THE GAP BETWEEN PROMISE AND PRACTICE IN THE GLOBAL FIGHT AGAINST CORRUPTION

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Corruption by and of public officials is a serious threat to governments and it undermines the rule of law. Furthermore, corruption materially affects the environments in which companies operate and erodes the fabric of everyday economic life; it is the invisible tax that raises the cost of doing business and unfairly places it on those least able to pay.[1]

I. INTRODUCTION

IN THE LAST 30 YEARS, THERE HAVE BEEN six major anti-corruption conventions. The impetus for these conventions was the 1977 enactment of the *Foreign Corrupt Practices Act*[2] (*FCPA*) in the United States (U.S.). The competitive disadvantage created by the *FCPA* incited American corporations to lobby the United States government to get other countries on board. The first international anti-corruption convention, the *Inter-American Convention Against Corruption*,[3] was adopted by the Organization of American States (OAS) in March of 1996. This was followed in November 1999 by the *Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.[4] The Council of Europe adopted two conventions: an anti-corruption convention with criminal sanctions was adopted in 1998 and the other in

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1 Trade Compliance Center, *Addressing the Challenges of International Bribery and Fair Competition: The Third Annual Report Under Section 6 of the International Anti-Bribery and Fair Competition Act of 1998*, Executive Summary (2001), online: Trade Compliance Center <http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?204:71:1d3f3a75f36e7eb4c0ba094146751029ed694b7bbe97bf52fb8f64f51b3654dd:3>.

2 *Foreign Corrupt Practices Act* of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. 78 a, 78m, 78t, 78dd-1, 78dd-2, 78ff (1988 & Supp. V. 1993)).

3 OAS, *Inter-American Convention Against Corruption*, 29 March 1996 (entered into force 06 March 1997) [*OAS Convention*].

4 *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 17 December 1997, S.Treaty Doc. No. 105-43, 37 I.L.M. 1 (entered into force 15 February 1999) [*OECD Convention*].

1999, which provided civil remedies to compensate for damages incurred as a result of corruption. The African Union (AU) followed suit in 2003 when it adopted the *Convention on Preventing and Combating Corruption*.[5] In October of the same year, the United Nations General Assembly adopted the most recent convention to counter corruption, the *United Nations Convention Against Corruption*.[6] This paper will compare the first five of these conventions, highlighting their strengths and weaknesses. Next, Canadian legislation that existed prior to and resulted from the conventions that Canada has ratified will be discussed. In light of these anti-corruption conventions, a case study will be examined and the questions it raises will be addressed. Finally, the paper will examine whether or not the *UNCAC addresses* the current gaps in law and practice.

II. HISTORY

POWER, MONEY, AND WHISPERS OF UNDERWORLD involvement — the 1976 Japanese Lockheed scandal has the makings of a Hollywood thriller. The American aircraft corporation paid the Japanese Prime Minister US$1.4 million to influence Japanese airlines to purchase the L-1011 aircraft. After a decade-long legal dispute, the Japanese Prime Minister Kakuei Tanaka was convicted and sent to jail. Lockheed, on the other hand, found its bribe to be a "profitable investment,"[7] as none of its executives were fined or jailed. Needless to say, the once good relations between the countries soured.

Although the scandal was a media darling, Lockheed was not alone in its behaviour. Upon investigation, the Securities and Exchange Commission (SEC) discovered in excess of US$300 million in "questionable payments"[8] had passed between foreign officials and American companies — over 400 of whom had been implicated. In response to this "shocking, shameful development that sullied the reputation of [the United States],"[9] Congress enacted the *Foreign Corrupt Practices Act* [10] in 1977. In the first decades of enforcement, presidents, prime ministers, royal family members, ministry officials, military, and

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[5] *African Union Convention on Preventing and Combating Corruption*, 11 July 2003 [*AU Convention*].

[6] *United Nation Convention Against Corruption*, (2003) U.N. Doc. A/58/422 [*UNCAC*].

[7] Juliette D'Hollander, "Ethics in Business: The New OECD Convention on Bribery" (1999) 33 R.J.T. 147 at 153, n. 13.

[8] *Ibid.* at 153.

[9] Quote from Senator Proxmire, one of the drafters of the *FCPA* as cited in D'Hollander, *supra* note 7 at 153, n. 13.

[10] *Supra* note 2.

police officers were all scrutinized under the *FCPA*. As a result, 17 companies and 33 individuals have been charged.[11]

The United States Department of Justice enforces this domestic criminal law, which applies extraterritorially to American citizens, American corporations, or other entities falling within its jurisdiction who bribe foreign government officials.[12] It is important to note that the *FCPA* permits "grease" or facilitation payments. Grease payments are payments, "the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign political official, political party, or party official."[13] This narrowly interpreted exception includes circumstances where the official has little or no discretion in performing such day-to-day activities as "obtain[ing] permits, licences, or other official documents, visa, police protection or mail delivery, phone service, power and water supply, or actions of similar nature."[14] The second part of the *Act*, which deals with accounting standards, is administered by the SEC and applies to all corporations registered with the SEC.

Nearly 20 years after the original Lockheed Scandal, the Department of Justice was presented with an opportunity to save face. In January 1995, the Lockheed Corporation pled guilty to *FCPA* violations for bribing an Egyptian legislator in the sale of three transport planes. The corporation and two of its former employees were found guilty and received significant fines. Suleiman Nassar, Lockheed's Vice President of Middle East and North African Marketing, earned the dubious honour of becoming the first person imprisoned for an *FCPA* conviction.[15] Despite

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[11] William F. Pendergast, "Foreign Corrupt Practices Act: An Overview of Almost Twenty Years of Foreign Bribery Prosecutions" (1995) 7 International Quarterly 187 at 193.

[12] A. Timothy Martin, "Corruption and Improper Payments: Global Trends and Applicable Laws" (1998) 36 Alta. L. Rev. 416.

[13] *Supra* note 2, § 78dd-2(b).

[14] *Supra* note 7 at 158.

[15] Lockheed paid US$25 million in fines and a further US$3 million civil settlement. Allan R. Love, a former manager, cooperated with the investigation. Suleiman A. Nassar, the vice-president, fled to Syria to avoid prosecution. After being extradited back to the U.S., he was sentenced to 18 months in prison and fined US$125,000. See United States Department of Justice, "International Extradition: The International Fugitive" (December 1996), 44:6 USA Bulletin at 26-29, online: United States Department of Justice <http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4406.pdf>. Also see Jack G. Kaikati *et al.*, "The Price of International Business Morality: Twenty Years Under The Foreign Corrupt Practices Act" (2000) 26:3 J. Business Ethics 213 at 216; *United States v. Lockheed Corp.* (N.D. Ga. 1994); *United States v. Love* (N.D. Ga. 1994); *United States v. Nassar* (N.D. Ga. 1994).

a 1988 amendment[16] that sought to clarify the Act, American businesses complained that complying with the *FCPA*'s strict provisions resulted in lost business opportunities. The U.S. quest to repair its sullied reputation had placed it at a competitive disadvantage.[17] Acquiescing to corporate America's pleading to eradicate the *FCPA* would create a public relations nightmare both domestically and internationally. Therefore, the U.S. sought to level the playing field by urging the global community to follow its lead.

III. REGIONAL CONVENTIONS

1. The Organization of American States (OAS)

The OAS "brings together the countries of the Western Hemisphere to strengthen cooperation and advance common interests."[18] It is composed of 35 independent countries and boasts that it is "the region's premier forum for multilateral dialogue and concerted action."[19]

After much lobbying by the United States, the OAS adopted the first international anti-corruption convention in March of 1996. The following year, the *Inter-American Convention Against Corruption*[20] entered into force. Through a number of mandatory and discretionary provisions, the *OAS Convention* sought to curb the supply and demand sides of public sector corruption. Signatories are required to adopt laws that criminalize both foreign and domestic bribery as seen in accordance with the *FCPA*. The *OAS Convention* seeks to go one step further by mandating financial disclosure and transparency in accounting practices, as well as laying out guidelines for "asset seizure, extradition, and international cooperation in the collection of evidence."[21] While this was an important first step for the international community, the *OAS Convention* contained some key flaws. The most significant was the lack of an explicit monitoring system. In 2001, a follow-up mechanism was adopted, but its effectiveness has been undermined by a chronic lack of resources.

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[16] *Omnibus Trade and Competitiveness Act* of 1988, U.S.C.A. ss. 78dd-1 & 78dd-2.

[17] Heather Manweiller & Bryan Schwartz, "A Proposal for an Anti-corruption Dimension to the FTAA" (2001) 1 Asper Rev. Inter. Bus. & Trade L. 67.

[18] "About the OAS: The OAS and the Inter-American System," online: OAS <http://www.oas.org>.

[19] *Ibid.*

[20] *Supra* note 3.

[21] David Hess & Thomas W. Dunfee, "Fighting Corruption: A Principled Approach; The C [2] Principles (Combatting Corruption)" (2000) 33 Cornell Int'l L.J. 593 at 603.

