The increasing importance of corporate social responsibility (CSR) means that companies must consider multi-stakeholder interests as well as the social, political, economic, environmental and developmental impact of their actions. However, the pursuit of profits by multinational corporations has led to a series of questionable corporate actions, and the consequences of such practices are particularly evident in developing countries.

Adefolake O. Adeyeye explores how CSR has evolved to aid the anti-corruption campaign. By examining voluntary rules applicable for curbing corruption, particularly bribery, and analysing the domestic and extraterritorial laws of Nigeria, the United Kingdom and the United States for holding corporations liable for bribery, she assesses the adequacy of international law’s approach towards corporate liability for bribery and explores direct corporate responsibility for international corruption. The roles of corporate governance, global governance and civil liability in curbing corporate corrupt practices are given special focus.

Adefolake O. Adeyeye is an adjunct lecturer at the Faculty of Law, National University of Singapore (NUS), where she teaches a module on corporate social responsibility, which she designed and developed. Her research interests are in corporate social responsibility, multinational corporations, corporate governance, global governance, international law and sustainable development.
CORPORATE SOCIAL RESPONSIBILITY OF MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES

Perspectives on Anti-Corruption

ADEFOLAKE O. ADEYEYE
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This book is a product of my PhD thesis which I undertook at the Faculty of Law, National University of Singapore. Moving to Singapore with my husband in 2000, I had no idea I would pursue a PhD and then undertake to write a book adapted from the thesis.

Writing this book has been a long and arduous task. Between the time the PhD degree was awarded and the publication of this book, corporate social responsibility (CSR) has undergone drastic changes. The work of the Special Representative of the UN Secretary-General (SRSG) on business and human rights, which has wide-ranging implications for CSR and developing countries, is complete. In June 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights. Interestingly, the SRSG’s mandate was created in 2005, the same year I commenced my PhD. The role of institutional investors and of corporate governance in general in promoting CSR is now more pronounced. The UK Bribery Act, which was passed in 2010 after years of criticism about the state of the corruption laws in the UK, came into force on 1 July 2011. It has been fascinating but demanding to follow the changes that have occurred. Where possible I have tried to accommodate the implications of some of these changes in the book.

This book focuses primarily on anti-corruption as a CSR issue. It explores mechanisms that are useful for curbing international corruption, including both voluntary and mandatory rules. The aim is to provide a fresh outlook on avenues for eliminating corruption, especially in developing countries, through the lens of CSR.

The completion of my thesis and then the book would not have been possible without the support of a large number of people. I am indebted to my PhD supervisor, Professor Sornarajah, for his
guidance and friendship. To my friends, too many to list, thank you for the prayers and support. Finally, I would like to express my heartfelt gratitude to my family. Kunle, I couldn’t possibly have done this without you. Fope, Oba and Aji, you put so much meaning into life!
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Companies Act 1986, s. 423
Companies Act 2006, ss. 170, 172, 260
Conditional Fee Agreements Ord. 1995
Courts and Legal Services Act 1990, s. 58
Legal Aid Act 1988, s. 31(1)
Prevention of Corruption Act 1906
Prevention of Corruption Act 1916
Public Bodies Corrupt Act 1889

US

Alien Tort Claims Act 1789 (28 USC s. 1350)
Bribery of Public Officials 1962 (18 USC s. 201)
Foreign Corrupt Practices Act (FCPA), 1977 (15 USC s. 78dd-1, et seq.)
General Provisions 1947 (1 USC § 1)
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### UK

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*Darayan Holdings Ltd and others v. Solland International Ltd and others [2005]* 4 All ER 73

*DST v. Rakoil [1987]* Lloyd’s Law Rep 246

*Foss v. Harbottle [1843]* 2 Hare 461, 67 ER 189

*Halle v. Trax BW Ltd [2000]* BCC 1020

*John Shaw & Sons (Salford) Ltd v. Shaw [1935]* 2KB 113

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Acronyms and abbreviations

AU
African Union
AIC
Australian Institute of Criminology
Am. J Comp. L
American Journal of Comparative Law
Am. J Int’l L
American Journal of International Law
Am. U Int’l L Rev.
American University International Law Review
Arb. Int’l
Arbitration International
Asia Bus. L Rev.
Asia Business Law Review
ATCA
Alien Torts Claim Act
ATCSA
Anti-terrorism, Crime and Security Act
BIT
Bilateral Investment Treaty
Berkeley J Int’l L
Berkeley Journal of International Law
British Journal of Criminology
Bus. L Rev.
Business Law Review
Cal. L Rev.
California Law Review
CCB
Code of Conduct Bureau
CCR
Centre for Constitutional Rights
CDC
Control Data Corporation
CNL
Chevron Nigeria Limited
CEO
Chief Executive Officer
CMHT
Cohen, Milstein, Hausfeld & Toll
Colum. J Transnat’l L
Columbia Journal of Transnational Law
<table>
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<tr>
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<tr>
<td>Colum. L Rev.</td>
<td>Columbia Law Review</td>
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<tr>
<td>Cornell Int’l LJ</td>
<td>Cornell International Law Journal</td>
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<tr>
<td>Cornell L Rev.</td>
<td>Cornell Law Review</td>
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<tr>
<td>CSO</td>
<td>civil society organisation</td>
</tr>
<tr>
<td>CSR</td>
<td>corporate social responsibility</td>
</tr>
<tr>
<td>COE</td>
<td>Council of Europe</td>
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<td>CPIB</td>
<td>Corrupt Practices Investigation Bureau</td>
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<tr>
<td>Depaul L Rev.</td>
<td>Depaul Law Review</td>
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<tr>
<td>Disp. Res. J</td>
<td>Dispute Resolution Journal</td>
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<tr>
<td>DOJ</td>
<td>Department of Justice</td>
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<td>Duke J Comp. &amp; Int’l L</td>
<td>Duke Journal of Comparative and International Law</td>
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<tr>
<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
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<td>EFC Act</td>
<td>Economic and Financial Crimes Establishment Act</td>
</tr>
<tr>
<td>EFCC</td>
<td>Economic and Financial Crimes Commission</td>
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<tr>
<td>EITI</td>
<td>Extractive Industry Transparency Initiative</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>Emory Int’l L Rev.</td>
<td>Emory International Law Review</td>
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<td>EP</td>
<td>Equator Principles</td>
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<td>EPFI</td>
<td>Equator Principles Financial Institution</td>
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<tr>
<td>ESG</td>
<td>environmental, social and governance</td>
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<td>ETC</td>
<td>Environmental Tectonics Corporation</td>
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<td>Fordham J Corp. &amp; Fin. L</td>
<td>Fordham Journal of Corporate and Finance Law</td>
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<tr>
<td>FCPA</td>
<td>Foreign Corrupt Practices Act</td>
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<td>FDI</td>
<td>Foreign Direct Investment</td>
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<td>FDS</td>
<td>Federal Directorate of Supply</td>
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<td>GTE</td>
<td>General Telephone &amp; Electronics Corporation</td>
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<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>GRECO</td>
<td>Group of States against Corruption</td>
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<td>GRI</td>
<td>Global Reporting Initiative</td>
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<tr>
<td>GTE</td>
<td>General Telephone and Electronics Corporation</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce; International Criminal Court</td>
</tr>
<tr>
<td>ICGN</td>
<td>International Corporate Governance Network</td>
</tr>
<tr>
<td>ICPC</td>
<td>Independent Corrupt Practices Commission</td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>IFC</td>
<td>International Finance Corporation</td>
</tr>
<tr>
<td>IGO</td>
<td>international governmental organisation</td>
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<td>IGAC</td>
<td>International Group for Anti-corruption Co-ordination</td>
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<tr>
<td>Int’l Law.</td>
<td>International Lawyer</td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
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<td>ILM</td>
<td>International Legal Materials</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IP</td>
<td>intellectual property</td>
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<td>IPS</td>
<td>Institute for Policy Studies</td>
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<td>ILRF</td>
<td>International Labor Rights Fund</td>
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<tr>
<td>J Corp. L</td>
<td>Journal of Corporate Law</td>
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<tr>
<td>J Int’l Aff.</td>
<td>Journal of International Affairs</td>
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<tr>
<td>J Int’l Econ. L</td>
<td>Journal of International Economic Law</td>
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</table>
List of acronyms and abbreviations

KBR  
Kellogg, Brown and Root  

KSC  
Korea Supply Company  

LMCLQ  
*Lloyds Maritime and Commercial Law Quarterly*  

Law & Contemp. Probs.  
*Law and Contemporary Problems*  

Law & Pol’y Int’l Bus.  
*Law and Policy in International Business*  

LNG  
liquefied natural gas  

Loy. LAL Rev.  
*Loyola of Los Angeles Law Review*  

*Michigan Journal of International Law*  

Mich. LR  
*Michigan Law Review*  

Manchester J Int’l Econ. L  
*Manchester Journal of International Economic Law*  

MESICIC  
Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption  

MNC  
multinational corporation  

MOSOP  
Movement for the Survival of the Ogoni People  

NAFTA  
North American Free Trade Agreement  

NAPIMS  
National Petroleum Investment Management Services  

New England Int’l & Comp. L  
*New England International and Comparative Law Annual*  

NIEO  
New International Economic Order  

NEPAD  
New Partnership for Africa’s Development  

Non-State Act. & Int’l L  
Non-State Actors and International Law  

Nw. UL Rev.  
*Northwestern University Law Review*  

NYL Sch. J Int’l & Comp. L  
*New York Law School Journal of International & Comparative Law*  

NYUL Rev.  
*New York University Law Review*
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<td><em>New York University Journal of International Law and Politics</em></td>
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<tr>
<td>NGO</td>
<td>non-governmental organisation</td>
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<td>OAS</td>
<td>Organization of American States</td>
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<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>OUCLJ</td>
<td><em>Oxford University Commonwealth Law Journal</em></td>
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<td>PACI</td>
<td>Partnering Against Corruption Initiative</td>
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<td>PCA</td>
<td>Prevention of Corruption Act</td>
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<td>PCGG</td>
<td>Presidential Commission on Good Government</td>
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<td>Principles for Responsible Investment</td>
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<td>RECIEL</td>
<td><em>Review of European Community and International Law</em></td>
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<td>SFO</td>
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<td>Sing. JICL</td>
<td><em>Singapore Journal of International and Comparative Law</em></td>
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<td>Sing. JLS</td>
<td><em>Singapore Journal of Legal Studies</em></td>
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<td>SLC</td>
<td>Special Litigation Committee</td>
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<td>SLR</td>
<td><em>Singapore Law Reports</em></td>
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<td>SPGL</td>
<td>Spectrum Power Generation Ltd</td>
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<td>Stolen Assets Recovery</td>
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<td>TRIPS</td>
<td>trade-related aspects of intellectual property rights</td>
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<td><em>Tulane Journal of International and Comparative Law</em></td>
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UNCAC United Nations Convention against Corruption
UNCTAD United Nations Conference on Trade and Development
UNDP United Nations Development Programme
UNGC United Nations Global Compact
UNODC United Nations Office on Drugs and Crime
USC United States Code
USDOJ United States Department of Justice
Vand. J of Transnat’l L Vanderbilt Journal of Transnational Law
Vand. L Rev. Vanderbilt Law Review
Vill. L Rev. Villanova Law Review
Wm. Mitchell L Rev. William Mitchell Law Review
Wis. Int’l LJ Wisconsin International Law Journal
WBCSD World Business Council for Sustainable Development
WEF World Economic Forum
WGB OECD Working Group on Bribery in International Business Transactions
WTO World Trade Organisation
Yale J Int’l L Yale Journal of International Law
Yale LJ Yale Law Journal
Introduction

Anti-corruption is a corporate social responsibility (CSR) issue. Until quite recently, however, corruption was not typically associated with CSR. This may be because corruption is seen as an issue primarily addressed by hard laws and regulations, while CSR is seen as a voluntary corporate-led initiative promoting self-regulation. Corruption typically meant public corruption, with the spotlight focused on public officials and governments. The United Nations Global Compact (UNGC), which seeks to advance responsible corporate citizenship, added anti-corruption as the tenth principle in 2004, four years after the other nine principles were launched.¹

CSR as a potentially useful approach for combating corruption has been underexplored.² The many instances of corporate bribe payments which impact on economic, political and social aspects of society, especially in developing countries, call for a serious examination of the role CSR can play in the fight against international corruption. CSR can be defined as the broad set of responsibilities corporations face over and above profit maximisation. It requires the use of both binding and non-binding rules to ensure corporate compliance with these responsibilities. Currently, the major approach towards the application and implementation of CSR standards has been through the use of soft laws which are non-binding voluntary initiatives.

This book explores the soft and hard laws applicable to corruption as a CSR issue. It focuses on the supply side of corruption, an issue

which international business has been associated with. The role corporations play in fuelling the engines of corruption is best addressed under CSR. The hope is to provide a fresh outlook on avenues for eliminating corruption, especially in developing countries, and increase scholarship in the area of corruption and CSR.

Corruption covers a wide range of issues including transnational bribery (or international corruption), embezzlement of public funds, trading in influence, and the concealment and laundering of the proceeds of corruption. The terms ‘international corruption’ and ‘transnational bribery’ will be used interchangeably in this book. They both refer to the offer or provision of money, goods or other benefits to a foreign public official in order to influence favourable business deals. The focus of the book is limited to transnational bribery because attempts to curb this are primarily directed at corporations, especially multinational corporations (MNCs). Transnational bribery has a negative impact especially on developing countries.

A rationale for curbing transnational bribery from a developed-country point of view prevalent in the early 1980s to late 1990s was to stop corruption as a barrier to trade. From this perspective, there is a need to prevent corrupt payments from causing economic inefficiencies, impediments to trade and investment in transitional markets, and impediments to the development of accountable democratic and market-oriented institutions in transitional markets. Since then, awareness has arisen of another rationale for curbing corruption. In addition to impeding investment, corruption undermines economic growth, burdens the poor and affects all aspects of development. On the adoption of the United Nations Convention against Corruption (UNCAC), Kofi Annan, then secretary-general of the UN, said ‘corruption hurts the poor disproportionately – by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign investment and aid’. This alternative rationale seems more discerning of the interests of both the developed and developing

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world. Effective deterrence of transnational bribery is needed not only to ensure competitiveness in international trade, but also to impact positively on development, economic growth and poverty reduction—issues developing countries are all too familiar with.

Part I of this book concerns the general subject of CSR and anti-corruption.

Chapter 1 discusses three issues at the heart of CSR: issues of profit maximisation versus broader responsibilities, the voluntary versus mandatory approach and the emergence of universal standards of CSR. The major problem evolving universal standards face is that of enforcement. Chapter 1 shows how soft laws emerged as the preferred norm for enforcing CSR. Chapter 1 also discusses the global changes taking place in domestic and international spheres aimed at improving CSR. These include changes in legal awareness of corporate power, public scrutiny, legal action and corporate awareness of the importance of CSR.

Chapter 2 outlines anti-corruption as a CSR standard. It discusses corruption and gives instances of international corruption implicating MNCs. The chapter then examines the soft and hard laws regulating international business in relation to corruption. The impact of such laws in improving CSR and eliminating corruption is discussed. Voluntary rules to curb international bribery developed by three non-state actors, namely Transparency International, World Economic Forum and the International Chamber of Commerce, are examined. Following the examination of selected voluntary rules, mandatory applicable national laws addressing transnational bribery in three selected countries, namely the United Kingdom, the United States and Nigeria, are considered.

Part II of this book focuses especially on mechanisms for curbing international corruption through the lens of CSR.

