begs the more significant question: *why?*

That question is unfortunately beyond the scope of this paper. There are innumerable factors one could point to, or angles from which to consider the problem, the corrupt legacy imprinted by South Africa's apartheid past; a white-owned media telling a story about corruption in black South Africa; a winner-take-all power struggle between Zuma and Mbeki; a lack of so-called "political will" amongst the leaders involved; an overwhelming need on the part of the ANC to consolidate power; overtones of tribalism between Zulus and Khosa; the worldwide corruption of the arms trade generally; the risks associated with a de facto one-party state vs. the checks and balances inherent in a multi-party state; the inability or unwillingness of the people of South Africa to directly hold their leaders accountable, and so forth. However, the clear lesson seems to be that there is no magic bullet, no guarantee against corruption, and no "roadmap" that leads inexorably to its eradication.

Still, the battle is a worthy one. Of the many ills attributable to corruption, perhaps the most insidious is the steady dissolution, and increasing skepticism and fatigue of a populace that slowly loses faith in the honesty of its leaders. South Africa appears to be in the throes of such a decline in confidence and faith, but perhaps some comfort can be found in the fact that if a new set of leaders were to arise, the laws and institutions to fight corruption are already in place, the roadmap ready to be followed, this time hopefully to a better end.