2. The Organisation for Economic Cooperation and Development (OECD)

The OECD was the next organization to adopt a convention to combat corruption, as the 30 member states of the OECD "shar[e] a commitment to democratic government and the market economy."[22] Although the OECD has fewer member states than the OAS, it has greater economic influence. The World Bank states that 80 percent of OECD members are "high-income countries,"[23] with all G8 participants belonging to the OECD. In November 1997, the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*[24] was adopted. This convention, which commentators have considered "the most significant advancement in the fight against corruption and the strongest demonstration of its universal condemnation,"[25] entered into force in February 1999.

Unlike the *OAS Convention*, the *OECD Convention* has a very specific target: bribery of foreign public officials. Despite this narrowed scope, "bribery" and "foreign public official" are given a wide interpretation. Both the *OECD Convention* and the *FCPA* criminalize bribery within the definition of obtaining or retaining business,[26] but the *OECD Convention* expands the scope to include bribery where the purpose is to obtain "other improper advantage in the conduct of international business."[27] Like the *FCPA*, the *OECD Convention* has been criticized by Transparency International[28] for permitting "grease" or facilitation payments.[29]

In an effort to remain respectful of the different legal traditions, member states are to enact domestic legislation that conforms to the standards established by the *OECD Convention*. This is in contrast to the *FCPA*, which dictates a uniform set of rules.[30] The *OECD Convention* provides for criminal and civil sanctions for the bribery of foreign

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22 "About OECD," online: OECD <http://www.oecd.org/about/0,2337,en_2649_201185_1_1_1_1_1,00.html>.

23 "Doing Business: Economy Characteristics," online: World Bank <http://rru.worldbank.org/DoingBusiness/ExploreEconomies/EconomyCharacteristics.aspx>.

24 *Supra* note 4.

25 *Supra* note 21 at 602.

26 *Supra* note 4, art. 1(1).

27 *Ibid.*

28 Transparency International is "the only international non-governmental organisation devoted to combating corruption, brings civil society, business, and governments together in a powerful global coalition." "About TI," online: Transparency International <http://www.transparency.org>.

29 "The Commentaries on the Convention on Combating Bribery of Officials of Foreign Public Officials," online: OECD <www.oecd.org>.

30 *Supra* note 7.

officials. As the provisions of the *Convention* are mandatory, the OECD Working Group on Bribery (OECD Working Group) has been established to monitor and promote compliance. The first phase undertaken by the OECD Working Group was to assess the adequacy of national legislation. The second phase, which is still underway, is to monitor whether signatories are enforcing their legislation. Findings of the OECD Working Group are based on both self and mutual evaluation. With a view to transparency, these findings are published on the OECD website.

3. Council of Europe

The mandate of the Council of Europe (CoE)[31] "is [t]o create, develop, and strengthen the principles of democracy and the rule of law in member states."[32] Currently there are 46 member states.

The CoE has adopted two conventions to deal with corruption, namely the CoE *Criminal Law Convention on Corruption*[33] (*CCC*) adopted in 1998, and the CoE *Civil Law Convention on Corruption*[34] (*CLCC*), adopted the following year. They came into force on 1 July 2002 and 1 November 2003, respectively. As seen in the other international conventions, the CoE conventions establish regional consensus regarding standards for criminalization, civil sanctions, and enforcement. It is interesting to note that a number of non-member states observed the negotiations, including Canada, Japan, Mexico, and the U.S.

The CoE conventions are broader in scope than the *FCPA*, the *OAS* and *OECD Conventions* as they target public and private sector corruption. The *CCC* criminalizes bribery,[35] trading in influence,[36] and money laundering of proceeds from corruption offences.[37] The *CLCC* provides civil remedies, which stem from the "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof."[38] Remedies can include damages and the ability to nullify or void a contract.

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[31] It is important to note that the Council of Europe, the Council of the European Union and the European Council are distinct bodies. The Council of Europe is not part of the European Union.

[32] Council of Europe, "The Council of Europe Secretariat: Mandates and Objectives," online: CoE <http://www.coe.int/t/e/mandates/mandat.asp>.

[33] Council of Europe, *Criminal Law Convention on Corruption*, 4 November 1998, CETS 173 [*CCC*].

[34] Council of Europe, *Civil Law Convention on Corruption*, 4 November 1999, CETS 174 [*CLCC*].

[35] *Supra* note 33, arts. 2-11.

[36] *Ibid.*, art. 12.

[37] *Ibid.*, art. 13.

[38] *Supra* note 34, art. 2.

Both CoE conventions contain mandatory provisions that are monitored by the Group of States Against Corruption (GRECO),[39] a monitoring body established in May 1998 prior to the adoption of the conventions. Compliance to the conventions is sought through mutual evaluation and peer pressure. Regardless of the efficacy of this body, little can be accomplished in the way of enforcement when one considers that 30 percent of the membership has yet to ratify the conventions.[40] Notable exceptions include the economic powerhouses of France and Germany, as well as Italy, Russia, and Spain.

4. The African Union (AU)

The African Union (AU), founded in 2002, is the newly founded successor to the Organisation of African Unity,[41] whose membership spans the entire African continent, with Morocco as the only exclusion. Some of the objectives of the AU include the promotion of "democratic principles and institutions, popular participation and good governance" and "sustainable development at the economic, social and cultural levels as well as the integration of African economies."[42]

The *AU Convention*[43] was adopted in July 2003, a year after the AU was founded, and came into force on 4 August 2006. Following the path of other international conventions, the *AU Convention* seeks to establish a regional consensus, and it mimics the CoE conventions in scope. Private and public sector players can be found criminally liable for corrupt practices ranging from bribery,[44] to illicit enrichment,[45] to the laundering of proceeds of crime.[46] Though the *AU Convention* calls for the creation of an elected, 11-member advisory board to oversee implementation,[47] a lack of resources to fund such measures will likely thwart its effectiveness. Given that 9 of the 20 nations perceived as being

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[39] Though all signatories to the treaty are members of GRECO, not all members of GRECO are signatories.

[40] As of 4 January 2007, 13 of 46 signatories have not ratified the *CCC* and 14 of 46 signatories have not ratified the *CLCC*. See online: Council of Europe <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=1&DF=3/3/2007&CL=ENG>.

[41] "African Union in a nutshell," online: African Union <http://www.africa-union.org>.

[42] *Ibid.*

[43] *Supra* note 5.

[44] *Ibid.*, arts. 11 & 12.

[45] *Ibid.*, art. 8.

[46] *Ibid.*, art. 6.

[47] *Ibid.*, art. 22.

the most corrupt are found within its membership, the AU faces significant challenges.[48]

IV. LEGISLATIVE MEASURES TAKEN BY CANADA TO COMBAT CORRUPTION

DESPITE A SCORE OF 8.5/10 IN TRANSPARENCY International's report, ranking as the 14th least corrupt country in 2006,[49] Canada has been a reluctant partner in the global fight against corruption. Though the *OAS Convention* was adopted in 1996, Canada did not sign on to it until 7 June 1999. Of 28 eligible member states, only Barbados and Belize signed the convention after Canada. The convention was finally ratified on 1 June 2000. Meanwhile, Canada ratified the *OECD Convention* on 17 December 1998. Canadian companies should also be aware of the obligations imposed by the *FCPA*, especially the accounting provisions not specifically found in current Canadian legislation.[50]

Before Canada became a signatory to its first anti-corruption convention in 1997, Canada had legislation that dealt with corruption. A number of provisions in the *Criminal Code*[51] address corruption of Canadian officials, including: bribery of judicial officers;[52] bribery of officers;[53] frauds on the government;[54] municipal corruption;[55] selling or purchasing office;[56] and influencing or negotiating appointments or dealings in offices.[57] The *Criminal Code* also prohibits secret commissions involving an agent.[58] While no provision specifically deals with the corruption of foreign officials, section 465(3) states:

> Every one who, while in Canada, conspires with anyone to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place

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48 "Transparency International Corruption Perceptions Index 2006," online: Transparency International <http://www.transparency.org/policy_research/surveys_indices/cpi/2006>.

49 *Ibid.*

50 Robert A. Bassett, "Canadian Companies Beware: the U.S. Foreign Corrupt Practices Act Applies to You!" (1998) 36 Alta.L.Rev. 455.

51 R.S.C. 1985, c. C-46, s. 119.

52 *Ibid.*, s. 119.

53 *Ibid.*, s. 120.

54 *Ibid.*, s. 121.

55 *Ibid.*, s. 123.

56 *Ibid.*, s. 124.

57 *Ibid.*, s. 125.

58 *Ibid.*, s. 426.

> shall be deemed to have conspired to do that thing in Canada.