Chapter 3 explores the role of global governance. Global governance and the emergence of global administrative law are significant concepts in the fight against corruption. The link between global governance, anti-corruption and development from a CSR point of view is explored, as is the manner in which global governance can reduce international corruption for the benefit of development. Hitherto, links between corruption and development have usually been addressed from international development or governance (government) perspectives.
Chapter 4 considers international law. It advances the discussion, introduced in Chapter 2, of the limitations of both soft laws and domestic hard laws in the fight against corruption. What impact does international law have in the fight against corruption? This chapter examines international laws categorised as regional and multiregional laws. The chapter then reviews the approach of current international law towards corporate liability and jurisdiction for prosecuting international corruption. In light of the failure of states to hold corporations liable for transnational bribery, the chapter considers the justification, criticisms and consequences of holding corporations directly responsible for the international crime of corruption.

Chapter 5 explores the role of civil liability as a potential deterrent in the fight against corruption. The chapter examines the application of the law of contract, specifically illegality, and the approach of English courts towards the enforceability of corrupt contracts and arbitral awards. It discusses the recent trends in international arbitration regarding the role of arbitrators in addressing international corruption. It considers the application of tort laws such as breach of fiduciary duties and interference in economic advantages used in the UK and US courts, which may serve as deterrents against corrupt corporate practices. Most approaches to transnational bribery see it as a crime warranting state prosecution and seldom consider the relevance of civil law.

Chapter 6 explores the role of corporate governance. Many writers believe corporate governance is relevant for addressing CSR and needs to be revamped. The chapter considers the current status of corporate governance in relation to broad or external CSR issues, particularly international corruption. It examines derivative actions which fall under the umbrella of corporate governance, arguably as an example of how corporate governance impacts on CSR. It considers the usage and impact of derivative actions in compelling corporate responsible behaviour in matters involving international corruption. The chapter attempts a comparative study of the use of derivative actions in the US and the UK. The recent changes in the UK law pertaining to derivative actions and the relevance of these for CSR and transnational bribery are also considered. Finally, the increasingly important role of institutional investors is examined.

Chapter 7 concludes the book.
PART I

Corporate social responsibility
and anti-corruption
CSR covers a wide spectrum and there is no consensus on the meaning of the term. It emerged from the need to address wrong corporate behaviour regarding social issues or issues which do not directly impact on the business bottom line. Such issues include environmental, labour and human rights abuses external to the company (broad or external CSR issues), particularly abuses occurring in developing countries. CSR was seen as the voluntary actions businesses take to address these issues. Many CSR-related codes, guidelines and initiatives evolved and were adopted by companies to prove they were committed to social responsibility.

CSR has also been related to the philanthropic and charitable activities companies carry out in order to give the impression that they are good corporate citizens. Just as good citizens who can afford it give charitably, so corporations began to give charitably but perhaps on a larger scale. Such charitable giving is not without questions. Proponents of capitalism have questioned the right of executives to give away money which does not belong to them.\(^1\) CSR was understood to be about companies’ measures to regulate business activities because they believed it was the moral thing to do and would improve public perceptions of their style of business and ultimately improve their bottom lines. Thus a direct relationship between CSR and profit maximisation was proved.

However, it soon became clear that CSR is not really about improving a company’s bottom line. It is about the relationship

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between business and society. If this relationship is marred by either party, there will be consequences. In the case of business, there are repercussions for wrong company action which affect societal expectations. These consequences may not merely give rise to legal sanctions; they may affect the very right of corporations to freely pursue their business activities. For instance, the total loss of confidence between Shell and the Ogoni people as a result of environmental protest, which led to the killings of Ken Saro-Wiwa and eight others by the Nigerian military in the late 1990s, has led to Shell being removed as an operator in Ogoniland.²

This chapter will address three main issues at the heart of CSR: whether corporations have broad responsibilities other than profit maximisation; whether CSR is beyond rules or subject to voluntary or mandatory rules; and whether universal standards of CSR are evolving.

Do corporations have broad responsibilities?

There are two main schools of thought regarding this issue, traditional and emerging. The traditional school says the only responsibility corporations have is that of maximising profits to shareholders. A well-known author associated with this view is Milton Friedman. In his book *Capitalism and Freedom* (1962), which was based on a series of lectures he gave in 1956, he said:

the view has been gaining widespread acceptance that corporate officials and labor leaders have a ‘social responsibility’ that goes beyond serving the interest of their stockholders or their members. This view shows a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.³

The CSR issues Friedman was concerned with included philanthropy, production and labour costs. Examples of CSR cited by Friedman


³ Friedman, *Capitalism and Freedom*. 
include the alleged social responsibility of business officials and labour leaders to keep prices and wage rates down in order to avoid price inflation, and claims that business should contribute to the support of charitable activities and especially universities. Friedman felt that a responsibility to keep prices and wage rates down would lead to product and labour shortages, grey markets and black markets. He said price controls, whether legal or voluntary, if effectively enforced would eventually lead to the destruction of the free-enterprise system and its replacement by a centrally controlled system, and would not be effective in controlling inflation. With regard to charitable activities, Friedman felt that such giving was an inappropriate use of corporate funds in a free-enterprise society.\footnote{See \textit{ibid.}, pp. 134–6.}

Corporate philanthropy should not be equated with CSR; it is but one aspect of it. Friedman’s objective was to ensure that social responsibility does not affect the workings of a free-market economy adversely, specifically focusing on the market in America at the time. The issues of concern in recent times are more global in scope and include human rights, the environment, development and anti-corruption (broad issues). There are instances in which adherence to social responsibilities will conflict with a free-market economy and the ultimate corporate goal of profit maximisation. A close examination of these broad issues shows that Friedman’s assertions can no longer hold true. In these areas, corporations increasingly have to consider other stakeholders.

Moreover, it would seem that the proponents of this school are not averse to state regulation or intervention for controlling many different areas of business activity. They simply want business to focus on making profits and to stay accountable to shareholders only. Indeed, in an article published in the \textit{New York Times} magazine in 1970, Friedman made reference to the need for corporate executives, in carrying out their business responsibility for profit maximisation, to be mindful of the basic rules of society, embodied in law and ethical custom.\footnote{\textit{Ibid.} See also Milton Friedman, ‘The social responsibility of business is to increase profits’, in W. Michael Hoffman and Robert E. Frederick (eds.), \textit{Business Ethics: Readings and Cases in Corporate Morality} (New York: McGraw-Hill, 1995), pp. 137–41.}
In January 2005, The Economist published a survey on CSR which suggested profit maximisation should be the corporation’s goal. The survey also suggests that CSR reflects a mistaken analysis of how capitalism serves society and will distract attention from genuine problems of business ethics that need to be addressed. In their view, getting the most out of capitalism requires lots of public intervention of various kinds such as taxation, public spending and regulation in many different areas of business activity. It also requires corporate executives to be accountable to shareholders. Despite Friedman’s writings in 1962 and later, an analysis of the emerging school of thought and recent developments in CSR suggests corporations do have broader social responsibilities.

The emerging school of thought is shifting noticeably towards the concept of corporate social responsibility. It believes business has broader responsibilities that extend beyond owners and shareholders to include employees, customers, suppliers and host communities (multi-stakeholders). Proponents of this school believe businesses should be increasingly considered responsible because they are effectively the actors in society – producers, distributors, tax payers, polluters, investors, service providers etc. They are the most effective ‘private forces to do both widespread good and widespread harm’. Christopher Stone, a well-known writer who believes corporations should be socially responsible, has challenged the fundamental assumption – that managers of corporations should be steered by profit and not societal values – underlying four related though separate propositions opposing CSR.

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8 Ibid., pp. 80–7. The four related propositions are (1) the promissory argument – the supposed promise running from management to shareholders that it would maximise shareholder profits; (2) the agency argument – shareholders designated management as their agents; (3) the role argument – supposed consideration of the role of management; and (4) the polestar argument – if managers acted as they promised shareholders they would, this would be best for all. See also Christopher Stone, ‘Why shouldn’t corporations be socially responsible?’ in W. Michael Hoffman and Robert E. Frederick (eds.), Business Ethics: Readings and Cases in Corporate Morality (New York: McGraw-Hill, 1995), pp. 141–5.
Is CSR beyond rules or subject to voluntary or mandatory rules?

This issue is the subject of much controversy. For instance, when it came to identifying what CSR is, Stone believed it was beyond legal rules. He likened CSR to the role responsibility plays in humans, which guides a person to act in a certain way despite the lack of legislative prohibitions. He advocated a legal system that in dealing with corporations moves towards an increasingly direct focus on the processes of corporate decision making. This argument is rejected. While a focus on processes of corporate decision making is ideal, corporate decision making at the present time is very complex. More often than not, it does not reflect the individual perceptions of any one decision maker and may override personal values. Therefore, there is a need for rules which would hold corporations accountable and guide them towards certain actions. A realistic look at the structure and pattern of the modern corporation suggests that the broader responsibilities must be enshrined within clearly defined rules.

According to Christian Aid, modern CSR was born during the 1992 Earth Summit in Rio de Janeiro, when UN-sponsored recommendations on regulation were rejected in favour of a manifesto for voluntary self-regulation put forward by a coalition of companies called the World Business Council for Sustainable Development (WBCSD). CSR is an entirely voluntary, corporate-led initiative to promote self-regulation as a substitute for regulation at either national or international level. CSR encompasses the voluntary codes, principles and initiatives companies adopt in their general desire to confine corporate responsibility to self-regulation. Christian Aid believes business needs to be bound by tighter national laws and regulations held in a framework of agreed international standards.

Christian Aid’s view that CSR is entirely self-regulatory is not correct. CSR includes both voluntary and mandatory rules developed to improve corporate behaviour. Anti-corruption laws are examples of mandatory CSR rules. Increasingly, businesses are now being bound by laws in areas which would typically fall under ‘social’ responsibility.

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9 Stone, *Where the Law Ends*. 10 Ibid., pp. 120–1.
12 Ibid. 13 Ibid. 14 Ibid.
Are universal standards of CSR evolving?

The WBCSD is a powerful coalition of companies actively involved in CSR. It defines CSR as the continuing commitment by business to behave ethically and contribute to economic development, while improving the quality of life of the workforce and their families, as well as of the community and society at large. This definition is sound, but, unfortunately, the WBCSD also says there can be no universal standards in CSR because CSR means different things to different people, depending upon a range of local factors, including culture, religion and governmental or legal framework conditions.\(^{15}\)

This book argues that universal standards are evolving in the areas of human rights, contributions to sustainable development, the environment and anti-corruption. Multiple actors are involved in the evolution of these standards. They include non-governmental organisations (NGOs), such as Christian Aid; global business leaders, such as the WBCSD; corporations; international organisations, such as the United Nations; and states.

In the area of human rights, corporations have allegedly been accused of involvement in complicit acts with the governments of the countries in which they invest.\(^{16}\) In the area of anti-corruption, corporate scandals involving corrupt payment to domestic and foreign public officials are well documented.\(^{17}\) Corporations have also been implicated in environmental issues which cause environmental degradation and damage.\(^{18}\) Such implications suggest a disregard for environmental protection.

Proof of the evolution of universal standards can first be gleaned from the now defunct UN Draft Norms\(^{19}\) which aimed to produce standards applicable to all corporations (MNCs and other business enterprises) integrating human rights, labour rights, environment, development and anti-bribery issues. The implementation of these standards via the Draft Norms would have been novel because it

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\(^{16}\) For example, see the case of *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88.

\(^{17}\) For examples, see Chapter 2 of this book.

\(^{18}\) For example, see David Gilbert and Lafcadio Cortesi, ‘Corruption, land conflict and forest destruction: an Asia Pulp and Paper case study’, Rainforest Action Network, 17 May 2011.

would have allowed for corporations to be held directly responsible in international law for violating such standards. However, the Draft Norms were not implemented because of the strong criticisms they received from industry bodies and governments concerned with their legitimacy to hold corporations directly responsible for human rights norms. Such critics point to international law which requires state responsibility for the enforcement of human rights norms.  

The impasse resulting from controversies with the Draft Norms led to the appointment of John Ruggie as Special Representative on the issue of human rights and transnational corporations and other business enterprises. In 2008, the mandate was extended for three more years. It can be said that the work of Ruggie and his team has led to a

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20 For examples, see Canada’s submission to the High Commissioner for Human Rights on the responsibilities of business with regard to human rights, www.ohchr.org/english/issues/globalization/business/docs/canada.doc. See Carlos M. Vasquez, ‘Direct vs indirect obligations of corporations under international law’ (2005) 43 Colum J Transnat’l L 927, 929, where such criticisms are highlighted.

21 ECOSOC, Commission on Human Rights, Sixty-first session, Promotion and Protection of Human Rights, Agenda 17, 15 April 2005. UN Doc E/CN.4/2005/L.87. The initial mandate of the SRSG was as follows:

(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
(b) To elaborate on the role of states in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
(c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as ‘complicity’ and ‘sphere of influence’;
(d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
(e) To compile a compendium of best practices of states and transnational corporations and other business enterprises.

22 In 2008, the mandate was extended for a period of three years. The renewed mandate was as follows:

(a) To provide views and concrete and practical recommendations on ways to strengthen the fulfillment of the duty of the state to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation;
(b) To elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders;
(c) To explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities;
(d) To integrate a gender perspective throughout this work and to give special attention to persons belonging to vulnerable groups, in particular children;
highly acceptable business and human rights framework.\textsuperscript{23} It is argued that discussions, chiefly Ruggie’s work which followed the defunct Draft Norms, point to the evolution of universal standards at least in the area of human rights and business.

The evolution of universal standards in the area of sustainable development and the environment is recognised through soft law mechanisms such as the OECD Guidelines for Multinational Enterprises.\textsuperscript{24} The guidelines, which were most currently reviewed in May 2011, are recommendations addressed by government to multinational enterprises, providing voluntary principles and standards for responsible business conduct.\textsuperscript{25} In the area of environment, they encourage enterprises to protect the environment and conduct their activities with the wider goal of sustainable development in mind.\textsuperscript{26} Environmental management and protection are integral parts of sustainable development.\textsuperscript{27} Enterprises should raise their environmental performance through improved internal environmental management and better contingency planning for environmental impacts.\textsuperscript{28}

Agenda 21 is another soft-law instrument which aims to promote efficient and cleaner production, including increased reuse and recycling of residues and reduction of the quantity of waste discharged. Agenda 21 considers the role of business and industry in sustainable development.

\begin{enumerate}
\item To identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact;
\item To work in close coordination with United Nations and other relevant international bodies, offices, departments and specialised agencies, and in particular with other special procedures of the Council;
\item To promote the framework and to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including states, national human rights institutions, international and regional organisations, transnational corporations and other business enterprises, and civil society, including academics, employers’ organisations, workers’ organisations, indigenous and other affected communities and non-governmental organizations, including through joint meetings;
\item To report annually to the Council and the General Assembly.
\end{enumerate}

\textsuperscript{23} For more on Ruggie’s work, see www.business-humanrights.org/SpecialRepPortal/Home.
\textsuperscript{24} See www.oecd.org/dataoecd/43/29/48004323.pdf. \textsuperscript{25} \textit{Ibid.}
\textsuperscript{28} See above OECD Guidelines, vi. Environment.
development, advising business and industry to recognise environmental management as the highest corporate priority and key determinant to sustainable development. Activities which should be carried out to ensure this include governments identifying and implementing, in consultation with business and industry, economic instruments and normative measures such as laws, legislation and standards. Voluntary private initiatives and reporting are encouraged.\textsuperscript{29} It will be recalled that the WBCSD during the Earth Summit in Rio de Janeiro had campaigned strongly for voluntary self-regulation.

**GLOBAL CHANGES TO CSR**

In the domestic and international spheres, there have been changes to the approach on CSR. These changes show increased recognition that corporations have broader responsibilities. They also illustrate the legal possibilities for CSR and the role different segments of society play in ensuring CSR. Four changes will be addressed in this chapter.

**Legal awareness of the need for CSR**

There is an increasing awareness that MNCs play a role in the making of international legal norms favourable to foreign investment and should therefore have more responsibility corresponding with their increasing power. MNCs are economic entities with great power to influence the making of international legal regimes, as Sarah Anderson, one of the co-authors of the study entitled *Top 200: The Rise of Corporate Global Power* published by the Institute of Policy Studies in 2000, illustrates. In an interview she was asked the following question:

Given that 51 of the largest economies in the world are corporations, what conclusions can be drawn about the state of economic dominance?