In some cases, the courts have applied this provision to offences committed outside of Canada provided "there [is] a 'real and substantial link' between [the] offence and this country."[59] Further, when weighing jurisdictional issues and potential concerns of the international community, Canadian courts have considered both the possibility of "interfering in another country's affairs,"[60] as well as the "interest in an offence not going unpunished."[61] It is also interesting to note that the *Criminal Code* is silent on jurisdiction in the case of being considered a party to an offence for aiding[62] or abetting.[63] Some have argued that the offence does not have to take place in Canada.[64] By this reasoning, if it could be shown that a person, juridical or otherwise, was a party to a bribery-related offence committed outside of Canada and there was a real and substantial link to that person, such person may be liable. Finally, the *Income Tax Act* (*ITA*)[65] contains provisions relevant to the issue. While some commentators have noted that the *ITA* has always disallowed the deduction of bribes as a business expense due to their illicit nature,[66] others claim they continue to be deductible in limited circumstances.[67]

In complying with the *OECD Convention*, Canada enacted the *Corruption of Foreign Public Officials Act* (*CFPOA*),[68] which came into force on 14 February 1999. The *CFPOA* makes it an indictable offence for every person "who, in order to obtain or retain an advantage in the course of business . . . offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official."[69] Given that it was enacted in compliance with the *OECD Convention*, it suffers the same limitations. The definition is restricted to bribery of foreign public officials,[70] but grease payments[71] are permitted. Debate exists as to whether the *CFPOA* applies to crimes that have taken place outside of

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[59] *Libman v. The Queen*, [1985] 2. S.C.R. 178.
[60] *Re. Ouellette and The Queen* (1998), 126 C.C.C. (3d) 219 at para. 26.
[61] *Ibid.*
[62] *Supra* note 51, s. 21(1)(b).
[63] *Ibid.*, s. 21(1)(c).
[64] Craig Forcese, "Deterring 'Militarized Commerce': The Prospect of Liability for 'Privatized' Human Rights Abuses" (1999-2000) 31 Ottawa L. Rev. 171 at 196.
[65] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1.
[66] *Supra* note 7.
[67] Vern Krishna, "Tax Views: Doing business in corrupt countries" *The Lawyers Weekly* 18:46 (16 April 1999) [Krishna].
[68] *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34.
[69] *Ibid.*, c. 34, s. 3(1).
[70] *Ibid.*, c. 34, s. 2 .
[71] *Ibid.*, c. 34, ss. 3(4)-(5).

Canadian borders. According to Edward Greenspan, "Parliament could have, but did not, deem activities which occur abroad to have occurred in Canada, as it did in the area of war crimes, air piracy and the protection of nuclear material."[72] Further, the *Criminal Code* specifically provides jurisdiction for torture[73] and crimes related to terrorism.[74] The same is true for the recently enacted *Crimes Against Humanity and War Crimes Act*.[75] As noted by the OECD Working Group in a review of Canada's implementation, "Canada rarely asserts extraterritorial jurisdiction, and has not established such jurisdiction with respect to the bribery of a foreign public official."[76] In response, Canada has explained that "it has generally legislated extraterritorial criminal jurisdiction in cases where there is an international consensus that a crime is of such universal concern as to justify extraterritorial jurisdiction."[77] This failure to provide for jurisdiction has weakened the *CFPOA*. If the alleged offence was committed by a Canadian, the Canadian government can always exercise jurisdiction using the nationality principle,[78] but this is a discretionary power that may have political consequences. Since there is yet to be any jurisprudence on this matter, how the courts will deal with this issue remains to be seen.

The enactment of the *CFPOA* has required amendments to other legislation or changes to future legislation.[79] As noted earlier, the question of deductibility of bribes is addressed in section 67.5(1) of the *ITA*,[80] which states:

> In computing income, no deduction shall be made in respect of an outlay made or expense incurred for the purpose of doing anything that is an offence under section 3 of the Corruption of Foreign Public Officials Act or under any of sections 119 to 121, 123 to 125, 393 and 426 of the

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[72] Patricia Adams, "Foreign aid corruption case puts Canada on Trial" *The National Post* (20 August 1999) C7. (QL).
[73] *Supra* note 51, s. 7 (3.7).
[74] *Ibid.*, ss. 7(3.73) - (3.75).
[75] *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, s. 8.
[76] "Canada: Review of Implementation of the Convention and 1997 Recommendation" at 13, online: OECD <http://www.oecd.org/dataoecd/13/35/2385703.pdf>.
[77] *Ibid.* at 13-14.
[78] Mark Freeman & Gibran Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at 492.
[79] Both 2003, c. 21 (Bill C-45), *An Act to amend the Criminal Code (criminal liability of organizations)* which came into force on 31 March 2004 and the *Public Service Employment Act*, R.S. 1985, c. P-33 which was enacted on 7 November 2003 have had to consider the *CFPOA*.
[80] *Supra* note 65, s. 67.5 [emphasis added].

> *Criminal Code*, or an offence under section 465 of the *Criminal Code* as it relates to an offence described in any of those sections.

In addition, section 67.5(2) gives the Minister the ability to "make such assessments, reassessments and additional assessments of tax, interest and penalties and such determinations and redeterminations as are necessary to give effect to subsection 67.5(1) for any taxation year." This leaves open the question of deductibility of grease payments, which are permitted under the *CFPOA*. Vern Krishna suggests that "[c]orrupting foreign officials to do what they are supposed to do is legal for criminal and tax purposes, but buying new business is verboten."[81] It appears that the Minister of National Revenue's only argument would be that of the dissent in *65302 British Columbia v. The Queen*.[82] Bastarache J. argued unsuccessfully that when taken as a whole, sections 9 and 18 of the *ITA* demonstrate that it was not the intention of Parliament to allow for the deduction of fines and penalties.

Although historically law enforcement agencies and the Canada Revenue Agency (CRA) have not worked closely together, it would appear that the *ITA* might be one of the most effective tools to uncover transgressions. This option appears to be thwarted by the CRA's policy to forgo criminal prosecutions and civil penalties to taxpayers who have not yet filed a return, but opt to file a voluntary return and pay "only the tax due plus interest . . . [or] who voluntarily submit the missing information and pay only taxes and interest."[83]

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[81] Krishna, *supra* note 67, see also Vern Krishna, "The Income Tax Act and deductibility of bribes" *The Lawyers Weekly* 21:46 (12 April 2002).
[82] *65302 British Columbia v. The Queen*, [1999] 3 S.C.R. 804.
[83] Vern Krishna, "Voluntary disclosure of tax transgressions" *The Lawyers Weekly* 22:1 (3 May 2002).

V. CASE STUDY

Consider the following scenario:[84]

Company A has been conducting business in Country L for nearly a decade. Given the competitiveness of the market, it decides that the only way to ensure it will get a lucrative contract is to offer a bribe to Mr. S. Mr. S, a public servant for many years, has been appointed by Country L as the first chief executive of the project. Company A transfers money to a Swiss bank account belonging to its agent, Mr. B, who coincidentally has been appointed as Honorary Consul in Country L by the Cabinet of Country A. Within a day or two, Mr. B transfers 60 percent of the funds received to Mr. S, and over the course of the next six years, nearly CAD$500,000 is received through a total of 23 transactions.

Rumours begin to circulate that there are irregularities in the project. An audit reveals that Mr. S abused a housing scheme, charged personal expenses to the project (a trip to Europe for him and his wife), and used his influence to secure jobs for family members. Further investigation reveals that Mr. S received money not only from Company A, but also from companies in countries B, C, D, E, F, G, and H. Country L begins criminal prosecution against Mr. S and would like to do the same against all the companies involved.

If Company A was a Canadian company, what are Canada's responsibilities and obligations? Currently, Canada's legislation and obligations under the *OAS* and *OECD Conventions* create an obligation to act. Company A would fall under the definition of "person," [85] which includes a "body corporate . . . [and a] company."[86] Mr. S would be

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[84] These are the facts of *Rex v. Acres International Ltd.* (2002) High Court of Lesotho, online: Odious Debts <http://www.odiousdebts.org/odiousdebts/publications/JugdmentAcres.pdf> [*Acres*]; see also *Acres International Limited v. The Crown* (2003) Court of Appeal of Lesotho, online: Odious Debts <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=subcontent&AreaID=12>; "The Lesotho Highlands Water Project Case Study: Multinational Trials," online: Southern African Information Portal on Corruption <http://www.ipocafrica.org/cases/highlands/multinational/index.htm>. See also Fiona Darroch, "The Lesotho Corruption Trials - A Case Study" prepared for Transparency International. "The Lesotho Highlands Water Project Case Study: Funding of Anti-corruption Trials," online: Southern African Information Portal on Corruption <http://www.ipocafrica.org/cases/highlands/funding/index.htm>.

[85] *Supra* note 68, s. 2. The *CFPOA* states that "person" means a person as defined in section 2 of the *Criminal Code*.

[86] *Supra* note 51, s. 2. According to the definitions in section 2 of the *Criminal Code*, "'every one,' 'person' and 'owner,' and similar expressions, include Her

deemed a "foreign public official" according to section 2 of the *CFPOA,* which defines "foreign public official" as "a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function." The money transferred to Mr. S via Mr. B falls under the bribing a foreign official provision because Company A "obtain[ed] . . . an advantage in the course of business [by] . . . directly . . . giv[ing] . . . [a] reward . . . [to] any person for the benefit of a foreign public official."[87] It does not qualify under any of the saving provisions[88] listed, nor were the transfers merely facilitation payments.[89]

Since the acts of Company A fall squarely within the definition of the offence, the *OECD Convention* requires that parties "either . . . extradite its nationals or . . . prosecute its nationals for the offence of bribery of a foreign public official."[90] The *OECD Convention* further qualifies this obligation by stating that the investigation and prosecution "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."[91]

If Canada chooses to proceed, the Royal Canadian Mountain Police (RCMP) would conduct the investigation and the Attorney General would conduct the prosecution. If Canada decides not to proceed, it has an obligation to co-operate with Country L. The *OECD Convention* requires parties to "provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention."[92] As this is a criminal offence, mutual legal assistance may be made available.[93] If this legal assistance is made available, it can be provided at any stage, from investigation to appeal, and can include assistance with "search and seizure; evidence gathering orders for testimony from persons or production of documents and things for use in a foreign state; leading of evidence; enforcement of foreign fines; and temporary transfer of detained persons to testify or assist."[94] Should Country L request

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Majesty and an organization"; It further defines 'organization' as 'a public body, body corporate, society, company, firm, partnership, trade union or municipality . . . '"

87 *Ibid.*, s. 3(1).
88 *Ibid.*, s. 3(3).
89 *Ibid.*, s. 4.
90 *Supra* note 4, art. 10(3).
91 *Ibid.*, art. 5.
92 *Ibid.*, art. 9(1).
93 *Mutual Legal Assistance in Criminal Matters Act,* R.S.C. 1985 (4th Supp.), c. 30.
94 *Supra* note 76 at 19.

extradition,[95] according to the *Extradition Act*,[96] the penalties imposed by the *CFPOA* are sufficient to permit Canada to do so.

VI. CANADA'S TRACK RECORD IN THE ENFORCEMENT OF ANTI-CORRUPTION MEASURES

ACCORDING TO THE TRANSPARENCY INTERNATIONAL Progress Report on the OECD Convention Enforcement, Canada has "few inadequacies in the legal framework for foreign bribery prosecutions."[97] Since the enactment of the *CFPOA*, one case has been prosecuted and three have been investigated.[98]

The Transparency International Progress Report on OECD Convention Enforcement lists the 2005 case, *R. v. Watts*[99] as the one case where the *CFPOA* was applied. The accused, Hydro Kleen Systems Inc., pled guilty to an act contrary to section 3(1)(a) of the *CFPOA*.[100] The Alberta Court of Queen's Bench accepted the plea and fined the corporation C$25,000. The charges against Robert Watts, the president and majority shareholder of Hydro Kleen and Paulette Bakke, the operations coordinator, were stayed. In a separate and earlier proceeding, Hector Ramirez Garcia, the U.S. customs official at the Calgary International Airport who received bribes amounting to C$28,299.88, pled guilty and was sentenced to six months in prison.[101]

The fact scenario presented above is based on the scandal surrounding the Lesotho Highlands Water Project (LHWP), one of three cases that have been investigated. In the 1990s, Masupha Sole, the Chief Executive Officer (CEO) of the US$2.4 billion project, received over US$2 million in bribes from Acres International and 11 other international dam-building companies. Of the 12 companies implicated, all originated

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[95] *Supra* note 4, art. 10.
[96] *Extradition Act*, 1999, c. 18, s. 3(1)(a).
[97] "TI Report Card 2004 on Enforcement of OECD Convention - Canada" (20 August 2004), online: Transparency International <http://www.transparency.org>.
[98] Canada, Foreign Affairs and International Trade, "Development and Society: Corporate Social Responsibility – Bribery and Corruption", *Seventh Report to Parliament: Implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Enforcement of the Corruption of Foreign Public Officials Act* (2 October 2006), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/tna-nac/ds/7-report_parliament-en.asp#enforce>.
[99] [2005] A.J. No. 568.
[100] *Supra* note 68.
[101] *R. v. Garcia*, [2002] A.J. No. 1262.

from countries that are signatories to at least one of the conventions discussed above, while 10 are signatories to the *OECD Convention*.

The Lesotho Government's decision to take on both parties is stated succinctly by Prime Minister Pakalitha Mosisili: "It takes two to tango . . . that is why we are prosecuting both, the officer and the multinational company."[102] The Lesotho government pursued Sole first, instituting both criminal and civil proceedings. To ensure the trial would withstand the expected public scrutiny, Judge Brendan Cullinan, a highly experienced former chief justice of Lesotho, was pulled out of his retirement in South Africa. Sole was eventually convicted and, on appeal, sentenced to 15 years in prison.

The prosecution then turned its attention to the multinational companies implicated in the scandal. In September 2002, Acres International of Canada (Acres) was the first of these companies to be convicted. Acres was initially given a fine equal to C$3.8 million; on appeal it was reduced to C$2.6 million. The following year, Lahmeyer International of Germany (Lahmeyer) was convicted. On appeal, their original fine of C$2.2 million was increased to C$2.5 million. The French multinational Spie Batignolles (now Schneider Electric SA), having "exhausted every legal avenue,"[103] pled guilty to bribery and agreed to pay a fine of C$2 million. The last trial, against Italian company Impregilo who was charged with five counts of bribery,[104] began in September 2006.[105] Impregilo ultimately pled guilty.[106]

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[102] Patricia Adams, "The Canadian Connection: A corruption trial in Lesotho should be forcing Canadian agencies to re-examine their relationships with firms that engage in bribery" *The National Post* (27 June 2002) FP15 (QL).

[103] Fine L. Maema, "An address on the Lesotho Highlands Water Project corruption trials at the South African Institute of International Affairs" (19 July 2004) [unpublished], online: South African Institute of International Affairs <http://www.saiia.org.za/modules.php?op=modload&name=News&file=article&sid=371&CAMSSID=66857a3f4163b0b280bd13a5a1c2465f>.

[104] Carmel Rickard, "Water project trial targets Italian giant" *Business Day* (4 September 2006), online: Business Day <http://www.businessday.co.za/articles/frontpage.aspx?ID=BD4A264169>.

[105] Note that in June 2003, Mr. Du Plooy, the intermediary who acted on behalf of Impregilo, plead guilty to bribing Mr. Sole in exchange for a fine and a prison sentence that was conditionally suspended. Guido Penzhorn, "Lesotho Highlands Water: A Case Study" (Paper presented to the Commonwealth Secretariat and Chatham House Anti-Corruption Conference, London, England, April 2006) [unpublished], Annex 19, online: Commonwealth Secretariat <http://www.chathamhouse.org.uk/pdf/research/il/ILanticorruption.pdf> [Penzhorn].

[106] European Anti-Fraud Office (OLAF), Press Release OLAF /06/13 "Three European Companies Guilty in African Aid Fraud Case" (3 October 2006), online: European Commission <http://ec.europa.eu/anti_fraud/press_room/pr/2006/13_en.html>.

The implication of a Canadian company in the LHWP scandal gave Canada an opportunity to demonstrate to the world that it was a leader in the fight against corruption; however, Canada balked. Canadian authorities initiated an investigation, but abandoned it when they found the acts were committed between June 1991 and May 1997, prior to the enactment of the *CFPOA*. In August 1999, when asked about the case, the Department of Foreign Affairs and International Trade stated that it was "not treating this issue at all";[107] meanwhile the Department of Justice refused to comment on whether Canada would provide mutual legal assistance. They did not.

In stark contrast, Switzerland's highest court responded positively to a request from the government of Lesotho for legal assistance. In April 2006 at an anti-corruption conference organized by the Commonwealth Secretariat and Chatham House in London, the lead counsel on behalf of the Lesotho government, Guido Penzhorn, explained how "[p]rosecutions such as these and particularly for a small country like Lesotho are not feasible without international assistance."[108] Swiss mutual assistance legislation permitted the prosecution to obtain Sole's bank records which served as the foundation upon which they built their case. Penzhorn went on to credit the Swiss response for keeping the momentum going on prosecutions that "may well have been scuttled already at a very early stage."[109]

To put Canada's response in perspective, consider the corrupt behaviour being engaged in at a domestic level. *The Commission of Inquiry into the Sponsorship Program and Advertising Activities*[110] traces the roots of the Liberal Party of Canada's misuse of government funds from its beginnings in 1994 and past 2003 when the program was finally cancelled by PM Paul Martin. Justice John H. Gomery's report includes such damning statements as "[f]rom 1997 to 31 August 2001, there was a widespread failure to comply with the government's contracting policies and regulations";[111] and "[t]he parliamentary appropriation process was not respected. Senior public servants . . . and some officials of the Crown corporations were knowing and willing participants in these

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[107] *Supra* note 72.