To which she replied:

I think once you understand the extent of their economic power, it should be no surprise that most governments in the world have been pursuing policies

that are in the interest of these large corporations. Through the World Trade Organization, the World Bank, the International Monetary Fund and also regional trade agreements, large corporations are getting more and more powers and privileges to operate as they like around the world . . . And as we’ve seen in Seattle and Prague and many other places around the world, a new peoples’ movement against corporate globalization is beginning to take off.\(^{30}\)

In the report mentioned above, the economic and political power of the world’s top 200 corporations was examined. It was found that of the 100 largest economies in the world, 51 are corporations, whereas 49 are countries; of the 200 largest companies, US corporations have dominance. Corporations are driving the process of corporate globalisation and arguably benefiting the most from it. The conclusions are that widespread trade and investment liberalisation have contributed to a climate in which dominant corporations are enjoying increasing levels of economic and political clout that are out of balance with the tangible benefits they provide to society.\(^{31}\)

A good illustration of the role MNCs play in fashioning international legal norms can be found in intellectual property legislation. Private actors have played an important role in the evolution of intellectual property rights.\(^{32}\) Writers document the role private actors such as business leaders played in pressing for higher standards of patent protection and seeking protection for the fruits of corporate research and development.\(^{33}\) Private actors also played an important role in the establishment of the 1883 Paris Convention for the Protection of Industrial Property.\(^{34}\) Private-sector lobbyists were influential in decisions reached arising from the successful negotiations of the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights.\(^{35}\)

Intellectual property (IP) also illustrates the capture of international law by political and economic powers. IP frequently serves as an


\(^{33}\) Ibid., 291 and accompanying footnotes.

\(^{34}\) Ibid., 292–3.

\(^{35}\) Ibid., 314.
instrument of power and, once captured, is a basis for further accumulation of power.  

Susan Sell explains that a critical approach to IP acknowledges the power of private actors and recognises that the interests of the powerful are often enhanced at the expense of others. She warns against treating the state as a unitary actor with well-defined interests and focusing on the state as legislator because in the context of intellectual property, private actors rather than states have frequently prompted changes in intellectual property protection.

Another illustration of the role MNCs play in fashioning international law can be found in foreign investment law. Foreign direct investment (FDI) is a direct investment made to obtain a lasting interest in an enterprise operating in an economy other than that of the investor. The lasting interest implies a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. Through FDI, MNCs have been able to influence the making of international legal regimes. Kamminga and Zia-Zarifi, writing in 2000, note that ‘corporations were (and remain) very active in promulgating internationally binding standards for the protection of their investments and competitiveness, now securely in place through the World Trade Organisation system, the macroeconomic regulations of the International Monetary Fund (IMF), and the nearly 2,000 bilateral investment treaties (BITs) in existence’.

The use of BITs has become more common. It has even been said that BITs have contributed to prevailing customary international law, although this is controversial. Sornarajah refers to a wide divergence

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36 Ibid., 274.
in the practice of states and standards in BITs, which suggests that it is unlikely BITs will give rise to any significant customary international law.\textsuperscript{42} He argues that a more likely explanation for the explosion of BITs is the need for states to agree on definite rules relating to foreign investment in view of the absence of rapid development in international law, which was badly needed.\textsuperscript{43}

The law on FDI which protects the investments of MNCs demonstrates the impact of MNCs on international law and states. MNCs need protection to secure their investment. The developed states ensure the protection of MNCs because they expand trade and investment, which increases the economic power of the developed states.\textsuperscript{44} As a result of the power and resources they command, MNCs themselves are able to influence the law to achieve their aims.

The resolution of disputes under international law directly between foreign investors and host states has become fairly established.\textsuperscript{45} MNCs are able to enter into direct contracts with states, which may include choice of law, stabilisation and arbitration clauses to the detriment of such states. Arbitrators have consistently held that such contracts are subject to international law and not the local law of the host state. They are able to use low-order sources to formulate applicable international legal norms.\textsuperscript{46} Sornarajah, referring to the theory of internationalised contracts, says it was built on the basis of the low-order sources of international law and ‘it would not be far-fetched to argue that they were manipulated in order to secure the protection of foreign investments made by multinational corporations’.\textsuperscript{47} In essence, MNCs are able to fashion or influence international legal principles favourable to the protection of their investments.

The problem with fashioning international law this way is that it may be captured by dominant powers in the economic and political spheres. Some of the established principles in foreign investment law are to the detriment of developing countries. Unfortunately, because

\textsuperscript{42} Sornarajah, \textit{International Law of Foreign Investment}, pp. 206, 267. \textsuperscript{43} Ibid., p. 213.
\textsuperscript{44} Ibid., p. 4. \textsuperscript{45} See Cowenfeld, \textit{International Economic Law}, p. 493.
\textsuperscript{46} For extensive discussions on the negative impact of low-order sources of law in foreign investment law and on the theory of internalisation of contracts, see Sornarajah, \textit{International Law of Foreign Investment} and, more particularly, M. Sornarajah, \textit{The Settlement of Foreign Investment Disputes} (Boston: Kluwer Law International, 2000), ch. 9.
\textsuperscript{47} Sornarajah, \textit{International Law of Foreign Investment}, p. 68.
in reality most developing countries have some degree of international indebtedness, foreign exchange problems and balance of trade deficits, they need foreign investments to survive. Too strong an adherence to liberalisation and/or deregulation may create a loss of investment, which is badly needed in developing countries, and so host states have to be careful in their relations with MNCs. As a result, they sign BITs and concede to arbitration which may be detrimental to their economy. Similarly, home states, in order to allow for the free flow of investments and economic development, find it expedient to ensure MNC protection.

Examples of how developing countries succumb to foreign investment disadvantageous to them can be found in policies they adopt that reflect an unproven linkage between intellectual property protection and incentives to invest.\(^\text{48}\) Desperate for foreign investment, many countries sign foreign investment agreements that require them to offer much higher standards of protection than are incorporated in trade-related aspects of intellectual property rights (TRIPS).\(^\text{49}\) However, the mobilisation of groups to protest against the broad expansion of property rights, such as the movement to provide HIV/AIDS drugs in sub-Saharan Africa, has also been noted.\(^\text{50}\) These examples suggest that countries may not be too willing to adopt disadvantageous policies. There is much to be said for the right of developing countries to have access to drug production without intellectual property rights issues looming in the background. There is a tendency to conclude that developing countries are pressured and coerced into signing BITs. However, Sornarajah considers that BITs should be seen as voluntary agreements entered into between consenting parties, unless there is evidence to the contrary.\(^\text{51}\) The outcome of each treaty should be based on the relative strengths and mutual confidence of the parties.\(^\text{52}\)

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\(^\text{49}\) Sell, ‘Intellectual property and public policy in historical perspective’.

\(^\text{50}\) Ibid., 319; Drahos, ‘BITs and BIPs’, 801.

\(^\text{51}\) Sornarajah, International Law of Foreign Investment, p. 208. Evidence which he cites as contrary includes the signing of a treaty made conditional on the granting of aid, loans or trade preferences.

\(^\text{52}\) Ibid., p. 216.
Most legal norms formulated in international economic law protect the rights of foreign investors. For instance, calls to incorporate social standards into free-trade agreements have been contentious. More recently, the responsibilities of foreign investors are being considered, but for the time being legal norms are usually formulated as soft law. Seidl-Hohenveldern suggests that the main value of international soft law, which is very important in the field of international economic law, is as a device to overcome a deadlock in relations between states pursuing conflicting ideological and or economic aims.

Some writers are quick to point out that some norms embedded in soft law instruments become hard law and as such it may be better to refer to such instruments as law. Such writers see international law as being constituted by not just treaties and custom but also including multiple normative forms, of which arguably the soft laws paraded on the international stage can lay claim. It is submitted that soft laws which crystallise into hard laws raise no substantial issues, since the soft law norms can now be adequately referred to as hard law and treated accordingly.

The problem arises when soft laws are used as a means of overcoming deadlock or as a smokescreen to avoid considerations of hard law possibilities. In such situations, soft laws, which are typically non-binding and self-regulatory, may fail to effect adequate change. Furthermore, without the authority which hard laws command, the effectiveness of soft laws may be even more doubtful. These considerations raise the question – why are soft laws considered for

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53 The MNC is a prime example.
54 See Kevin Kolben, ‘Integrative linkage: combining public and private regulatory approaches in the design of trade and labour regimes’ (2007) 48 Harv. Int’l L J 203, where the author was concerned with labour rights.
58 Ibid.
responsibility issues, while hard laws are considered for investment protection issues.\textsuperscript{59} There have been allusions to the possibility that MNC non-compliance with corporate codes of conduct or socially responsible representations may lead to claims for misrepresentation and unfair trade practices and that third-party social responsibility audits may strengthen such claims.\textsuperscript{60} The 2003 case of Nike Inc. \textit{v.} Kasky is typically referred to as justification for this stance. The case concerned allegations that Nike was mistreating and underpaying workers. Nike responded to these charges by sending out press releases, and writing letters to the press and others. Nike also commissioned a report on the labour conditions at its production facilities, which found no evidence of widespread abuse or mistreatment of workers. The respondent then sued Nike in a California court for unfair and deceptive practices under California's unfair competition law and false advertising law. He claimed Nike made false statements or material omissions of fact concerning the working conditions under which Nike products were manufactured. The case was constitutional in nature and premised on whether Nike’s statements could be defined as commercial or non-commercial speech, and therefore protected by the first amendment. The US Supreme Court decided to dismiss the case and entered no decision.

It is submitted that in reality such claims are few and far between. They are seldom made and rarely successful. Accordingly, arguments on the effectiveness of soft law corporate codes should not be based on such possibilities. It may be better to see such arguments as illustrations of the global changes to CSR. There have also been allusions to the fact that the incorporation of social responsibility standards into contracts with third-party suppliers or investment agreements with host governments may lead to breach of contract claims.\textsuperscript{61} These are positive developments, generally pointing to changes in the corporate perception of CSR.

\textsuperscript{59} Levit, 'Bottom-up international law making', p. 414.  \textsuperscript{60} 539 US 654.  \textsuperscript{61} Levit, 'Bottom-up international law making', p. 444 and footnote, where she cites the example of BP entering into a series of legally binding agreements with host states in which it committed to abide by security principles.
Greater public scrutiny by international civil society, which raises awareness of corporate misbehaviour and pressurises corporations to act responsibly, has been termed the ‘spotlight effect’. For example, MNCs in the Nigerian oil industry have much been in the news for complicity in human rights and environmental abuses. In particular, Shell, which is the largest producer and has stayed the longest in Nigeria, has faced much criticism internationally and domestically in recent times. Browen Manby says:

The role played by the oil multinationals in Nigeria has received increasing attention in recent years as protest against oil production has grown, and with it the repressive response of the Nigerian government. Shell in particular, the largest producer in Nigeria, has faced a barrage of criticism over its activities in the country. This criticism reached a height in 1994 and 1995, when the government suppressed anti-Shell protests by the Movement for the Survival of the Ogoni People (MOSOP), executing MOSOP leader and internationally known author Ken Saro-Wiwa and eight other Ogoni activists in November 1995.

As a result of this incident and others such as the Brent Spar spills and the negative publicity that followed, Shell was forced to reconsider CSR. In 1997, Shell published its statement of general business principles. The principles have existed since 1976, but were revised in 1997 due to heightened public interest in human rights and the concept of sustainable development. A further revision took place in 2005. Through the principles, Shell recognises the need for a social contract to operate effectively. The group recognises five areas of responsibility, namely shareholders, employees, customers, business partners and society as a whole. Shell aims to conduct business as a responsible corporate member of society, observing the laws of the

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countries in which it operates, expressing support for human rights and contributing to sustainable development.

The bad publicity which Shell received in the 1990s not only forced the group to reconsider CSR, it also put other corporations on notice of the importance of respecting broad CSR issues. However, whether this notice has led to improved corporate behaviour must be examined closely. A 2003 confidential report commissioned as part of Shell’s efforts to help develop a ‘peace and security strategy’ in the Niger Delta said Shell feeds violence in the area and may have to leave by 2009.66 In 2004, Ethical Corporations reported that Shell’s record for being a leader in corporate responsibility was under direct attack as a result of evidence suggesting that its social and environmental performance around the world does not match its public pronouncements.67 Shell’s 1997 revised principles state that the group has a systematic approach to health, safety and environmental management. The 2005 revised principles affirm this, but add security to the list.

Shell’s transparency has also come under attack. Some have argued for a more receptive attitude towards outside influence with legitimate interests as a way of tackling such problems.68 More transparency seems to be the watchword. The 2005 revised principles aimed to address this issue, recognising the need for stakeholder dialogue and engagement. The 1997 revised principles referred simply to communication through comprehensive corporate information programmes providing full relevant information to legitimately interested parties. The voice of external stakeholders and the media in campaigning against the deeds or misdeeds of Shell is a relevant factor exerting pressure on the group to take CSR seriously. For such codes to be effective in other companies or industries, civil society would have to play the same role. This may not be the case because the pattern of civil society has generally been to address itself to the misbehaviour of global giants in the pursuit of CSR, ignoring lesser but equally responsible or irresponsible companies.

68 Ibid.
NGOs have used protests as well as collaboration with banks which underwrite projects carried out by MNCs to ensure CSR. A recent example can be seen in the announcement by JPMorgan Chase that it would introduce policies to promote sustainable forestry and indigenous peoples’ rights and block funding that could be used for illegal logging. It also promised to reduce its own, and its clients’, carbon emissions. These promises were made as a result of protests outside the New York City and Chicago offices relating to claims that the bank’s underwriting of illegal logging in Indonesia and human rights abuses were tied to a Chase-funded mining operation in Peru. BankTrack, a loose collection of non-governmental organisations, has collaborated with banks to jointly tackle environmental and social concerns. JPMorgan Chase and twenty-nine other major banks have signed the Equator Principles, which promote responsible environmental stewardship and socially responsible development by evaluating the threats projects pose to forests, natural habitats and indigenous populations. However, there are issues as to adequate transparency and monitoring of the banks on a project-by-project basis.  

Another example of civil society activity putting pressure on corporations to act responsibly is the New York City Pension Funds which proposed a resolution calling for ExxonMobil management to review and report to shareholders concerning the potential investor risks and liabilities resulting from corporate payments to the Indonesian military. ExxonMobil reportedly makes annual payments of $6 million for the ‘protection’ of its natural gas operation in Aceh. Thirteen organisations have joined the board of trustees in urging ExxonMobil management to publish what it pays. At a ballot held on 25 May 2005 at ExxonMobil’s AGM in Irving Texas, 7.6 per cent of shareholders backed the resolution.  

70 See www.stopexxonmobil.org/ for the ExxonMobil transparency advertisement by the organisations and the NYC shareholder resolution.  
Legal action

In the US, the Alien Torts Claims Act (ATCA)\textsuperscript{72} has been significant for holding MNCs directly liable for tort injuries caused by actions in violation of the law of nations or a treaty of the US. The area of law pertaining to ATCA is still emerging; its application is controversial and it is important to note that, to date, no US-based MNC has yet been subject to an enforceable judgment in the US for acts performed abroad.\textsuperscript{73} The case of *Doe v. Unocal*\textsuperscript{74} is widely regarded as having the greatest potential impact on the scope and interpretation of ATCA. It was the first case to find that ATCA can be used to hold an MNC liable for violations of universally recognised human rights standards committed jointly by the MNC and its foreign business partners.