[108] Penzhorn, *supra* note 105 at para. 14.

[109] Guido Penzhorn SC, "Comments on the Current Lesotho Bribery Prosecutions", Presentation before the Senate foreign relations committee on 21 July 2004 at para. 11, online: U.S. Senate Committee on Foreign Relations <http://foreign.senate.gov/testimony/2004/PenzhornTestimony040721.pdf> [Senate].

[110] Canada, Parliamentary Inquiry, *Commission of Inquiry into the Sponsorship Program and Advertising Activities: Who is Responsible?* (Ottawa: Minister of Public Works and Government Services Canada, 2005), online: Collections Canada <http://www.gomery.ca/en/phase1report/ffr/ff_eng_full.pdf>.

[111] *Ibid.* at 475 at para. 3.48.

arrangements."[112] Given the taint of corruption in the party who enacted Canada's legislation, one questions if it was what Riesman refers to as a *lex simulata*: "a legislative exercise that produces a statutory instrument apparently operable, but one that neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied."[113]

VII. BARRIERS TO THE ENFORCEMENT OF ANTI-CORRUPTION MEASURES

THE LESOTHO TRIALS, SAID TO "REPRESENT the most important international corruption cases in the world today,"[114] highlight the challenges faced by countries who wish to prosecute parties involved in corrupt transaction. The prosecution experienced first hand that "[i]t is one thing to tell the world that one's Nation is participating in an international convention, and another matter altogether to actually live up to the convention itself."[115] By the end of the trials, it was obvious that this comment, made in reference to Latin American governments, applied equally to the wealthiest western democracies. The Attorney General of Lesotho, Fine L. Maema, recalls, "When these prosecutions commenced in 1999 the perception from abroad and in particular the host countries of the contractors/consultants involved appeared to be one of scepticism sometimes bordering on amusement."[116] Now, both the Attorney General and the chief prosecutor are frequently invited as speakers at anti-corruption conventions worldwide. In *Lahmeyer*, the Court of Appeal speaks to the challenges faced by the Lesotho authorities in their fight against and concludes that the key to unravelling the intricacies of the case was "[a]bove all . . . political will and the provision of the necessary resources."[117]

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[112] *Ibid.* at 473-74 at para. 3.44.

[113] W. Michael Reisman, *Folded Lies: Bribery, Crusades and Reforms* (New York: Free Press, 1979) at 31, cited in Philippa Webb, "The United Nations Conventions Against Corruption: Global Achievement or Missed Opportunity?" (2005) 8:1 J. Int'l Econ. L. 191 at 221 [*Webb*].

[114] *Supra* note 102.

[115] Luz Estella Nagle, "The Challenges of Fighting Global Organized Crime in Latin America" (2003) 26 Fordham Int'l L. J. 1648 at 1678.

[116] *Supra* note 103.

[117] *Lahmeyer* quoted in Penzhorn, *supra* note 105 at para. 18.

1. Lack of Political Will

The Acres International case is troubling for a number of reasons. The dismissive attitude taken by the Canadian government towards the government of Lesotho's decision to pursue the case was unjustified. The comment that "there is corruption with courts in the Third World"[118] by a Canadian government official at the office of the Canadian Executive Director to the World Bank may have some truth, but in light of Canada's refusal to assist in ensuring an investigation and prosecution without the taint of corruption, it can only be construed as inflammatory. The eloquent then-Speaker of the South African Parliament, Dr. Frene Ginwalla, offers the following insightful remark: "attributing corruption to [African] cultures is both arrogant and racist, as well as convenient and self-serving. It says more about the culture of the North, than our own."[119] At minimum, Canada's response was not in line with a country that is a signatory to two conventions that aim to combat corruption.

Comments made by Penzhorn before the U.S. Senate Committee on Foreign Relations are telling. In 1999, when it appeared that the prosecution would be limited to the demand side, the proceedings received praise from the companies and their respective governments. As it became clear that the supply side would also be pursued, Penzhorn noted a "discernable change in attitude."[120] On the question of political will, he concluded that "[t]here is a lingering impression in Lesotho, as well as in South Africa, that the interest of first world countries in the present prosecutions lies not so much in the successful outcome of these prosecutions but rather in protecting the interest of its companies that are involved."[121] Sadly, the fact that both Acres and the Lesotho government sought the assistance of the Canadian government, but only Acres received any, bolsters this belief.[122] Acres correctly asserts that Canadian companies face increasing risks abroad and need support to "ensure that they receive a fair hearing, due process and an impartial judicial system when operating in developing countries,"[123] but the facts

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[118] "Bank Silent on Corporate Corruption in Lesotho" (8 September 2003), online: Global Policy Forum <http://www.globalpolicy.org/socecon/bwi-wto/wbank/2003/0908corruption.htm>.

[119] Anver Versi, "On Corruption and Corrupters" (1996) 215 African Business 7 at 7.

[120] *Supra* note 109 at para. 8.

[121] *Ibid.* at para. 20.

[122] See generally A. Hylton, "Acres Responds" *The National Post* (5 April 2004) FP15 (QL).

[123] Oskar T. Sigvaldason "The Canadian challenge: Acres International's case highlights the risks Canadian companies face in developing countries, and the

of this case do not suggest that their rights were at risk of being compromised.

The timing of the acts *vis a vis* legislation may justify the Canadian government's decision not to prosecute, but the decision of the Canadian International Development Agency (CIDA) and the Crown corporation, Export Development Canada (EDC), to continue to work with Acres casts further doubts on the sincerity of Canada's commitment to combating corruption. Both the CIDA[124] and EDC[125] have anti-corruption guidelines that permit them to stop working with organizations found guilty of corruption. Neither agency's guidelines specify that the organizations must be found guilty in a Canadian court. When asked about the EDC's ongoing support for Acres, the EDC's spokesman said, "It's not the role of financial institutions to punish companies for these things."[126] In connection with the LHWP convictions, a World Bank financed contract, Acres International "was declared ineligible to receive any new [World] Bank financed contracts"[127] for three years. The integrity of the position taken by the CIDA and EDC must be questioned in light of these sanctions imposed by the World Bank in July 2004.

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need to ensure they receive due process" *The National Post* (19 July 2002) FP11 (QL).

[124] CIDA's anti-corruption program was updated in October 2004. CIDA now "reserves the right to disqualify any proposal submitted by a Consultant if the Consultant or any of the Consultant's officers, employees and Subcontractors included in the proposal:
a) were convicted during a period of three years prior to the submission of the proposal, by a court of law in Canada or in any other jurisdiction, for an offence involving bribery or corruption or;
b) are under sanction, for an offence involving bribery or corruption, imposed by a government, a governmental organization or a development organization providing development assistance," online: CIDA <http://www.acdi-cida.gc.ca/cida_ind.nsf/vLUallDocByIDEn/219D23E24A716D0785256DEC006D0345?OpenDocument#sec100>.

[125] "EDC's Anti-Corruption Policy Guidelines," online: EDC <http://www.edc.ca/corpinfo/csr/anti_corrup/acpg_e.pdf>.

[126] Stephen Leahy, "Groups fear Canadian funding for Romanian mine" *Inter Press Service News Agency* (16 November 2003), online: Odious Debts <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=9103>.

[127] The World Bank, News Release, No. 2005/33/S, "World Bank Sanctions Acres International Limited" (23 July 2004).

2. Lack of Financial Resources

The prospect of financing a prosecution, which "would constitute a considerable drain on [a country's] financial resources,"[128] creates a significant barrier to the enforcement of the conventions. When we contrast the annual revenue of the Government of Canada ($348.2 billion) to that of Lesotho ($625.4 million), it becomes abundantly obvious who has a greater capacity to bear the burden of a costly trial. Compare the same figure to the governments of the other corporations implicated in the LHWP: Germany ($1.079 trillion); France ($882.8 billion), the UK ($688.9 billion); Italy ($688.9 billion); Sweden ($177.7 billion); Switzerland ($123.2 billion); and even South Africa ($37.48 billion). That none of these governments have given any financial assistance borders on the absurd. Stated bluntly, "[f]aced with its own economic and social problems, such as a frightening Aids pandemic, Lesotho cannot really afford the costs incurred in these prosecution."[129]

At a public meeting in Pretoria in November 1999, a number of bodies, including the World Bank, the European Union (EU), and several large financial institutions made a commitment to the government of Lesotho to provide financial assistance for the prosecution of the trials. Five years later, after spending over R28 million[130] on the trials, Lesotho had yet to receive any of the promised assistance[131] nor had they been successful in getting Acres to pay their R13 million fine.[132] In July 2004, Acres claimed an agreement was made with the Lesotho government to pay the said fine. Ironically, John Ritchie, a vice-president for this company who did C$21-million worth of work on the LHWP, states that a "commitment was made in accordance with what we were capable of