In *Doe v. Unocal*, EarthRights International, the Center for Constitutional Rights and two California-based law firms assisted eleven plaintiffs from Burma in bringing a lawsuit against Unocal and others. The lawsuit alleged that Unocal, an MNC which was in joint venture with the Myanmar Ministry for Oil and Gas Enterprise and Total, was complicit in crimes against humanity, forced labour, torture, loss of homes and property, and rape since the Burmese government’s military and intelligence personnel, who were using illegal force under international law to the benefit of the joint venture, were Unocal’s agents; Unocal had knowledge of this and was making payments to the personnel.\textsuperscript{75} The military government on its part was able to plead sovereign immunity. In December 2004 the parties reached a settlement. Although, the case eventually settled out of court, the issues in *Doe v. Unocal* have been considered in other cases including *Wiwa v. Royal Dutch Petroleum Co*. The Unocal case illustrates an option for pursuing direct corporate liability claims, but

\textsuperscript{72} 1789 (28 USC § 1350).


\textsuperscript{74} 963 F. Supp. 880.

there are limitations to its use such as issues of jurisdiction and interpretation.\textsuperscript{76}

\textit{Wiwa v. Royal Dutch Petroleum Co.}\textsuperscript{77} revolves around the murder, by hanging, of Nigerian activist and writer Ken Saro-Wiwa in November 1995, the torture and detention of his brother, and the shooting of a woman peacefully protesting against Shell’s planned pipeline in Nigeria. The case was brought on behalf of the plaintiffs by EarthRights International, a non-governmental organisation, as co-counsel with Judith Brown Chomsky, the Center for Constitutional Rights, Paul Hoffman and Julie Shapiro.\textsuperscript{78} The plaintiffs in the case, members of the Ogoni people, allege that companies participated in human rights violations against them in retaliation for their political opposition to companies’ oil exploration activities in Nigeria. They also allege that Shell acted under colour of law by participating in the human rights violations and was a de facto state actor. Shell was not exempt from ATCA liability because its alleged financing of and participation in the torture and killings of Wiwa and the other Ogoni activists, if proven, establish significant ties to the state.\textsuperscript{79}

The defendants, Royal Dutch Petroleum Company and Shell Transport and Trading Co. plc, moved to dismiss both the initial and the amended complaints on the grounds of lack of personal jurisdiction over Royal Dutch/Shell, forum non conveniens (the defendants argued that the case should be heard in the Netherlands or England), and lack of subject matter jurisdiction (defendants argued, inter alia, that ATCA did not apply to a corporation and that the claim was precluded by the political question and act of state doctrines, as well as Nigerian law on corporate liability). In September 1998, the presiding judge concluded that personal jurisdiction was appropriate in New York, but also ruled that England was a more


\textsuperscript{77} 226 F. 3d 88.

\textsuperscript{78} EarthRights International, ‘\textit{Wiwa v. Royal Dutch Shell} case history’, 31 January 2006, www.earthrights.org/site_blurbs/wiwa_v__royal_dutch_shell_case_history.html. See also Center for Constitutional Rights current cases, ccjustice.org/current-cases.

convenient forum, and therefore that the defendants’ motion to dismiss should be granted for forum non conveniens.\textsuperscript{80}

On appeal to the US Court of Appeals for the Second Circuit, the plaintiffs argued that a forum non conveniens dismissal would vitiate Congressional intent to allow plaintiffs’ claims to be heard in US courts. In a huge victory for the plaintiffs, the Court of Appeals two years later, in September 2000, reversed the district court’s forum non conveniens dismissal, concluding that the United States is a proper forum. The Court also upheld the district court’s ruling that jurisdiction over the defendants was proper and remanded the case back to the district court to rule on the defendants.\textsuperscript{81} In June 2009, thirteen years after the case was first filed, the parties settled the claims for $15.5 million.\textsuperscript{82}

Another case involving litigation for corporate accountability for human rights abuses, incidentally also occurring in Nigeria, is \textit{Bowoto et al. v. Chevron}.\textsuperscript{83} The case involves victims of gross human rights abuses associated with Chevron’s oil production activities in the Niger Delta region of Nigeria. In May 1999, a coalition of private civil rights and human rights lawyers and non-profit human rights organisations filed suit against Chevron in a federal court in San Francisco under ATCA.\textsuperscript{84} The case is based on two incidents involving the shooting of peaceful protesters at Chevron’s Parabe offshore platform and the destruction of two villages by soldiers in Chevron helicopters and boats.\textsuperscript{85} Chevron argued that the case should be dismissed because corporate law protected it from responsibility for the acts of its subsidiary.

In a major victory for the plaintiffs, on 23 March 2004 a federal judge denied ChevronTexaco’s motion for summary judgment,

\textsuperscript{80} \textit{Ibid.} \textsuperscript{81} \textit{Ibid.}


\textsuperscript{83} United States District Court for the Northern District of California, case no. C 99–02506 SI.

\textsuperscript{84} The non-profit human rights organisations included the Center for Constitutional Rights and EarthRights International which are involved in many other such cases, for example \textit{Wiwa v. Royal Dutch Petroleum Co}. See www.earthrights.org/legal/chevron. See also http://ccrjustice.org/ourcases/current-cases/bowoto-v.-chevron.

\textsuperscript{85} The case concerning the villages has since been dropped because the plaintiffs chose not to pursue the case. See www.earthrights.org/legalrelated/factsheet_case_history_and_status.html.
ruling that ChevronTexaco may be held liable for the acts of its subsidiary Chevron Nigeria Ltd (CNL), where ChevronTexaco allowed the subsidiary to hire the notorious Nigerian military and police as a security force. The presiding judge, however, found that there was evidence from which a jury might conclude that CNL acted as Chevron’s agent. The judge noted the ‘extraordinarily close relationship between the parents and subsidiary prior to, during and after the attacks’, as well as evidence of ‘cover-up’ of CNL’s activities by Chevron.\(^86\)

Previously, the Court in early 2000 rejected Chevron’s earlier request to dismiss the case. Chevron had argued that Nigeria was the proper forum for the dispute. It had also argued that the claims arising out of the Parabe incident did not allege violations of international law because the plaintiffs were trespassing on the platform and that litigation of the Parabe claims would interfere with US foreign policy vis-à-vis Nigeria. The Court concluded that none of these assertions warranted dismissal of the case at such an early stage of the proceedings.\(^87\) In December 2008, jurors unanimously agreed that Chevron was not liable. The plaintiffs’ appeal and petition for rehearing were rejected respectively in September 2010 and February 2011. In June 2011, the plaintiffs filed a petition with the US Supreme Court. A companion state case filed by the plaintiffs in February 2003 alleging that Chevron violated California’s unfair business practices law, both through its involvement in the abuses at issue and by conducting a knowingly false media campaign to cover up what happened, was settled in 2009.\(^88\)

*John Doe 1 et al. v. Exxon Mobil Corporation*\(^89\) is another case to do with corporate accountability for human rights abuses. It was filed in June 2001 by the International Labor Rights Fund (ILRF) in the Federal District Court for the District of Columbia on behalf of eleven villagers from Aceh who were victims of human rights abuses by ExxonMobil’s security forces.\(^90\) The case revolves around ExxonMobil’s activities to protect its operations. The allegations

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86 See EarthRights International, ‘Royal Dutch Shell to go to trial’.  
87 Ibid.  
89 No. 01–1357 CIV, case pending.  
90 See www.iradvocates.org/exxoncase.html. The International Rights Advocate is continuing the work started by the ILRF and reference to the case can be found at their website.
are that ExxonMobil knowingly employed brutal military troops to protect its operations, and the company aided and abetted the human rights violations through financial and other material support to the security forces. In addition, the case alleges that the security forces were either employees or agents of ExxonMobil, and thus ExxonMobil is liable for their actions. ExxonMobil’s primary defence is that the human rights violations may have occurred, but the company did not specifically intend this result, and therefore cannot be held liable. In October 2001, ExxonMobil filed a routine motion to dismiss the claim, and the plaintiffs filed a response against this motion. In 2004, the presiding district court judge asked for additional briefing on the impact of the 2004 Supreme Court’s decision in Sosa v. Alvarez-Machain upon the case. The case of John Doe et al. v. Exxon Mobil Corporation was later dismissed. In July 2011, the US Court of Appeal for the District of Columbia, remanded the case to the district court reversing the dismissal of the ATCA claims. Sosa v. Alvarez-Machain was a case against a state actor, which involved a foreign victim suing for damages for arbitrary arrest. However, the case is also significant for cases against non-state actors such as MNCs. Sosa v. Alvarez-Machain addressed the proper scope of ATCA. It upheld the use of the Act by foreign victims of serious or heinous international law violations.

All the cases discussed involved allegations of human rights abuses carried out by MNCs in the extractive industry in developing countries. The Doe v. Unocal and Wiwa v. Royal Dutch Petroleum Co. cases were settled out of court. The other two cases are still pending at the time of writing. It will be interesting to see the outcomes of these cases. Overall, the cases illustrate the impact of international legal action for demanding CSR, at least where serious or heinous human rights abuses are concerned.

91 Ibid.  
92 124 S.Ct 2709.  
In the UK, the Thor, Connelly and Cape plc cases have also impacted positively on the direct liability of MNCs in foreign countries. These cases have allowed both British and foreign citizens to sue parent companies for injuries caused by their subsidiaries in foreign countries on the tort law principles of duty of care or negligence.

Lubbe and others v. Cape plc and related appeals involved claims brought by over 3,000 plaintiffs for damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos and its related products in South Africa. The claims were made against the defendant, as a parent company which, knowing that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it was alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations.

The brief facts of the case were that the defendant, a public limited company, was incorporated in England in 1893 under the name Cape Asbestos Company Limited, principally to mine and process asbestos and sell asbestos-related products. From shortly after 1893 until 1948 it operated mines and mills in South Africa. In 1948, the corporate structure of the defendant’s group was changed. The mines and mills were operated by the subsidiary of the defendant until 1979, when they were sold to a third party. Although originating in South Africa, the defendant’s asbestos-related business was not confined to that country. From 1899 the defendant operated a number of factories in England engaged in processing asbestos and manufacturing asbestos products. Another subsidiary, incorporated in Italy, operated a factory in Turin.

The issue before the House of Lords was whether proceedings brought by the plaintiffs against the defendant should be tried in England or in South Africa. The House of Lords held that on an application for a stay of proceedings on the ground of forum non

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95 Below n. 103. 96 Below n. 108. 97 Below n. 98. 98 House of Lords, [2000] 4 All ER 268. 99 A separate suit was carried out by employees of the Italian factory. By virtue of Article 2 of the Brussels convention, forum non conveniens was not at issue.
conveniens the court should leave out of account considerations of public interest or policy which did not relate to the private interests of any of the parties or to securing the ends of justice. Although South Africa was the more appropriate forum for the trial of asbestos-related personal injury litigation brought by over 3,000 South African plaintiffs against an English parent company in respect of the operations of its South African subsidiaries, lack of means in South Africa for the plaintiffs to obtain the professional representation and expert evidence essential to the just determination of their cases would amount to a denial of justice so that, in the unusual circumstances of the proceedings, no stay would be granted.

The house thereby (1) dismissed an appeal by the defendant, Cape plc, from the Court of Appeal,\textsuperscript{100} which had reversed the decision of the presiding judge of the High Court staying the personal injury action brought by the plaintiffs, Schalk Lubbe, suing as administrator of the estate of Rachel Lubbe, and four others; and (2) allowed appeals by the plaintiffs and over 3,000 others who in nine further actions had commenced similar proceedings against the defendant. The Court of Appeal had upheld the High Court judge’s decision, which had given directions for the further actions to proceed as a group action, but had stayed all the proceedings in favour of South Africa.\textsuperscript{101} On 21 December 2001, the group action by 7,500 South Africans against English parent company Cape plc, which operated mines through subsidiaries there until 1979, was settled.\textsuperscript{102}

The *Thor* cases\textsuperscript{103} involved three sets of claims brought by forty-four plaintiffs against the defendants, Thor Chemical Holdings Limited (Thor), an English company, its wholly owned South African subsidiary (Thor SA) and Mr Cowley, the chairman and controlling shareholder of Thor. Thor SA manufactured and reprocessed mercury compounds at factories in Natal in South Africa. Mr Cowley took an active part in the management of the companies in the group of which Thor was the holding company. The claims were

\textsuperscript{100} See [1998] CLC 1559.

\textsuperscript{101} See [2000] 1 Lloyd’s Rep 139. See also www.lawreports.co.uk/hlpc_juli.8.htm.

\textsuperscript{102} See www.johnpickering.co.uk/news/group-action.html.

for compensation for personal injuries caused by exposure to mercury during the course of their employment. The defendants were each alleged to be directly liable to the plaintiffs in tort for setting up and maintaining factories in South Africa which they knew, or ought to have known, would be unsafe for those who worked in them.

In the first claim brought by three defendants in October 1994, the defendants applied to stay the proceedings on the grounds that they should be heard in South Africa. Their application was dismissed by the presiding judge on 11 April 1995. Amongst other things, the judge concluded that the defendants had failed to satisfy him that South Africa was clearly or distinctly the more appropriate forum for the trial of those proceedings. The defendants appealed, but their appeal failed because in the meantime they had served a defence and the Court of Appeal decided that in so doing they had submitted to the jurisdiction of the English court.\(^\text{104}\)

The second claim arose out of proceedings started by seventeen other plaintiffs making virtually the same allegations against the defendants. In March 1996 the defendants applied to stay those proceedings but later abandoned the application. This action was then consolidated with the earlier action. After an unsuccessful attempt to strike out the consolidated action on the grounds that it disclosed no cause of action and other protracted procedural preliminary battles in April 1997, the defendants settled the plaintiffs’ claims for £1.3m.\(^\text{105}\)

In January 1998, twenty-one plaintiffs brought the same claim against the defendants. The defendants sought to stay the proceedings on the grounds of forum non conveniens. The Court of Appeal (1) refused the defendants leave to appeal the decision of Garland J’s of 31 July 1998, refusing to grant the defendants a stay of these proceedings on the grounds of forum non conveniens; and (2) granted leave to appeal Gray J’s decision of 5 November 1998, dismissing an appeal to set aside judgment obtained in default of defence.\(^\text{106}\)


\(^{105}\) Ibid. \(^{106}\) See *Sihole and Others v. Thor Chemical Holdings Ltd*. 
In January 1999, the Court of Appeal granted Thor permission to continue with its defence of the proceedings. It then emerged from company documents filed in December 1999 that Thor’s parent company had undertaken a demerger which involved the transfer of subsidiaries valued at £19.55 million to a newly formed company. Two weeks before the start of the three-month trial, an application to the court was then made, on behalf of the claimants, for a declaration under section 423 of the Companies Act 1986 that the dominant purpose of the demerger was to defraud creditors, such as the claimants, and it was thus void. Thor and its chairman disputed that this was the purpose, but the Court of Appeal held that in the absence of information to the contrary, the inference that the demerger of Thor was connected with the present claims was ‘irresistible’. The court ordered Thor to pay £400,000 into court within seven days and to disclose documents concerning the demerger. The case was settled on the first day of trial.\textsuperscript{107}

Connelly v. RTZ Corp. plc\textsuperscript{108} involved Edward Connelly, a British citizen who worked for the defendants in an open-cast uranium mine owned and operated by a subsidiary of the first defendant in Namibia. Connelly developed cancer of the throat, as a result of which he became permanently disabled and brought a claim in respect of his illness against one or more of the companies in the RTZ Group who were domiciled in England. The defendants sought to stay the action on the ground of forum non conveniens. Their application in this regard was successful in the High Court. The plaintiff’s appeal against the stay was dismissed by the Court of Appeal. While it was accepted that the plaintiff had no reasonable prospect of being able to take proceedings in Namibia in the absence of any form of legal aid in that country, the court took the view that it was prevented from taking into account the availability of legal aid for proceedings in England by virtue of the provisions of section 31(1) of the Legal Aid Act 1988.

When the factor of availability of legal aid was left out of account, the country with which the claim had the most substantial connection, and therefore the most convenient forum, was Namibia.