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[128] *Supra* note 103.
[129] *Supra* note 109 at para. 19.
[130] Wiseman Khuzwayo, "Crooked company snubs Lesotho" *Business Report* (21 March 2004), online: Business Report <http://www.busrep.co.za/index.php?fSectionId=&fArticleId=379293>. Using the Bank of Canada exchange rate for 3 January 2007, 0.1687, the Canadian equivalent is $4.7M.
[131] *Supra* note 109 at para. 17.
[132] Acres International has asked to be able to pay the fine in installments. *Supra* note 132 and Wiseman Khuzwayo, "Acres has not paid a cent of its fine for corruption" *Business Report* (12 September 2004), online: Business Report <http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=2221338>.
Using the Bank of Canada exchange rate for 3 January 2007, 0.1687, the Canadian equivalent is $2.2M.

paying."[133] Lesotho, a country that ranks 24th among the world's least developed nations,[134] was not given the luxury of making disbursements when they were capable of paying. To date, the only money Lesotho has received is from the fines they have been able to collect.[135]

VIII. LOOKING TO THE FUTURE: THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

HAVING EXPLORED THE ORIGIN AND EXPERIENCE of regional anti-corruption conventions, we now turn look to the future. The *United Nations Convention Against Corruption* (*UNCAC*), the "first legally binding, international anti-corruption instrument,"[136] entered into force on 14 December 2005. Today, with 81 signatories, it is the most widely ratified anti-corruption convention.[137] To better understand what role the *UNCAC* will play in the future fight against corruption, it is helpful to consider two key issues that influenced the negotiation and adoption of the most recent of the anti-corruption conventions: a global policy shift to address security concerns and the LHWP prosecution and trials.

1. Global Shift in Policy

As was seen with the *OAS* and the *OECD Conventions*, the United States took the lead in advocating for the *UNCAC*.[138] Whereas past

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[133] Karen MacGregor & John Saunders, "Acres accused of still owing $2-million in fines" *The Globe and Mail* (19 July 2004), online: Probe International <http://www.probeinternational.org/tgp/print.cfm?ContentID=10998>.

[134] UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, "List of Least Developed Countries," online: The United Nations <http://www.un.org/special-rep/ohrlls/ldc/list.htm>.

[135] Email from Guido Penzhorn to Lori Ann Wanlin (19 June 2006).

[136] United Nations Office on Drugs and Crime, "You Can Stop Corruption: International Anti-Corruption Day" (9 December 2006), online: UNODC <http://www.unodc.org/unodc/event_2006-12-09_1.html>.

[137] As of 4 January 2007 it has 81 ratifications and 140 signatories. For an up–to-date list of signatures, see "United Nations Convention against Corruption," online: The United Nations <http://www.unodc.org/unodc/crime_signatures_corruption.html>.

[138] Note that the U.S. contributed $500,000 to promote ratification and implementation of the *UNCAC*. U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, "U.S. Contributes $500,000 to Support Implementation of the United Nation Convention Against Corruption" (13 December 2004), online: U.S. Department of State <http://www.state.gov/p/inl/rls/other/39714.htm>.

conventions focused on the desire to level the playing ground for trade, *UNCAC*, like many policies since 2001, made this motivation secondary to the need to "combat international crime and terrorism."[139] At the Third Annual Forum on Fighting Corruption and Safeguarding Integrity held prior to the adoption of the *UNCAC* in 2003, Commerce Secretary Don Evans notes the change in policy and suggests that the "task to attack corruption has taken on greater urgency."[140] Also, he suggests that "[c]ountries plagued by chronic corruption endanger not only their neighbors but, as potential sanctuaries to terrorist groups, they threaten the world."[141] In his opening statement for the hearing on the *UNCAC*, Chairman Richard G. Lugar advises the Senate Committee On Foreign Relations, that it "improves the tools through which [U.S.] law enforcement agencies can investigate and prosecute money laundering, which can and has been used to fund terrorism."[142] Lugar also reminds the committee that "fundamental U.S. national security interests demand that the United States work hard to establish a global climate of intolerance for corruption and bribery."[143] Only months prior to the November 2006 ratification of the *UNCAC* by the United States, President George W. Bush reiterated the primacy of this strategy in a press release: "Promoting transparent, accountable governance is a critical component of our freedom agenda."[144]

One of the consequences of this policy shift is a move away from the near solitary goal of the *OECD Convention,* preventing bribery of foreign public officials, to a comprehensive instrument which addresses a broad range of corrupt practices including both foreign and domestic bribery in the public or private sphere,[145] embezzlement,[146] trading in influence,[147]

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139 Office of the Press Secretary, The White House, Press Statement, Statement by the President on Kleptocracy, President George W. Bush (10 August 2006), online: United States Department of State <http://www.state.gov/p/inl/rls/prsrl/ps/70194.htm>.

140 United States Department of Commerce, Remarks by Commerce Secretary Don Evans at the Third Annual Forum on Fighting Corruption and Safeguarding Integrity (31 May 2003) Seoul, South Korea, online: US Department of Commerce <http://www.osec.doc.gov/ogc/occic/SecEvans_GFIII.htm>.

141 *Ibid.*

142 United States Senate, Richard G. Lugar, Opening Statement for Hearing On United Nations Convention Against Corruption, Senate Committee On Foreign Relations (21 June 2006), online: United States Senate <http://www.senate.gov/~foreign/testimony/2006/LugarStatement060621.pdf>.

143 *Ibid.*

144 *Supra* note 139.

145 *Supra* note 6, arts. 15-16, 21.

146 *Ibid.*, arts. 17, 22.

147 *Ibid.*, art. 18.

abuse of functions,[148] illicit enrichment,[149] and money laundering.[150] It is important that the *UNCAC* recognize the multifaceted nature of corruption, but there is a reason to question the wisdom of taking such an expansive approach. The conclusions of a recent study on the effectiveness of global prohibition regimes[151] echoes those found by this paper: "the antibribery regime in general and the OECD Convention in particular have not been particularly effective in reducing perceived corruption, increasing control of corruption, increasing prosecutions of bribery, or reducing perceived bribery."[152] The analysis suggests a number of factors that contribute to the effectiveness of a regime. These include "clear causal explanation for a problem,"[153] "behavioral diversity is small,"[154] "behavioral change expected of targets is modest,"[155] "clarity of objectives is high,"[156] "allocation of resources for the purpose of implementation is high,"[157] and "regime participants articulate explicit, balanced implementation systems."[158] In addition, target groups who are either large or powerful[159] are detrimental to the effectiveness of a regime. One of the identified strengths of the *OECD Convention* was its limited scope.[160] Based on this analysis, adopting an expansive scope may not bode well for the success of the *UNCAC.* Further, given the nuanced causes of the problems, the significant behavioral change required, the varying objectives, the unspecified allocation of resources and the range of implementation systems, the *UNCAC* has significant obstacles to overcome. This is to say nothing of the target groups who may range from customs officials to organized crime rings.

While broadening the scope of the corruption may create some disadvantages, reframing corruption as a national security concern may benefit domestic implementation. In the past, access to bank records and

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148 *Ibid.*, art. 19.
149 *Ibid.*, art. 20.
150 *Ibid.*, art. 23.
151 The author used four indicators in the analysis: the annual Corruption Perceptions Index published by Transparency International, The International Risk Guide published by Political Risk Services Group (2004), prosecutions, the Bribe Payers Index published by Transparency International. See Kathleen A. Getz, "The Effectiveness of Global Prohibition Regimes: Corruption and the Antibribery Convention" (2006) 45:3 Business & Society 254 at 266-69.
152 *Ibid.* at 269.
153 *Ibid.* at 259.
154 *Ibid.* at 260.
155 *Ibid.*
156 *Ibid.* at 261.
157 *Ibid.* at 262.
158 *Ibid.* at 263.
159 *Ibid.* at 260.
160 *Ibid.* at 272.

various financial or commercial documents may have been shielded by privacy laws. Governments may now have greater latitude in legislating measures that impede on privacy if the reason cited is security rather than trade. Consider, for example, the far reaching implications of the *USA PATRIOT Act*.[161]

2. Lessons Learned

The LHWP prosecution and trials undoubtedly influenced the negotiations of the conventions as by the time the convention was adopted in 2003, convictions had been secured for Sole, Acres and Lahmeyer. It is therefore worth exploring whether the *UNCAC* would have assisted the prosecution in the LHWP scandal had it been in force at the time.

a) Political Will and Cooperation

Based on his experience as chief prosecutor, Penzhorn offers many practical suggestions. One of such suggestions is for home and host countries to focus on their respective sides of the corrupt act while extending help to the other when needed. The advantage of such an approach is that both sides, supply and demand, are prosecuted while avoiding obvious evidentiary and procedural problems.[162] However, as seen in the LHWP cases, only Lesotho demonstrated the political will to pursue the prosecution. Discretionary power is at times susceptible to political will. The *UNCAC* addresses the issue of discretion directly by stipulating that parties "shall endeavor to ensure that any discretionary legal powers . . . are exercised to maximize the effectiveness of law enforcement measures . . . "[163] Further, although parties retain the right to refuse mutual legal assistance,[164] reasons must be given for the refusal.[165] Refusals based on the ground that the offence involves fiscal matters are not permitted.[166]