\textsuperscript{108} See [1997] 4 All ER 335.
The plaintiff's solicitors then agreed to enter into a conditional fee arrangement with the plaintiff for the preparation and presentation of a claim before the English courts. Such an arrangement was legitimated by section 58 of the Courts and Legal Services Act 1990 and the Conditional Fee Agreements Order 1995. The plaintiff then made an application to remove the stay. The application failed at first, but the Court of Appeal allowed an appeal and removed the stay. This was on the grounds that, as it was permissible for the court to have regard to the existence of the conditional fee arrangement (in contrast to the situation with regard to legal aid), the court was thus enabled to recognise the fact that the only place where the plaintiff could effectively bring any action in respect of his illness and consequential disability was the courts of England and Wales. The defendants appealed to the House of Lords but the view of the Court of Appeal was upheld not only on the basis adopted by that court, but also on the basis that section 31(1) of the 1988 Act did not operate to exclude the question of the availability of legal aid from consideration in the context of a forum non conveniens application.

Corporate awareness of the importance of CSR

Corporations themselves have an increasing awareness of the rising importance of corporate responsibility, as suggested by a recent questionnaire survey. Many corporations now have codes and initiatives guiding their approach to CSR. Generally, one advantage with such soft laws is that they are voluntary. As a result, they are non-threatening to companies that adopt them. If adopted willingly and purposefully, they have the potential to make a substantial contribution to the promotion of the CSR agenda. Another advantage is that they are flexible and so easily adaptable to change. CSR needs constant review and must be adaptable to change. Thus, such codes are

109 Ibid.
110 See background to case by Wright J in Connelly v. Rio Tinto plc and another (unreported) Queens Bench Division dated 4 December 1998. See also Connelly v. RTZ Corp plc and another, Court of Appeal, Civil Division, [1996] 1 All ER 500 and [1997] 4 All ER 335, House of Lords.
necessary tools for improving corporate behaviour. They create awareness of CSR issues, but in many cases the question remains whether they are adequate to demand responsible corporate behaviour.

There are a number of factors which need to be considered in relation to the effectiveness of such soft laws. These include the institutions involved in their creation, parties which subscribe to the soft laws, the influence stakeholders can exert in ensuring compliance, how close the goals of the soft laws are to the goals of those who adopt the laws, and the transparency mechanisms put in place for implementation, monitoring and compliance. Such soft laws will be categorised into three sectors, namely industry-initiated codes, multi-stakeholder codes and/or general codes. The categorisation is useful for determining the effectiveness or otherwise of the soft laws.

Many of the codes businesses publish are industry initiated. Shell’s statement of general business principles already discussed is an example of industry-initiated codes.\(^\text{112}\) An advantage of such codes is that they illustrate clearly the awareness of CSR amongst companies. The voluntary and flexible nature of such codes makes them more adaptable to change, aiding the fulfilment of some CSR goals. However, such codes by themselves cannot address CSR goals effectively.

The Extractive Industry Transparency Initiative (EITI) is an example of a multi-stakeholder code. The EITI is a voluntary initiative between governments, international organisations, companies, NGOs and business. It aims to promote transparency and accountability by requiring companies to declare payments made to governments while governments declare corresponding receipts.\(^\text{113}\) Jeroen van der Veer cites the EITI as useful for tackling the problems of poverty, corruption and conflict resulting from misuse of revenues because of the greater transparency it demands. It aims to improve the management of resources and promote better governance.\(^\text{114}\) However, the UK Department for International Development has identified the establishment of an effective validation mechanism to assess country implementation, the need for broader government


\(^{113}\) See http://eitransparency.org/.

\(^{114}\) See ‘Why transparency is important’, www-static.shell.com/static/media/downloads/speeches/jvdveiti.pdf.
participation and increasing financial support as key challenges for the initiative.\textsuperscript{115}

Many corporations are involved in stakeholder dialogues to determine corporate codes which would be beneficial to business and society. For example, to address the problems of human rights security abuses in extractive industries operating in developing countries, the Voluntary Principles on Security and Human Rights (Voluntary Principles) were created. The Voluntary Principles stem from a tripartite initiative between business and civil society groups, led by the United States and United Kingdom governments and now including the Netherlands and Norway.\textsuperscript{116} The Voluntary Principles are examples of a multilateral agency-sponsored code. Such codes are usually geared towards a specific goal. The Voluntary Principles are designed to provide practical guidance to ensure that security arrangements carried out in the extractive industry are managed in accordance with human rights standards.

In a five-year overview of the principles, member companies, which include many with significant operations in developing countries such as British Petroleum, Chevron and Shell, identified three primary strengths of the principles.\textsuperscript{117} The first is that the Voluntary Principles achieve their purpose of providing guidance on managing security and human rights. The second is the increased credibility the tripartite approach, including governments, NGOs and company participation, gives the principles as opposed to the single stakeholder approach. Finally, the Voluntary Principles raise awareness of the security and human rights issues faced by companies. Lack of transparency, monitoring and auditing were cited as weaknesses of the principles. Companies acknowledged the need for independent verification to ensure the principles are actually being practised.

Although the Voluntary Principles were implemented in 2000, companies are still unable to measure their impact. This is regrettable, but only too common. One attribute of the Voluntary Principles


\textsuperscript{116} See www.voluntaryprinciples.org.

which companies emphasised was their value in creating greater recognition for CSR issues.\textsuperscript{118} Many standards create awareness, but their effectiveness remains to be seen. Nevertheless, the Voluntary Principles attempt to identify strengths and weaknesses and their transparency in providing feedback from companies is welcomed. Many of the challenges member companies face have been identified and there must now be concerted efforts to address these concerns. Independent monitoring and auditing is a step which is recommended, but no doubt will come with costs and other issues. As it is now, self-policing measures are inadequate.

Many corporations are also members of the UN Global Compact, a classic example of a general code. General codes address a wide range of social and ethical issues which typically are broad CSR issues. The Global Compact is a voluntary initiative launched in 2000 by the UN secretary-general at the time, Kofi Annan. The aim of the Global Compact is to encourage businesses to adopt ten principles which will showcase their commitment to corporate social responsibility, build social legitimacy and trust, and contribute to the UN’s broad-based development and other goals such as the Millennium Development Goals.\textsuperscript{119}

Principles 1 and 2 relate to human rights and urge businesses to support and respect international human rights and make sure their own corporations are not complicit in human rights abuses. Principles 3 to 6 deal with labour issues. Principles 7 to 9 deal with the environment and principle 10 deals with anti-corruption. Businesses are required to adopt a core set of values within their ‘sphere of influence’.

A pertinent question is whether the Global Compact is maximising its potential and ability to showcase CSR, build social legitimacy and trust, and contribute to development. Nevertheless, the partnership and active engagement between multiple levels of business, civil society and government which the Global Compact creates is good. The Global Compact has created mass awareness of CSR issues. Its focus on four core areas makes it clear which standards businesses need to adhere to, although there is uncertainty as to its interpretation of company spheres of influence.

Critics of the Global Compact see it as no more than an attempt to lend the legitimacy of the UN to corporate public relations hype. The voluntary nature of the Global Compact raises doubts as to its ability to address the important issue of accountability—transparency and monitoring. The Global Compact emphasises that it is not designed to monitor or measure corporate performance. Nevertheless, aware of the importance of these issues, it has put some integrity measures in place. Businesses are required to communicate their progress in implementing the Global Compact principles, but the Global Compact cannot guarantee the accuracy of the reports and its website is currently requiring individuals to review communication on progress reports online. It would be best for the Global Compact to use professionals in its reviews; however, given that CSR is still in its infancy, there may not yet be a core of such professionals suitable for the task. It is submitted that this is an issue the Global Compact should consider. It may well be that the sheer number of participants—there are over 4,000—volume of CSR work and apparent bureaucratic tendencies make it simply too difficult to assess the effectiveness and impact of the Global Compact on corporate behaviour.

The use of the industry-initiated codes such as the Shell Business Principles, multi-stakeholder codes such as the EITI, Voluntary Principles and general codes such as the Global Compact shows that business regards CSR as important. The factors necessary for considering the effectiveness of soft laws already mentioned when applied to the codes suggests some codes may be more effective than others. For example, industry-initiated codes like the Shell Business Principles are subscribed to by a sole business group, therefore the influence stakeholders may have is likely to be limited. Indeed in Shell’s case more transparency is the watchword. On the other hand, a multi-stakeholder code like the EITI may be more effective. The EITI involves multiple-party subscriptions and has the support of multiple professionals.

121 See UN Global Compact, ‘Notes on integrity measures’, www.unglobalcompact.org/AboutTheGC/integrity.html.
institutions. The goals are well suited to business in extractive industries, and because it involves multiple parties, interested stakeholders may have more avenues for input. However, there is a need for more financial and governmental support as well as country assessment.

But, as can be seen from the Global Compact, which is a general code, a multiplicity of parties and institutions does not necessarily equate to more effectiveness. Where transparency, monitoring and external audits are lacking or weak, as is the case with almost every one of the codes discussed, self-policing measures will be increasingly inadequate and inefficient in attempts to ensure CSR. These discussions raise valid questions about the effectiveness of codes as CSR tools.

CONCLUSION

Corporations increasingly have to consider other stakeholders. CSR should no longer be considered only in the light of profit maximisation. It is perhaps fair to say corporations have broader responsibilities towards society, particularly in the light of global changes to CSR. There is an increased awareness of the need for CSR considerations, especially in matters involving big corporations who have adequate investment protection and limited duties to behave responsibly. Global changes also highlight the legal possibilities of CSR as well as raising awareness of its concerns. The impact and consequences of disregarding multi-stakeholders can be huge. CSR is more than hype; it is a necessary form of self-regulation to ensure corporations behave in an appropriate manner.

CSR involves rules, both mandatory and voluntary. These rules bring CSR into legal scholarship where the effectiveness of the law or prospects for enforcement can be examined. This book is primarily concerned with the CSR rules for anti-corruption. The next chapter will address mandatory and voluntary CSR rules in the context of anti-corruption.

Universal standards of CSR are emerging. Presently, soft laws play a very important role in enforcement. However, soft laws are inadequate and in some circumstances ineffective. There is a need for corporate responsibility to be strengthened through the use of
hard law too. The next chapter will examine anti-corruption as an evolving standard of CSR. Corruption and the law applicable to it, both current and emerging, take CSR out of the ‘moral’-only sphere and place it firmly within the ‘legal’ as well as moral realm of expectation.
In international business, allegations of corrupt payments made to foreign public officials are numerous. These allegations put anti-corruption squarely within the CSR discourse. Nevertheless, until quite recently, corruption matters were not typically discussed under the rubric of CSR. CSR was usually associated with voluntary guidelines which companies adhered to in order to appear responsible. It typically did not concern the mandatory rules companies are subject to, of which anti-corruption legislation is a notable example.

The choice of the term ‘anti-corruption as a CSR standard’ aims to address the voluntary and mandatory rules relating to CSR. Anti-corruption regulation is a good illustration of the relevance of laws on CSR beyond arguments that laws have a role in ensuring compliance with CSR standards, typically seen as voluntary self-governance rules adopted by corporations. In the area of anti-corruption, many binding laws require corporations to shun bribery and corruption, providing sanctions for the failure to comply. This chapter will critically examine relevant national laws in three selected countries to determine whether enforcement and/or monitoring procedures are effective for transnational bribery.

This chapter will also address the voluntary rules adopted by corporations, which suggest corporate willingness to embrace CSR. Selected voluntary initiatives adopted by MNCs in the extractive industry will be critically examined. Generally, soft-law initiatives are classified as ineffective in the CSR debate. However, they remain the main source of regulation in this area. It is therefore necessary to adopt a critical analysis of these initiatives in a contextualised setting rather than adopt the abstract approach which is so prevalent now. The impact and effectiveness, suggestions for improvements, and limitations of such initiatives will be examined.
The concept of corruption was traditionally restricted to the perversion or destruction of integrity in the discharge of public duties by bribery or favour. More recently, it has been defined as an inducement by persons, public or private to show favour or act dishonestly or unfaithfully in the discharge of their duties. Corruption is usually associated with public officials and the performance of public duties influenced by bribery. However, it is now increasingly accepted that the act of corruption may be applicable to both public and private individuals and may extend beyond bribery.

Transparency International defines corruption as the misuse of public power for private profit or the misuse of entrusted power for private gain. The Hong Kong Independent Commission against Corruption defines it simply as an individual’s abuse of his authority for personal gain at the expense of other people. Corruption includes bribery, embezzlement, concealment and laundering of proceeds, and trading in influence.

Sources of corruption include procurement, campaign finance and poor financial management rules. In many instances, companies in the bid to obtain government projects may be involved in corrupt practices. To mitigate this problem, many countries have procurement rules. Campaign finance and poor financial management rules are more prominent in political corruption, which is beyond the scope of this book.

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1 See Colin Nicholls, Timothy Daniel, Martin Polaine and John Hatchard, Corruption and Misuse of Public Office (New York: Oxford University Press, 2006), paras. 1.02–1.03.
5 See United Nations Convention against Corruption, adopted by the General Assembly, 31 October 2003, article 13–31. See Nicholls et al., Corruption and Misuse of Public Office, para. 1.04, which notes that the UNCAC does not define corruption but includes some of the offences listed as corrupt criminal offences and reflects the modern tendency to consider corruption beyond bribery.
Corruption has many faces and comes in all shapes and sizes. As one writer has said, ‘The face of corruption is the dying grandmother who can’t get medication because her family can’t bribe the nurse.’ Corruption can be petty or grand. Grand corruption is ‘the misuse of public power by heads of states, ministers and top officials for private, pecuniary profit’. Grand corruption, at least in the developing world, is usually international because a purely domestic transaction seldom meets the criteria which enable grand corruption to flourish. Grand corruption involves two main activities: bribe payments and the embezzlement and misappropriation of state assets. This chapter will address the issue of bribe payments which can be ‘either a direct payment in return for showing favour or payment of part of the proceeds of a contract granted as a result of the bribe, called a kickback’. The focus is on bribery because it is ‘a widespread phenomenon in international business transactions including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions’. Bribery raises issues of CSR, amongst others.

While petty corruption such as that faced by the grandmother cited above is emphatically not condoned, the focus here will be on grand corruption, particularly the payment of bribes by MNCs to senior officials or ministers of state. It is believed that a focus on such grand corruption will effect changes which will greatly impact on petty corruption and development particularly in sub-Saharan African countries. If corruption is dealt with at the top levels of government, the effects are likely to trickle down to the lower levels.

In 2004, the World Bank reported that more than an estimated US$1 trillion, i.e. US $1,000 billion, was paid in bribes. The figure of US$1 trillion was based on 2001–2 economic data when the world

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9 See Moody-Stuart, ‘Corruption and its victims’. The criteria are size, immediacy of rewards and secrecy.
10 See Nicholls et al., *Corruption and the Misuse of Public Office*.
The global economy was at just over US$30 trillion.\textsuperscript{12} The World Bank when measuring the cost of corruption focused on measuring the extent of bribes from the private sector (individuals and firms) to the public sector. They obtained figures on bribes from worldwide surveys of enterprises, which asked questions about bribes paid for the operation of firms (licenses, regulation etc), as well as bribes paid to get favourable decisions on public procurement.\textsuperscript{13} World Bank data and research showed how some powerful corporations exert undue influence on state institutions, laws, regulations and policies, often through illicit means – described as state capture.

There is a multiplicity of evidence suggesting the involvement of MNCs and other businesses in the payment of foreign bribes.\textsuperscript{14} This evidence calls for enhanced efforts to address bribery, which should come from private-sector and public-sector initiatives and actions. This chapter will now analyse examples of international bribery cases involving MNCs, which typically are payments by corporate officials to foreign public officials. Such payments are mostly made through third-party agents or intermediaries. Many of the cases refer to sanctions levied by the US Department of Justice and Securities Exchange Commission (SEC) under breaches of the US Foreign Corrupt Practices Act (FCPA).

\section*{MNCs and international corruption}

In a globalised world economy, the problems of corruption are transnational. Corrupt networks are often created and nurtured with money from foreign investors, governments and companies.\textsuperscript{15} Although, MNCs are vehicles of development, they are also seedbeds of corruption. They are the chief participants in the supply side of corruption, giving bribes. They are involved in making facilitation

\begin{itemize}
\item \textsuperscript{12} See The World Bank Group, ‘The cost of corruption’, 8 April 2004, http://web.worldbank.org. At a UN conference in December 2003, Daniel Kaufmann had told reporters that the cost of corruption represents 5 per cent of the world economy, or more than 1.5 trillion dollars a year; see Pedro de la Llata, ‘Cost of corruption at 1.5 trillion a year’, Agence France-Presse, 2003.
\item \textsuperscript{13} Ibid.
\item \textsuperscript{15} See www.transparency.org/news_room/in_focus/2005/g8_summit/faq.
\end{itemize}
payments to public officials to grease the wheels for speedy receipt of contract awards; though much has been written about whether they in fact ‘grease’ or ‘sand’ the wheels. They also make commission payments to third parties/agents in the process of obtaining contract awards. Some examples of international bribery are discussed next.

**BAE Systems** In March 2010, the US Department of Justice reported that BAE Systems plc, a UK defence contractor, pleaded guilty to violations under the FCPA. The US charge claimed BAE impaired and impeded the lawful functions of the US by making false and inaccurate statements concerning its FCPA compliance programme. Investigations concerned allegations of BAE’s illegal payments to officials in several countries to secure lucrative contracts. It also included allegations that BAE paid huge sums of money to Saudi government officials. BAE agreed to pay a $400 million criminal fine in the US to settle the claim. BAE agreed to set up a compliance programme to help curb further violations of the FCPA.16

It was also reported that BAE settled an investigation into charges of corruption brought by the UK Serious Frauds Office (SFO). BAE agreed to pay £30 million and pleaded guilty to one charge of breach of duty to keep accounting records in relation to payments made to a former marketing adviser in Tanzania.17 In the UK, the SFO had previously dropped earlier investigations into the BAE Saudi Arabian deals.18

**Statoil ASA** In October 2006, the US Department of Justice reported that Statoil ASA, headquartered in Norway and listed on the New York Stock Exchange in order to resolve pending criminal investigation, acknowledged making bribe payments to an Iranian official in order to secure valuable oil and gas rights in Iran. Statoil violated the FCPA by making the corrupt payments and characterising the bribes as


17 See BBC News, “‘Outrage’ as deal ends BAE probes”, http://news.bbc.co.uk/2/hi/business/8501689.stm

18 Ibid. See also below pp. 61ff.
consulting fees. Statoil agreed to pay a $10.5 million penalty and entered into a three-year deferred prosecution agreement. The circumstances involving the conduct were that in 2001, Statoil developed contacts with an Iranian government official who was believed to have influence over the award of oil and gas contracts in Iran.

Following a series of negotiations with the Iranian official in 2001 and 2002, Statoil entered into a consulting contract with an offshore intermediary company. The purpose of that consulting contract, which called for the payment of more than $15 million over eleven years, was to induce the Iranian official to use his influence to assist Statoil in obtaining a contract to develop portions of the South Pars field and to open doors to additional Iranian oil and gas projects in the future. Two bribe payments totalling more than $5 million were actually made by wire transfer through a New York bank account, and Statoil was awarded a South Pars development contract that was expected to yield millions of dollars in profit.

The Department of Justice and Securities and Exchange Commission inquiries concerned corrupt payments, false books and records, and inadequate internal controls. Statoil agreed to the appointment of an independent compliance consultant, who would review and periodically report on the company compliance during the three-year term of the agreement. If the company fulfilled its obligations under the deferred prosecution agreement, after three years the criminal charges against it would be dismissed.19

ABB Ltd/ABB Gray, Inc./ABB Vetco Gray UK In July 2004, ABB Vetco Gray, Inc. and ABB Vetco Gray UK, the US and UK subsidiaries of Swiss company ABB Ltd, each pleaded guilty to FCPA violations in their pursuit of oil and gas construction contracts in Nigeria. The companies had paid more than US$1 million in bribes to Nigerian officials for confidential bid information and favourable recommendations. Officials of NAPIMS, a Nigerian government agency that evaluated and approved potential bidders for contract work on oil exploration projects in Nigeria, including bidders seeking subcontracts with foreign oil and gas companies, were the recipients of the bribes. ABB Ltd, the

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parent company, voluntarily disclosed the suspicious payment to the Justice Department and the Securities and Exchange Commission. Each subsidiary paid a criminal fine of US$5.25 million. The parent company also agreed to disgorge US$6 million in profits and to hire outside consultants to review its system of internal controls under civil fines.20

**Halliburton/KBR** In 2003, the United States, France and Nigeria began investigations into accusations that a subsidiary of Halliburton, Kellogg, Brown and Root (KBR), paid $180 million in bribes in an effort to win a natural gas project contract.21 KBR owned 25 per cent of a joint venture, known as TSKJ, incorporated in the Portuguese island of Madeira. Other partners each with 25 per cent included Technip SA France, ENI SpA of Italy and Japan Gasoline Corporation.22 In 1994, TSKJ was interested in winning a bid to build a liquefied natural gas (LNG) plant in Nigeria. TSKJ hired Mr Tessler, a British lawyer, as TSKJ’s agent. Agreements were made to pay Tessler at least $160 million via Swiss and Monaco bank accounts. Tessler was known to have contacts with the Nigerian government, including the dictator at the time, General Sani Abacha. In December 1995, TSKJ was awarded the LNG contract. In 1999, TSKJ was awarded another contract to expand the construction of the LNG plant.

The Halliburton investigation has received wide media coverage in different parts of the world and is still ongoing. In the US, Halliburton and KBR have agreed to pay $579 million in settlement. Another partner in the venture, ENI SpA, and a subsidiary have agreed to pay $125 million. The Serious Fraud Office (SFO) has also commenced actions in connection with the alleged corrupt payments in Nigeria.23

**Siemens** The US Securities Exchange Commission (SEC) and Department of Justice (DOJ) carried out investigations regarding

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allegations that employees of Siemens, a German-based manufacturer, paid hundreds of millions of euros in bribes worldwide to win telecommunications and other contracts. The investigations revealed that Siemens engaged in the systematic practice of paying bribes to foreign public officials in several countries to obtain lucrative business deals. Siemens brokered a settlement with the SEC and US DOJ, paying an unprecedented US$350 million to the SEC and US$450 million to the DOJ. A Munich court also held Siemens accountable and fined it for illegal conduct in giving bribes. Siemens has to pay combined sanctions of $1.6 billion in the US and Germany.24

Elf An example which shows Europe’s prior perception of foreign bribery is the case of alleged payments made in the late 1980s and early 1990s by the French oil company Elf whilst it was still under state ownership. The allegations concerned the keeping of a slush fund allegedly used to pay bribes via Swiss accounts to African leaders and to channel money to two main French political parties. Commentators have pointed out that at the time of these payments, party funding rules were loose and paying bribes to foreign officials was legal and so the company may not have broken French law.25 The same cannot be said for bribery payments taking place now. France ratified the United Nations Convention against Corruption (UNCAC) in 2005 and foreign bribery payments are no longer legal.

The difference in outcome between the Elf and the Siemens cases can perhaps be explained by the timing of the alleged misconduct, the magnitude of the corrupt practices, and the applicability of relevant foreign bribery laws. The Elf scandal took place when foreign bribery payments were still accepted as the norm in many states outside the US. There were no allegations that French laws on foreign bribery were broken, indeed the case which brought the matter to light was in relation to a criminal trial for embezzlement by senior officials of the

company at the time. The Siemens scandal, on the other hand, happened at a time when a wave of foreign anti-bribery sentiment was sweeping the globe.

According to a senior SEC official,

This pattern of bribery by Siemens was unprecedented in scale and geographic reach. The corruption alleged in the SEC’s complaint involved more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East, and the Americas. Our success in bringing the company to justice is a testament to the close, coordinated working relationship among the SEC, the US Department of Justice, and international law enforcement, particularly the Office of the Prosecutor General in Munich.26

The above examples of transnational bribery show that it is still rampant in international business and much still needs to be done to prevent it. The above analysis has mainly focused on attempts to impose sanctions on erring companies through the FCPA and to a lesser degree on attempts by other countries to curb misconduct. This may suggest that mandatory rules provide more scope for corporate liability. However, as will be seen in the section on the impact of mandatory rules, there is a serious need to improve effectiveness even where mandatory laws are applicable, especially in countries other than the United States. For the present, the focus will now turn to the impact of voluntary rules.

Selected voluntary rules and impacts

There are many principles, guidelines and initiatives which are non-binding and voluntarily created to help business counter bribery and corruption. The initiatives which will be discussed here are multilateral agency codes geared towards the specific goal of curbing corruption and developed by powerful non-state actors.

Transparency International’s Business Principles for Countering Bribery (TI Business Principles)

Transparency International (TI) is a well-known NGO which addresses corruption issues. It is at the forefront of attempts to eliminate corruption

and its annual publication of perceptions on corruption in different countries, listing the countries with the least and most corrupt tendencies, is globally well received.\textsuperscript{27} The TI Business Principles were developed by TI and Social Accountability International, in collaboration with private-sector companies, NGOs and trade unions, and introduced in 2002.

The aim of the TI Principles is to ‘provide practical guidance for countering bribery, creating a level playing field and providing a long-term business advantage’. They call for companies to have zero tolerance towards bribery and a commitment to the implementation of an anti-bribery programme. In November 2004, TI published a guidance document to help companies implement or review their anti-bribery programmes/practices.\textsuperscript{28}

Like many of the initiatives which will be discussed in this chapter, the TI Principles create awareness of the need to counter corruption in international business. The guidance document elaborates the need for companies to have both a values-based and compliance-based approach for an effective anti-bribery strategy.\textsuperscript{29} The guidelines are not standards, hence companies are not required to assess performance or seek external certification.\textsuperscript{30}

It is very difficult to determine the impact of the TI Principles on companies as they are simply a guide for companies to use in implementing their own anti-bribery programmes if they choose. There is no way of gauging the number of companies using the principles and there is no independent information on feedback from companies which have applied the principles to determine their effect. Any such information is gleaned from the social or sustainability reports of individual companies. The efficacy of the principles is therefore suspect. There is no external mechanism for enforcing compliance.

The TI Principles are seen as a valuable embodiment of the anti-corruption principle of the Global Compact, as a starting point for the implementation of a no-bribe policy by industry sectors, and as a potential pre-qualification requirement for bidders on internationally

\textsuperscript{27} See www.transparency.org/policy_research/surveys_indices/cpi.
\textsuperscript{28} See www.transparency.org/global_priorities/private_sector/business_principles/guidance_document.
\textsuperscript{29} \textit{Ibid.} \textsuperscript{30} \textit{Ibid.}
funded projects.\textsuperscript{31} The World Bank requires companies bidding on large bank-financed projects to certify the steps taken to ensure their representatives do not engage in bribery.\textsuperscript{32}

The TI Principles should also be seen as useful in the compliance-based approach. The guidance document recognises that if prosecutions arise as a result of bribery, some jurisdictions would factor the existence of a programme as a mitigating circumstance.\textsuperscript{33} This is indeed the case in the US. The US sentencing guidelines, while not making the implementation of an anti-corruption programme an affirmative defence, consider the presence of an effective compliance and ethics programme when sentencing.\textsuperscript{34} The new UK Bribery Act goes further: it creates an affirmative defence where commercial organisations have ‘adequate procedures’ in place to prevent bribery.\textsuperscript{35}

\textit{World Economic Forum Partnering against Corruption Principles for Countering Bribery (PACI Principles)}

The Partnering Against Corruption Initiative (PACI) was launched in partnership with TI and the Basel Institute on Governance in January 2004, at the World Economic Forum (WEF) annual meeting. The WEF believes MNCs have a particularly important role to play in upholding and advancing principles on human rights, labour, the environment and anti-corruption. The aim of the PACI was to rally together business leaders, governments, civil servants and legislators in the fight against corruption,\textsuperscript{36} as well as consolidate private-sector efforts to fight bribery and corruption and shape the evolving regulatory

\begin{itemize}
\item \textsuperscript{31} D. Nussbaum, ‘Strengthening good governance at the national level’, UNCTAD Expert Meeting on Good Governance in Investment Promotion, Geneva, Switzerland.
\item \textsuperscript{32} See www.transparency.org/global_priorities/private_sector/business_principles/guidance_document.
\item \textsuperscript{33} Ibid.
\item \textsuperscript{35} See ‘Failure of commercial organisations to prevent bribery, s. 7(2), Bribery Act 2010’, www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf. See King, ‘UK Bribery Act’.
\item \textsuperscript{36} See ‘The fight against corruption is a global priority’, www.weforum.org/documents/Newsletter/105/nl_1_05_en_seite6.html.
\end{itemize}
The PACI Principles are based on the TI Business Principles and likewise they call for commitment to a zero-tolerance policy towards bribery, and development of a practical and effective implementation programme by companies. They also create awareness of the corruption issues facing international business.

Unlike the TI Principles, the PACI Principles need to be adopted by companies. As from the end of 2010, PACI signatory companies numbered almost 160. The need for adoption by companies suggests there would be more scope for accountability than is available with the TI Business Principles. The PACI requires companies to submit a self-assessment within two years of adoption. However, the self-assessments are not publicly available on the PACI website and it is therefore uncertain when and if companies provide the assessments. The PACI has a version of the TI Self-Evaluation model which companies can use to evaluate the effectiveness of internal anti-corruption programmes. External verification or third-party certification is optional and in development.

The 2009 achievers survey which measures company progress in the three-stage process of the PACI (implementation, self-evaluation and external verification) suggests that while companies are increasingly implementing anti-corruption programmes and evaluating such programmes, their use of external accountability mechanisms is not so widespread.

It is submitted that the ability of the PACI to compel corporate responsibility is questionable because of the involvement of its members in corruption-related investigations and prosecutions. Since the PACI Principles were developed, a number of its founding members and/or their subsidiaries have been under investigation and/or prosecution for corrupt practices. In July 2004, two subsidiaries of ABB Ltd each pleaded guilty to FCPA violations in connection with their pursuit of

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40 Ibid.
41 Ibid.
42 ABB Ltd and Statoil were among the first signatories to the PACI principles in January 2004; see also above n. 36.
oil and gas construction contracts in Nigeria.\footnote{See discussions on ‘Examples of international bribery’ above.} In October 2006, the US DOJ reported that Statoil acknowledged making bribe payments to an Iranian official in order to secure valuable oil and gas rights in Iran.\footnote{United States Department of Justice, ‘US resolves probe against oil company that bribed Iranian official’, www.usdoj.gov/opa/pr/2006/October/06_crm_700.html.}

The effectiveness of the PACI is also questionable because of the failure by a number of companies involved in its evolution to adopt its principles and become PACI members. A 2005 WEF newsletter listed Chevron Texaco as a first signatory of the PACI;\footnote{See above n. 36.} however, the company is not included in the current table of signatories.\footnote{See www.weforum.org/en/initiatives/paci/Signatories/index.htm.} ChevronTexaco was involved in the evolution of the PACI, but is not yet a member.\footnote{World Economic Forum, ‘Partnering against Corruption Principles for Countering Bribery’, www3.weforum.org/docs/WEF_PACI_Principles_2009.pdf.} Japan National Oil Corporation and Saudi Aramco are two other companies involved in its evolution,\footnote{Ibid.} yet reluctant to sign the principles. These companies were part of a multi-industry and multiregional task force of fourteen members involved in the overall development of the PACI Principles.\footnote{The other eleven signatories are ABB, Alcan, Eskom, Fluor Corporation, Hochtief, Newmont Mining Corporation, Occidental Petroleum Corporation, Pakistan State Oil Company, PETRONAS, Skanska, Statoil Group.} In addition, there were ten engineering and construction member companies involved in the derivation process of the PACI Principles.\footnote{See above n. 47.} One of them, the Morganti Group, is not listed as a PACI signatory.\footnote{See www3.weforum.org/docs/WEF_PACI_SupportStatementSignatories_2011.pdf. The other nine members are ABB, AMEC, Fluor Corporation, Halcrow Group, Hilti Corporation, Hochtief, Obayahsi Corporation, Skanska, SNC-Lavalian International.} The failure by such companies to adopt the principles raises doubts about the ability of the PACI to widely compel corporate responsibility regarding corruption.