The experience of the LHWP scandal demonstrates that a co-operative prosecution is the ideal, but without prior agreements in place it is difficult to achieve. Of all the countries whose nationals were involved in

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[161] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act* of 2001, Pub. L. No. 107-56, [2001] U.S.C.C.A.N. 115 Stat. 272, online: Electronic Privacy Information Centre <http://www.epic.org/privacy/terrorism/hr3162.html> [*USA PATRIOT Act*].
[162] See *supra* note 109 at paras. 42 & 43.
[163] *Supra* note 6, art. 30(3).
[164] *Ibid.*, art. 46(21).
[165] *Ibid.*, art. 46(23).
[166] *Ibid.*, art. 46(22).

the LHWP, only South Africa,[167] Switzerland, and France offered any assistance.[168] As noted earlier, in the cases where assistance was offered, it "contributed immeasurably to the successful outcome of these prosecutions."[169]

Chapter IV of the *UNCAC* is devoted to international cooperation. It provides guidance on a variety of issues, including the transfer of sentenced persons[170] or of criminal proceedings,[171] cooperative approaches to law enforcement[172] and investigations[173] and the adoption of special investigative techniques.[174] The bulk of the chapter, however, consists of detailed provisions addressing the key issues of extradition[175] and mutual legal assistance.[176]

One of the most successful partnerships was between the Lesotho prosecution team and the European Anti-Fraud Office (OLAF), "the investigating and prosecuting arm of the EU which deals with white collar crime involving EU funds."[177] The prosecution credits OLAF for helping them access company records which "impacted directly on the conviction of Schneider Electric SA [now merged with Spie Batignolles],"[178] as well as in the prosecution of Impregilo of Italy.[179]

The *UNCAC* suggests the creation of an OLAF-like financial intelligence unit charged with collection, analysis and dissemination of reports of suspicious financial transactions,[180] including those potentially connected to money-laundering, [181] to the competent authorities. In an effort to remove some of the legal obstacles to accessing to key banking documents, *UNCAC* contains provisions which address bank secrecy. First, signatories must ensure that domestic

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[167] See *supra* note 109 at para. 21.
[168] *Ibid.* at para. 19.
[169] *Ibid.* at para. 11.
[170] *Supra* note 6, art. 45.
[171] *Ibid.*, art. 47.
[172] *Ibid.*, art. 48.
[173] *Ibid.*, art. 49.
[174] *Ibid.*, art. 50.
[175] *Ibid.*, art. 44.
[176] *Ibid.*, art. 46.
[177] Guido Penzhorn, "Three strikes against graft: assessing the impact of high-profile corruption" (Paper delivered to the Institute for Security Studies (ISS) seminar on the impact of high-profile corruption cases in Lesotho, Mozambique and South Africa, held in Gauteng, South Africa, 15-17 March 2004) at para. 13, online: Odious Debts <http://www.odiousdebts.org/odiousdebts/print.cfm?ContentID=10173>.
[178] See *supra* note 109 at para. 12 [emphasis added].
[179] *Supra* note 105 at para. 14.2.
[180] *Supra* note 6, art. 58.
[181] *Ibid.*, art. 14(1)(b).

criminal investigations may proceed unimpeded by bank secrecy laws.[182] Next, courts must have authority to grant access to or permit seizure of "bank, financial or commercial records."[183] Finally, bank secrecy may not be used as grounds to decline to act for purposes of freezing, seizure or confiscation[184] or to decline to render mutual legal assistance.[185]

b) Financial and Material Support

As discussed earlier, the government of Lesotho faced prohibitively expensive investigation and prosecution. The constraints felt by Lesotho are not unique. In recognition of "the special problems and needs of developing countries and countries with economies in transition"[186] the *UNCAC* contains three specific but non-mandatory provisions. First, in support of developing countries anti-corruption programmes, parties should afford "the widest measure of technical assistance."[187] Next, with the goal of fostering an atmosphere of cooperation and stimulating dialogue, it encourages "subregional, regional and international conferences and seminars."[188] Finally, it recognizes the need to support the efforts of "developing countries and countries with economies in transition" financially.[189] Practical measures such as stipulating that the costs for executing requests for mutual legal assistance be borne by the requested party,[190] may alleviate some of the financial burden, but as the LHWP demonstrates, they are insufficient to mount a thorough prosecution. To ensure that a lack of financial resources is not a barrier to the enforcement of anti-corruption measures, the *UNCAC* recommends that a specifically designated account be established by the United Nations. Parties are encouraged to make "adequate and regular voluntary contributions."[191] As a guide, the *UNCAC* suggests parties contribute "a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention."[192]

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[182] *Ibid.*, art. 40.
[183] *Ibid.*, art. 31(7).
[184] *Ibid.*
[185] *Ibid.*, art. 46(8).
[186] *Ibid.*, art. 60(6).
[187] *Ibid.*, art. 60(2).
[188] *Ibid.*, art. 60(6).
[189] *Ibid.*, art. 60(7).
[190] *Ibid.*, art. 46(28).
[191] *Ibid.*, art. 62(2)(c). See also *ibid.*, art. 60(8).
[192] *Ibid.*, art. 62(2)(c). Note the similarity of this provision to one found in the *Crimes Against Humanity and War Crimes Act*, which provides for the creation of a fund into which "all money obtained through enforcement in Canada of orders

3. Remaining Weaknesses

The *UNCAC* addresses a number of the weakness in the existing anticorruption regime which were exposed by the LHWP prosecution and trials but some weakness remain. The following four issues should be considered and the recommendations implemented in conjunction with the *UNCAC*.

i) Stronger Authoritative Deprivations

As discussed earlier, the CIDA and EDC continued to work with Acres International, despite its conviction by the court in Lesotho. Legitimate concerns with regard to foreign judgments do exist, but in situations where this is not the case — as the World Bank recognized was the case with Acres — signatory governments need to exercise authoritative deprivations. Commentators have noted the power of "authoritative deprivations, such as ineligibility to receive public funds, and the loss of accreditation, license, or charter"[193] and their ability to curb the activity of private actors. In *Lahmeyer*, the Lesotho Court of Appeal reminds "the international community and particularly funding agencies" that it is "incumbent on [them] . . . to revisit those practices and procedures it has in place and to use those sanctions it has the power to impose whenever contraventions of the kind proved in respect of this project occur."[194]

The inaction of these two funding agencies is precisely what the court is referring to. Sadly, the *UNCAC* offers little in the way of inciting action by funding agencies such as the CIDA and EDC. It stipulates that parties ensure that legal persons who are found liable of corruption are "subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions," but the *UNCAC* fails to directly tackle the question of authoritative deprivations. In addressing the question of sanctions, it suggests that parties consider disqualifying persons convicted of corruption related offences from holding of provisions related to either public office[195] or office in state owned

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of the International Criminal Court for reparation or forfeiture or orders of that Court imposing a fine" are paid. *Supra* note 75, s. 30(1)(a).

[193] Christopher D. Stone, "Corporate Vices and Corporate Virtues: Do public/private distinctions matter?" (1982) 130 U. Pa. L. Rev. 1441 at 1452.

[194] *Lahmeyer International GmbH v. The Crown*, Lesotho Court of Appeal, case number C of A (CRI) 6 of 2002, delivered on 7 April 2004. Steyn, President of the Court, and Grosskopf JA and Smalberger JA (both former judges of the South African Supreme Court of Appeal) at 55 quoted in Senate, *supra* note 109 at 32.

[195] *Supra* note 6, art. 30(7)(a).

enterprises,[196] but is silent on the issue of eligibility for receiving state funds. Governments should seek to ensure that governmental funding agencies follow policies that are in line with the spirit of its anti-corruption efforts.

ii) Co-ordinated efforts with Multilateral Development Banks

In 2002, the World Bank commissioned The Global Poll: Multinational Survey of Opinion Leaders to examine a number of issues relating to international development, including the impact of corruption. "Overall, the Bank [was] seen as doing a barely average job in helping developing countries reduce corruption."[197] Two years later, at the U.S. Foreign Relations Committee Hearings, the World Bank was not only commended for its efforts to combat corruption, but also credited as setting an example for other Multilateral Development Banks (MDBs) to follow.[198] This shift in the World Bank was also felt by the companies involved in the LHWP. Initially the World Bank's investigation found that Acres was not involved in any illicit activities. This finding was re-visited when the Lesotho prosecutions began. "The interests of the World Bank and those of Lesotho largely coincided and this resulted in close co-operation between the Bank's investigation and ours."[199] Recently, the World Bank declared Lahmeyer ineligible for bank contracts for a period of seven years, making it the second company implicated in the LHWP to receive sanctions.[200]

The *UNCAC* encourages cooperation between national authorities and the private sector including financial institutions,[201] but makes no

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196 *Ibid.*, art. 30(7)(b).