The TI Principles and PACI illustrate rather well the partnership which can take place between soft-law initiatives and hard laws in the CSR agenda. They are useful tools for fighting corruption. They create awareness of the need for companies to have a zero-tolerance approach towards bribery and to develop anti-corruption programmes, though whether companies are actually able to operate zero tolerance to bribery is questionable. The failure of the TI Principles to ensure implementation of
anti-bribery policies makes them inadequate to curb corruption. Although the PACI requires more commitment, there are doubts about its ability to compel companies to take measures against corruption.

Anti-bribery laws with adequate and effective enforcement have the potential to ensure compliance. However, such laws currently lack adequate enforcement mechanisms and legislation alone cannot curb bribery. Overseas bribery by companies is still very prevalent despite the existence of international anti-bribery laws criminalising this practice.\(^{52}\) Corruption is still a huge global issue.\(^{53}\) Therefore, effective use of both soft law initiatives and hard law can compel compliance and ensure CSR regarding corruption.

**International Chamber of Commerce Rules of Conduct and Recommendations for Combating Extortion and Bribery (ICC Rules)**

The ICC Rules are a self-regulation tool,\(^{54}\) first published in 1977 and later revised in 1996, 1999 and 2005.\(^{55}\) The need to fight extortion, solicitation and private-to-private corruption were integrity issues brought to light in the 2005 revised Rules.\(^{56}\) With regards to the ICC stance on MNCs and the supply side of bribery, like the earlier editions of the Rules, the 2005 edition does not have direct legal effect, but rather constitutes good commercial practice. The Rules call for enterprises to conform to the relevant laws and regulations of the countries in which they are established and in which they operate, and observe both the letter and spirit of these rules of conduct.\(^{57}\) The Rules require, among others, enterprises to prohibit bribery and extortion at all times and in any form, to implement corporate policies and codes, and to ensure compliance.\(^{58}\)


\(^{56}\) The 2005 edition defines extortion or solicitation as the demand of a bribe, whether or not coupled with a threat if the demand is refused. In the rules, bribery includes extortion.


\(^{58}\) See *ibid.* 1, 7 and 9 of the rules.

While the ICC has made many complementary moves to curb bribery in international business, the main criticism here is the voluntary nature of its rules in contrast with its call for business to comply with laws in countries in which they operate as well as obey the letter and spirit of the Rules. The letter and spirit of the Rules is for companies to prohibit bribery and extortion at all times and in all forms.\footnote{See above n. 55.} However, if companies do not observe the rules, nothing can be done. It is left for governments to enforce anti-corruption laws. This suggests that the enforcement of anti-corruption is the business of national governments and the international community. Where national governments do not have effective laws, then anti-corruption is unlikely to be prohibited or eradicated.

However, on the face of it, the ICC believes ‘Enterprises continue to have – and in future will probably more than ever have – a pivotal role in determining the integrity of business conduct.’ Yet they believe ‘[s]elf-regulation within the enterprise is the surest way to be certain of maximum compliance.’\footnote{See Vincke and Heimann (eds.), \textit{Fighting Corruption}.} In matters of international corruption, effective national laws may even be insufficient. This is because international corruption necessarily involves corruption at the transnational level, i.e. corruption in more than one state, affecting different laws. Thus, national governments would need to have overreaching or extraterritorial laws. But, even then, such laws can only be applicable to their nationals or national security interests. Therefore, while it is accepted that the eradication of corruption lies mainly with governments and the
international community, in view of the complexities such eradication/prohibition faces, companies are urged to be willing to accept the ICC Rules on a binding basis.

The ICC should consider sanctions for corporations that do not comply with its principles. It is a powerful body capable of implementing change in the corporate world, and acceptance of its rules on a binding basis by companies would at the very least suggest corporate seriousness in the pursuit of a less corrupt global world. It is accepted that this seems highly unlikely, given the ICC’s stance on self-regulation and the fact that such acceptance would probably have problems of its own. For instance, universal application of acceptance of a binding basis would be difficult and enforcement mechanisms would need to be put in place to ensure compliance. It is nonetheless noteworthy to include arguments for the need for the acceptance of the ICC Rules on a binding basis in a discussion on corruption and corporate social responsibility.

On the whole, despite the popularity and prevalence of non-binding rules for curbing corruption in international business, it has been shown that non-binding rules by themselves are inadequate and ineffective to ensure corporate responsibility for corrupt practices. This study will now address the issue of mandatory or binding rules to see what impact they have on anti-corruption as a CSR standard and what needs to be done to improve effectiveness.

Selected mandatory rules and impacts

Binding anti-corruption rules typically aim to criminalise bribery. This section of the book will focus on the criminalisation of bribery. It will consider the domestic and extraterritorial laws of three selected countries, namely the United Kingdom, the United States and Nigeria. Subsequent chapters will consider international law and civil remedies applicable to bribery.

The aim of examining selected criminal laws is threefold. The first is to examine the different approaches of each country to corporate criminal liability for the bribery of both domestic and foreign public officials. The second is to examine the different approaches to extraterritorial transnational bribery laws involving MNCs headquartered in the state and foreign public officials where applicable. The third
aim is to examine the effectiveness of enforcement mechanisms in place to ensure compliance with the domestic/extraterritorial law. In analysing the different approaches to corporate liability and transnational bribery, the features of any state law which are preferable will be highlighted. Of the three selected countries, the United States is the most active in holding corporations liable for corruption. While all three selected countries have domestic provisions for corporate criminal responsibility for the bribery of domestic public officials, not all three countries actually hold corporations guilty when involved in such crimes. For example, in the UK, prior to the newly enacted Bribery Act 2010, there was a lack of corporate responsibility for crimes of corruption. This was because of problems encountered when considering the concept of ‘corporate criminal responsibility’ as opposed to ‘individual criminal responsibility’. The Bribery Act 2010 creates a new corporate offence which addresses this difficulty in the context of organisations.64

With regard to corporate criminal liability for overseas or foreign bribery, not all of the three selected countries have overseas bribery laws applicable to companies. The UK and US have overseas bribery laws for legal persons, including corporations. Nigeria does not have overseas bribery laws for companies. Even in countries where there are extraterritorial bribery laws applicable to companies, such as the UK, there is still a very low record of corporate investigations and prosecutions for violations. A reason for this may be the lack of political willpower to regulate activities which occur outside the home state. The cost of such investigations or prosecutions may be another factor preventing a rise in their number. It is anticipated that with the enactment of the Bribery Act 2010 this will change. The chapter will now address the country rules in more detail.

**United Kingdom**

Prior to the UK Bribery Act passed by Parliament in 2010, corporations could be held liable for corruption under the common law offence of bribery65 and four main Acts, namely:66

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64 See s. 7, Failure of Commercial Organisation to Prevent Bribery, Bribery Act 2010.
65 For a detailed analysis on the common law offence of bribery, see Nicholls et al., Corruption and Misuse of Public Office, para 2.07ff.
66 The first three Acts listed are commonly known as the Prevention of Corruption Acts in the UK. The fourth Act applies to extraterritorial corrupt practices.
(1) The Public Bodies Corrupt Act 1889, which makes the active or passive bribery of a member, officer or servant of a public body, a criminal offence;\(^67\)

(2) The Prevention of Corruption Act 1906 extends to agents the offences created by the 1889 Act in relation to public officers,\(^68\) and deals with both public- and private-sector corruption;\(^69\)

(3) The Prevention of Corruption Act 1916 adds to the 1906 Act by imposing a presumption of corruption in the case of public bodies. If a person gives money, gift or other consideration to an employee of a public office, the money, gift or consideration shall be presumed corrupt unless the accused proves otherwise;\(^70\)

(4) The Anti-terrorism, Crime and Security Act 2001 (ATCSA) which included extraterritorial legislation on foreign bribery and corruption.\(^71\) It aimed to implement the OECD Convention on Corruption. It ensured that any common law offence of bribery, offences under section 1 of the Public Bodies Corrupt Practices Act 1889 and the first two offences under section 1 of the Prevention of Corruption Act 1906 are corrupt offences under the Act.\(^72\) The Act also ensured that under the common law offence of bribery, the public officer who receives or is offered the bribe need not be connected to the UK and that the public body could be outside the UK.\(^73\)

In 1998, a Law Commission report recommended that the common law offence of bribery and the Prevention of Corruption Acts should be replaced by a modern statute.\(^74\) A Corruption Bill was published in draft on 24 March 2003. On 17 July 2003, the Joint Committee of both Houses produced a report in consideration of

\(^{67}\) See Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (London: Sweet & Maxwell, 2003), pp. 289–92. Active bribery refers to the offering or giving, while passive bribery refers to the soliciting or receiving of bribes; see also Nicholls *et al.*, *Corruption and Misuse of Public Office*, para. 2.05.

\(^{68}\) See Pinto and Evans, *Corporate Criminal Liability*, pp. 293–6.

\(^{69}\) See Nicholls *et al.*, *Corruption and Misuse of Public Office*, paras. 2.31–2.32.


\(^{73}\) *Ibid.*, s. 108.

the bill. The UK Bribery Act, which came into force in July 2011, is meant to replace the existing UK law on corruption.

Under UK law, in order to hold a company liable for bribery, the prosecution must prove that the company officer involved had the necessary status and authority to make his acts the acts of the company. This principle is known as the identification doctrine and it seems to be derived from the House of Lords case of Tesco Supermarket Ltd v. Natrass, where Lord Reid said:

A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company . . . He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.

It is argued that the problem associated with this doctrine is magnified in cases involving transnational bribery.

There has been much debate about the suitability of the identification doctrine for attributing acts of bribery by legal persons, especially where large corporations are concerned. The UK law does not allow for aggregation of the states of minds of different people in the company and there have been calls for the need for UK law to consider

75 See HL Paper 157; HC 705.
77 [1972] AC 153 at 170 (House of Lords).
this approach, especially where large corporations are concerned. Nicholls et al. have pointed out that there had been a history of disquiet as to the director/controlling mind test and ongoing requests for government to come up with an alternative. In the context of transnational bribery, in particular, it has to be recognized that the common law test does not permit the creation of a corporate intent by simply aggregating the states of mind of more than one person within the corporation.\footnote{See Nicholls et al., Corruption and Misuse of Public Office, para. 10.74.}

Another doctrine related to the identification doctrine, which has been proposed to deal with the impasse caused by an application of the identification doctrine, is the Meridian test.\footnote{The Meridian test was set forth in the Privy Council case of Meridian Global Funds Asia Ltd v. Securities Commission, [1952] 2 AC 500.} The Meridian test aims to broaden the identification doctrine by holding that the rule of attribution should be a matter of interpretation or construction of the relevant substantive rule; i.e. attribution should depend upon the purposes of the provisions creating the relevant offences. However, the application of this test to bribery offences has been questioned\footnote{See ‘UK: Phase 2. Report’, para. 198–9.} and it is unlikely to be adopted in the UK for bribery offences.

Until very recently, with the enactment of the Bribery Act 2010, the UK government did not show a serious interest in curbing overseas bribery. From 1997 to 2004, in the seven years spanning the period during which the UK signed the OECD Anti-Bribery Convention and passed the ATCSA, no company or individual was prosecuted.\footnote{Susan Hawley and Andrew Philips, ‘Bribery begins at home: if Africa is to overcome corruption the West will have to clean up its own act’, Guardian, 6 October 2004, www.guardian.co.uk/comment/story/0,1320519,00.html.} Furthermore, only two out of twenty allegations of overseas bribery were under formal investigation.\footnote{Ibid.} The failure to prosecute did not result from of a lack of allegations but from a lack of political will and allocation of relevant resources.

The year 2004 saw an increase in the number of full investigations (nineteen), but only two prosecutions.\footnote{See OECD, ‘Steps taken by the United Kingdom’.} In June 2005, the Home Secretary reported forty-one allegations of overseas corruption.\footnote{See House of Commons, Hansard Written Answers to Question: Overseas Corruption, 20 June 2005: Column 767w, www.publications.parliament.uk/pa/cm200506/cmhansrd/cm050620/text/cm0620w31.htm#cm0620w31.html_spnew6.} The
majority of the allegations were for corruption taking place in Africa. However, there were also allegations of corruption taking place in Europe (eleven reports), the Middle East (five reports), South Asia (four reports) and North America (three reports) amongst others.\textsuperscript{87} Forty-four referrals were noted on the ATCSA register.\textsuperscript{88} Nevertheless, the 2005 phase 2 report of the UK on the implementation of the OECD Anti-Bribery Convention expressed surprise at the absence of prosecutions for foreign bribery in the UK since the country signed the convention.\textsuperscript{89} Possible reasons cited for the absence included the need to present a relatively high amount of evidence to commence an investigation and limited resources for investigation.\textsuperscript{90}

In June 2006, thirty-five overseas bribery allegations were vetted to see if there was sufficient evidence to open a case. Thirteen active investigations were carried out in England and Wales, with one active investigation in Scotland.\textsuperscript{91} However, it is interesting to note that in the same month, the \textit{International Herald Tribune} reported an executive director of Transparency International as saying that the UK did not have a single prosecution of foreign bribers.\textsuperscript{92} A good illustration of the UK’s lack of political will (at the time) in prosecuting companies for overseas bribery is the 2006 decision of the SFO to stop investigations into bribery involving senior BAE and Saudi Arabian officials.\textsuperscript{93} The SFO had launched investigations into BAE’s £43 billion Al-Yamamah arms deal with Saudi Arabia in 1985, which provided Tornado and Hawk jets plus other military equipment.\textsuperscript{94} Senior Saudi public officials and members of the Saudi royalty have

\textsuperscript{87} The other countries with allegations held by the criminal intelligence service include Latin America (two reports), the Caribbean (two reports) and the Pacific (one report).

\textsuperscript{88} See above n. 86. Of the reports from Africa, none were from North Africa.


\textsuperscript{90} Ibid.


been implicated in the investigations. There were accusations that the head of the Saudi National Security Council, son of the crown prince, took more than £1 billion in secret payments from BAE.95 The SFO claimed it dropped the investigations because of fear of a threat to national security.

In 2007, two NGOs – the Corner House and Campaign against Arms Trade – launched a judicial review into the SFO’s decision, claiming the investigation was tainted by government concerns about trade with Saudi Arabia and diplomatic considerations rather than national security issues, and the discontinuance was illegal under the OECD Anti-Bribery Convention.96 In April 2008, the English High Court ruled that the government and SFO unlawfully submitted to threats that there would be consequences to national interests if the investigations were not dropped.97 In the light of the High Court’s decision, the SFO was granted leave to appeal to the House of Lords. In a July 2008 ruling, the House of Lords overturned the High Court’s decision. It ruled that the SFO director acted lawfully in stopping the investigation when faced with a threat to national security. It also held that the UK courts did not have to determine whether the OECD Convention was complied with.98

A number of factors contributed to the lack of corporate liability for corruption in the UK. This included the difficulties in convicting legal persons for foreign bribery, the complexity of existing law, the lack of adequate resources and the use of national interest considerations. The need for a new foreign bribery law and the broadening of liability of legal persons for foreign bribery were issues the OECD working group addressed in a further review (phase 2 bis) of the UK compliance with the OECD Convention.99 It is hoped that with the enactment of the new Bribery Act, there will be a significant difference.