197 Princeton Survey Research Associates for the World Bank, Full Report, May 2003, "The Global Poll: Multinational Survey of Opinion Leaders 2002" at 55, online: The World Bank <http://siteresources.worldbank.org/NEWS/Resources/globalpoll.pdf>.

198 Vinay Bhargava & Emil Bolongaita, "Combating Corruption in Multilateral Development Banks: An Analysis of Key Issues and Recommendations Raised during the US Foreign Relations Committee Hearings" (25 July 2005), online: The World Bank <www.worldbank.org/publicsector/anticorrupt/combating%20corruption%20in MDBfull.doc>.

199 See *supra* note 109 at para. 15.

200 World Bank, Press Release, 129/2007/INT, "World Bank Sanctions Lahmeyer International for Corrupt Activities in Bank-Financed Projects" (6 November 2006), online: The World Bank <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21116129~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

201 *Supra* note 6, art. 39.

specific mention of MDBs. Despite the lack of explicit reference, the expertise of MDBs should be sought out, especially with regard to the provisions in chapter VI of the *UNCAC* which relate to technical assistance and information exchange.[202]

iii) Enforcement of Foreign Judgements

Countries like Lesotho that take on the significant challenge of prosecuting, convicting, and sentencing parties involved in corrupt acts will find that their effort may be for naught as there is no way to enforce the judgements outside of their borders. Effectively, corporations can choose to pay any imposed fines and view it as a cost of doing business or "simply does not pay the fine, as was the case with Acres, which only paid after strong pressure from the World Bank."[203]

The enforcement of foreign judgements is important for two main reasons: first, it ensures that corrupt acts are prosecuted; and second, it acts as a deterrent. Given that only 3 of a potential 65 members of the Hague Conference on Private International Law are signatories to *The Convention on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* which came into force in 1979,[204] it does not appear to be an element of the problem that will be resolved soon. While the *UNCAC* devotes a chapter to asset recovery,[205] it remains silent on the issue of judgements.

iv) Domestic Law: CFPOA Amendment

In circumstances where the bribe payer is a foreign national, Penzhorn states, "The obvious solution is for these countries themselves to prosecute the bribe payers."[206] The home country should also prosecute in cases where the host country is either unable or chooses not to.

Canada's legal framework is sufficient to fight corruption, but it appears to lack the will to do so. As noted earlier, the *UNCAC* does have provisions which address the question of prosecutorial discretion, but compliance is more likely under domestic law provisions than

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[202] *Supra* note 6, arts. 60-62.
[203] *Supra* note 105 at para. 21.
[204] *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, (entered into force 20 August 1979), online: Hague Conference on Private International Law <http://www.hcch.net/index_en.php?act=conventions.text&cid=78>.
[205] *Supra* note 6, arts. 51-59.
[206] *Supra* note 105 at para. 20.

international law instruments.[207] Consequently, the *CFPOA* should be amended to include a provision on jurisdiction and/or a provision that deems activities that have occurred abroad to have incurred in Canada; this will ensure that a lack of will does not undermine Canada's commitment. There is support for this amendment by the OECD Working Group who expressed concerns that "Canada's decision not to assert nationality jurisdiction could create a gap in the coverage of its implementing legislation."[208] Canada asserts that an amendment of the Federal Prosecution Service Deskbook, which recommends the "prosecutor set out in writing the grounds for not prosecuting 'in the public interest' when there is sufficient evidence to do so"[209] addresses the Working Group's concerns. While this is a step forward, it still leaves room for improper use of discretion.

4. Outstanding ratification

The discussion to this point has been from the perspective that states implicated in the LHWP have all ratified the *UNCAC*. It must be recognized that this is simply not the reality. Despite repeated references to the fight against corruption at the 2005 G8 summit at Gleneagles in Scotland, only half of the G8 members have ratified the *UNCAC*. In the progress report on the Africa Action Plan agreed upon in Kananaskis, the G8 Africa Personal Representatives urge countries to "work to ratify and implement the UN Convention against Corruption."[210] While it appears that 27 African countries have heeded the G8's recommendation to ratify the *UNCAC*, Canada, Germany, Italy and Japan have not.[211] Following the 2006 summit in St. Petersburg in Russia, Transparency International commented in its news release that "[t]he G8 cannot prescribe anti-

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[207] For a discussion on the challenges the UN faces in insuring compliance of international conventions, see *Webb supra* note 113 at 222.

[208] *Supra* note 76 at 24.

[209] OECD, Directorate for Financial and Enterprise Affairs, *Canada: Phase 2: Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions* (21 June 2006) at 22, online: OECD <http://www.oecd.org/dataoecd/5/6/36984779.pdf>.

[210] G8 Gleneagles 2005, *Progress Report by the G8 Africa Personal Representatives on Implementation of the Africa Action Plan* at para. 48, online: G8 Presidency website <http://www.g8.gov.uk/Files/KFile/PostG8_Gleneagles_AfricaProgress Report.pdf>.

[211] *Supra* note 137.

corruption and transparency measures that they themselves have not followed."[212]

Of the nine countries that had nationals involved in the scandal, only France, the U.K., South Africa and Lesotho have ratified the *UNCAC*. It is disappointing to note that neither Canada nor Germany, home countries of the two companies with the dubious distinction of being convicted in Lesotho and sanctioned by the World Bank, have ratified the convention.

Canada signed the *UNCAC* on 21 May 2004 and current Canadian administration, under the guise of the federal accountability action plan, asserts that it "remains committed to ratifying the *United Nations Convention Against Corruption* as soon as possible."[213] This position was reasserted in a report to the Canadian parliament in October 2006 which states that Canada is "currently taking steps that would enable [them] to ratify."[214]

IX. CONCLUSION

PRIOR TO THE ADOPTION OF THE *UNCAC*, the largest and most economically influential nations of the world, as well as the majority of the other nations, were signatories to at least one of the five regional anti-corruption conventions. Despite the legal framework these conventions created, corruption persisted without accountability due to systemic problems and lack of genuine political will.

The new millennium saw a shift in the approach to corruption. The U.S. reprised their advocacy role in the fight against corruption, but this time it was reframed to reflect the current realpolitik. Meanwhile, Lesotho emerged the winner from a veritable David and Goliath battle with corporations from some of the wealthiest countries. The Lesotho trials demonstrated that despite significant hurdles, a determined country can choose to prosecute parties involved in corruption and succeed.

By the end of 2006 the *UNCAC*, the first international anti-corruption convention, had become the most ratified of the conventions. Though it is too soon to assess its effectiveness, the *UNCAC* does offer some solutions. Significantly, it contains provisions for addressing issues such as lack of

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[212] Transparency International, Press Release, "The G8 Communique: Strong words on global fight against corruption, treading water on Africa and oil" (17 July 2006), online: Transparency International <http://www.transparency.org/news_room/latest_news/press_releases/2006/2006_07_17_g8_communique>.

[213] Government of Canada, "Federal Accountability Action Plan" (Initial Version), online: Government of Canada <http://www.faa-lfi.gc.ca/docs/ap-pa/ap-pa15_e.asp>.

[214] *Supra* note 98.

political will, and the need for cooperation, financial and material support; both noted challenges in the LHWP prosecutions and trials. If the current momentum that appears to be building around the *UNCAC* enables it to advance from implementation to enforcement, it may escape the dubious title of *lex stimulata*. Sadly, by undertaking such a wide mandate, history suggests that the prospects for success are slim.

As we look to the future, even if the *UNCAC* exceeds expectations, it alone cannot untangle the Gordian knot of corruption. States must reevaluate the policies of their funding agencies to ensure they are consistent with their international obligations. Once they are, states should exercise stronger authoritative deprivations as a means to dissuade corrupt practices. The sanctions imposed by the World Bank have set an example for governmental funding agencies and MDB's alike. Stronger coordination of efforts between these bodies and states should continue. Next, states should revisit their policies regarding the enforcement of foreign judgment. Where possible, agreements should be sought to facilitate their enforcement. Finally, states must reevaluate their own legislation and question its efficiency. Possible loopholes such as seen with Canada's *CFPOA* should be amended.

The fight against corruption is an ongoing one; it requires that all parties remain vigilant. If the struggle is to be won, political and business leaders should commit to memory the words of the Chief Executive of Transparency International David Nussbaum: "Promises don't reduce corruption; actions do. Taking the public pledge gets you the headlines, but real people the world over are waiting for those promises to be fulfilled."[221]

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[221] Transparency International, Press Release, "Corruption continues to cost opportunities for world's poor: G8 still far from fulfilling anti-corruption promises" (13 July 2006), online: Transparency International <http://www.transparency.org/news_room/latest_news/press_releases/2006/2006_07_13_g8_promises>.