97 See Frances Gibb and Philip Webster, ‘High Court rules that the halt to BAE investigation was “unlawful” a threat to British justice’, The Times online, 11 April 2008. See also above n. 96.
98 See R (on the application of Corner House Research and Others (Respondents) v. Director of the Serious Fraud Office (Appellant) (Criminal Appeal from Her Majesty’s High Court of Justice) [2008] UKHL 60.
United States

A US company may be found liable for domestic bribery under Title 18 of the United States Code (USC), section 201. This section deals with bribery of public officials and witnesses. The definition of ‘public official’ is very broad and includes any member of congress, delegate, resident commissioner, officer or employee acting on behalf of any department, agency or branch of the US government. Section 201(b) states that ‘whoever directly or indirectly gives, offers or promises anything of value to any public official – with intent (a) to influence any official act; or (b) to influence such public official to commit, or collude in or allow any fraud or make opportunity for any fraud; or (c) to induce such public official to do or omit to do any act in violation of the lawful duty of such official or person – has committed a crime punishable by a fine, imprisonment, or both, and may be disqualified from holding any office of honour, trust or profit in the United States.

The USC specifies that the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies and joint-stock companies as well as individuals.

In the United States of America v. Apex Distributing Company, Inc., Albert A. Finer, Hubert O’Reilly, the defendants were denied grounds to dismiss an indictment on several counts, including defrauding the United States of and concerning its governmental function and right to administer the business and affairs of the United States Navy, ‘free from unlawful impairment, corruption, improper influence, dishonesty and fraud’. The company was also found to have committed certain offences against the United States, including the crime of bribery in violation of 18 USC § 201.

In the United States, a corporation would be held liable for bribery domestic or foreign, if any of its employees commits the crime as stated in the applicable anti-bribery laws. Therefore, the United

100 See Bribery of Foreign Public Officials, 1962 (18 USCS § 201(a)).
101 See ibid. § 201(b).
103 Crim No 6516, USDC for the district of Rhode Island 148 F.Supp 365; 1957 U.S Dist. LEXIS 4029.
States’ approach to corporate criminal liability avoids the complexities present in the United Kingdom’s approach to the same. In the United States, a corporation will generally be held liable for the unlawful actions of its officers, employees and agents under a *respondeat superior* theory. The employee must be acting within the scope of his or her duties and for the benefit of the corporation. The company will not be liable for a limited number of actions that are truly outside the employee’s assigned duties or which are contrary to the corporation’s interests, e.g., where the corporation is the *victim* rather than the beneficiary of the employee’s unlawful conduct.

Unlike the United Kingdom, the United States holds corporations criminally liable for the actions of any corporate employee. The employee need not be a high-level executive. However, the relevance of a high-level executive being involved is crucial at the sanctioning stage. Participation, acquiescence, knowledge or authorisation by higher-level employees or officers are relevant factors in the determination of appropriate sanctions. ‘Under the applicable sentencing guidelines, higher fines may be imposed when a corporation’s management participates in or fails to take appropriate steps to prevent unlawful conduct.’

The simplicity with which corporations can be held criminally liable, the effective laws and good enforcement systems which have been consciously put in place make the US a model for effective anti-bribery laws. With regards to overseas bribery, the US Foreign Corrupt Practices Act is the most significant statute relating to corporate criminal responsibility for corruption. It implements the OECD Convention.

The FCPA has anti-bribery and accounting provisions. The anti-bribery provisions prohibit US companies conducting business with foreign government entities and government officials from bribing such foreign officials to obtain or retain business. The anti-bribery provisions also apply to individuals, firms, officers, directors, employees, or agents of a firm and any stockholder acting on behalf of a firm.

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The jurisdiction for corporate liability is either territorial or national and applies to issuers and domestic concerns. Since 1998, foreign companies and nationals which cause, directly or through agents, an act in furtherance of a corrupt payment to take place within the territory of the US are subject to FCPA territorial jurisdiction. If such liability is proved, a fine of up to $2,000,000 may be imposed on the corporation. Two affirmative defences under the FCPA excluding liability are (1) the defence that the payment was lawful under the written laws of the foreign country or (2) the money was spent as part of demonstrating a product or performing a contractual obligation.

There are numerous examples of FCPA prosecutions. The 2004 case of United States v. Kay is a good example because it illustrates an actual prosecution for violations of the FCPA by an issuer/domestic concern regarding payments to a foreign public official. It also gives a detailed analysis of the FCPA’s legislative history, and clarifies that the US senate and congress meant the FCPA to prohibit payments towards obtaining or retaining business and not just government contracts. In the case, Kay and Murphy, officials of American Rice Inc., were charged with violating the FCPA. It was alleged that they bribed Haitian officials to understate customs duties and sales taxes on rice shipped to Haiti. The reason for the conduct was to help American Rice Inc. obtain and retain business. The issue was whether, if proved beyond a reasonable doubt, the conduct of the defendants was sufficient to constitute an offence under the FCPA. The US Court of Appeal held that such bribes could (but do not necessarily) come within the ambit of the statute. It also held that the business nexus element of the FCPA does not go to the core of criminality of that statute. In this case, the business nexus was the link between the illicit benefit of reduced taxes and duties and the obtaining of the business venture or activity.

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109 An issuer is a corporation that has issued securities registered in the US or is required to file periodic reports with the SEC, while a domestic concern is a corporation which has its principal place of business in the US or which is organised under the laws of a state of the United States.

110 See 1977 (15 USCS § 78dd-1, et seq.), section 78f on penalties.

111 359 F.3d 738 (5th Cir. 2004).

112 Ibid., 746–61.

113 Ibid., 748.

114 Ibid., 741.
Nigeria

In Nigeria, a corporation can be held criminally liable for corrupt practices. The relevant Act is the Corrupt Practices and Other Related Offences Act enacted in 2000 (Corrupt Practices Act). The Act criminalises a wide range of corrupt practices, including bribery, fraud and other related offences. It applies to both public officials and private persons and is very broad in its scope. The Act covers not only corrupt dealings relating to public officers and public institutions, but also strictly private dealings between private businesses. ‘Person’ in the Act includes a natural person, a juristic person or any body of persons corporate or incorporate. Giving gratification through agents and bribery of public officials are two offences under the Act that corporations are likely to be guilty of. Accordingly, they will be the focus in this section.

Section 9(1) of the Corrupt Practices Act provides that any person who corruptly (a) gives, confers or procures any property or benefit of any kind to, on or for a public officer or to, on or for any other person, or (b) promises or offers to give, confer, procure or attempt to procure any property or benefit of any kind to, on or for a public officer or any other person, on account of any such act, omission, favour or disfavour to be done or shown by the public officer, is guilty of an offence of official corruption and shall on conviction be liable to imprisonment for seven years.

Section 9(2) provides that if in any proceedings for an offence under this section it is proved that any property or benefit of any kind, or any promise thereof, was given to a public officer or some other person at the instance of a public officer, by a person (a) holding or seeking to obtain a contract, licence, permit, employment or anything whatsoever from a government department, public body or other organisation or institution in which that public officer is serving as such, or (b) concerned or likely to be concerned in any proceeding or business transacted, pending or likely to be transacted before or by

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116 Ibid., s. 2, 8–26 dealing with offences and penalties under the Act.
119 Ibid., ss. 9 and 21 respectively.
that public officer or a government department, public body or other organisation or institution in which that public officer is serving as such, or (c) acting on behalf of or relative to such a person, the property, benefit or promise shall, unless the contrary is proved, be deemed to have been given corruptly on account of such a past or future act, omission, favour or disfavour as is mentioned in section 9(1) and (2).

Section 18 provides that any person who offers to any public officer, or being a public officer solicits, counsels or accepts any gratification as an inducement or a reward for (a) voting or abstaining from voting at any meeting of the public body in favour or against any measure, resolution or question submitted to the public body; (b) performing or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of any official act; (c) aiding in procuring or preventing the passing of any vote or the granting of any contract, award, recognition or advantage in favour of any person; or (d) showing or forbearing to show any favour or disfavour in his capacity as such officer shall, notwithstanding that the officer did not have the power, right or opportunity so to do, or that the inducement or reward was not in relation to the affairs of the public body, be guilty of an offence and shall on conviction be liable to five years imprisonment with hard labour.

The liability for section 9 is seven years imprisonment while that for section 18 is five years with hard labour. It is interesting to note that although corporations can be held liable, imprisonment, which is not suitable for corporate liability, is the only sentence available for a guilty party. It is argued that the Nigerian law, in order to address corrupt giving by corporations, needs to amend the legislation to include appropriate fines and make a distinction between fines to be paid by an individual and fines to be paid by a body corporate found guilty under sections 9 and 18 for instance. There is a need to address corporate liability for other offences under the Act, but the focus here is on the two offences mentioned.

The Independent Corrupt Practices Commission (ICPC) was established by the Corrupt Practices Act. Its responsibilities include investigating corruption reports and where appropriate prosecuting

\[120\text{ Ibid., s. 3.}\]
offenders.\textsuperscript{121} Other responsibilities include examining, reviewing and enforcing the correction of corruption-prone systems and educating and enlightening the public on corruption.\textsuperscript{122} The Economic and Financial Crimes Commission (EFCC) is another Nigerian commission which fights corruption, amongst other economic and financial crimes. It was created in 2002 to combat the advance fee fraud, a fax or email scam popularly known as ‘419 fraud’, and other crimes related to business and the economy.\textsuperscript{123}

There have been reports of many high-profile public official probes into corruption by the EFCC and the ICPC implicating MNCs.\textsuperscript{124} In 2003, the ICPC announced that it was probing top government officials for allegedly accepting bribes from a French firm, Sagem SA. Five people, including the then labour minister Hussaini Zannuwa Akwanga and two other former ministers, were charged in December 2003 with taking bribes from Sagem, which won a US$214 million contract to produce national identity cards.\textsuperscript{125} At the time, the Sagem trial was the highest-profile case brought against government officials in the three years after the ICPC was established.\textsuperscript{126} In June 2004, the ICPC withdrew the case, stating that it may file fresh charges. Almost five years after the initial charge was withdrawn, there have been no fresh charges filed against the ministers and others alleged to have been involved in the scandal.\textsuperscript{127} It is unknown if any high-level cases of corrupt public officials have been prosecuted by the ICPC.

A more recent example of probes by the ICPC and EFCC is that involving the alleged payment of a 10 million euro bribe by Siemens to Nigerian public officials. In October 2007, a German court fined Siemens 210 million euros for paying bribes to obtain contracts.\textsuperscript{128}

\textsuperscript{121} Ibid., s. 6(a).
\textsuperscript{122} Ibid., s. 6(b)–(f).
\textsuperscript{124} For a recent example, see ‘Siemens: Yar’Adua orders probe of €10m scandal’, EFCC, online: www.efccnigeria.org/index.php?option=com_content&task=view&id=33&Itemid=34. See also above pp. 47ff.
\textsuperscript{125} See ‘Nigeria ministers on bribe charge’, 30 December 2003, news.bbc.co.uk/2/hi/africa/3356807.stm.
\textsuperscript{126} Ibid.
\textsuperscript{128} ‘Siemens fined after bribery probe’, 4 October 2007, news.bbc.co.uk/2/hi/business/7028628.stm.
Investigations carried out by Siemens uncovered more than 1.3 billion euros in suspicious payments, of which 10 million euros was said to have been paid to Nigerian ministers. The findings of the German court prompted the Nigerian government to launch investigations into the matter, with the ICPC summoning many officials for questioning. In December 2007, the Nigerian government announced that it was revoking its last contract with Siemens for the supply of circuit breakers and other power generation accessories as a first step towards blacklisting Siemens. All dealings with Siemens were also suspended pending the probe into allegations of the 10 million euro bribe payments.

The discussions so far have pointed to Nigeria’s attempts to curb public corruption. Nigeria’s focus appears to be on weeding out public corruption. Although it has laws applicable to companies, there are no applicable sentences relevant for corporations; reports of high-level corruption charges tend to focus on the public official. Nigeria is not much concerned with punishing those on the supply side of public corruption – the MNCs – rather it seeks to punish the corrupt domestic public officials who accept bribes. Nigeria’s reaction to the bribery allegations, which was to suspend dealings with Siemens and revoke the 128.4 million naira contract, is a demonstration of weak political will. If the Siemens allegations are true, the bribes paid would have amounted to more than 1 billion naira. In this light, the revocation of a mere 128.4 million naira contract seems abysmal. Perhaps a better approach would have been to prosecute Siemens for involvement in the bribe paying under applicable Nigerian laws, subject to any limitations. In order to do this, there may be a need to review the Corrupt Practices Act as it relates to companies.

A 2004 Global Integrity report found that Nigeria had many laws criminalising corruption but lacked the political will to implement the laws. Nigeria also has many bodies designated to fight corruption such as the EFCC, ICPC and Code of Conduct Bureau (CCB).

\[130\] Ibid.
\[132\] See Odunlami, ‘Nigeria corruption notebook’. 
CCB was set up to act as a check on the conduct of public officers. It receives declarations of assets by public officers and has powers to refer breach of conduct to the Code of Conduct Tribunal. In the light of recent attempts to curb corruption, which can be seen in the work of the ICPC and EFCC and declarations by the Nigerian government, Nigeria’s political will to fight corruption is emerging; however, attempts for now are primarily focused on past and current senior public officials.

On the issue of extraterritorial laws, the Corrupt Practices Act has some effect outside Nigeria in relation to the investigation and liability for offences listed under the Act. Section 66(1) provides that citizens and permanent residents of Nigeria may be guilty of offences under the Act even if the offence is committed outside the country. Section 66(3) gives the ICPC power to engage the services of Interpol and the like to assist in tracing property and dealing with cross-border crimes. However, the extraterritorial scope of the Act may be unclear.

Nigeria does not appear to have extraterritorial laws preventing payment of bribes to foreign public officials by either natural or legal persons. This may be because of the historical background to the enactment of extraterritorial laws on foreign bribery, which came about as a result of the Watergate scandal and several other disclosures of large illicit payments by US firms. Thus, perhaps extraterritorial foreign bribery laws are seen as relevant solely for MNCs headquartered in developed countries carrying out corporate practices in other developed and developing countries.

**Usefulness of extraterritorial laws for curbing international corruption**

The usefulness of extraterritorial laws for curbing overseas bribery has been questioned. Many writers have argued that such laws are over-reaching. In his articles about the FCPA, Steven Salbu questions the logic

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135 For more on extraterritorial laws on corruption in Nigeria, see *Ibid.*
behind the extraterritorial criminalisation of bribery in general.\footnote{Steven R. Salbu, ‘The Foreign Corrupt Practices Act as a threat to global economy’ (1999) 20 Mich. J. Int’l L 419; see also Steven R. Salbu, ‘Bribery in the global market: a critical analysis of the Foreign Corrupt Practices Act’ (1997) 54 Wash & Lee L Rev. 229; ‘Extraterritorial restriction of bribery: a premature evocation of the normative global village’ (1999) 24 Yale J Int’l L 224.} He believes global heterogeneity is so compelling that the most perfectly formulated extraterritorial legislation would be crude and unwieldy. He says this global heterogeneity taints efforts to proscribe acts of bribery abroad. He believes there is a political peril of cross-national hostility attributable to ‘officious and overreaching legislation across national borders’\footnote{Salbu, ‘The Foreign Corrupt Practices Act as a threat to global economy’, 421.}. Instead, he promotes the use of strong domestic anti-bribery legislation and enforcement through persuasion as opposed to extraterritorial legislation.\footnote{\textit{Ibid.}, 437ff.} Salbu admits that it can be argued that extraterritorially applied legislation is necessary to expunge global corruption, but this underestimates the power of persuasion, light-handed diplomacy and dialogue in the information era.\footnote{\textit{Ibid.}, 445.}

With due respect to Salbu, the changing global perceptions of corruption and global efforts to curb corruption confirm the usefulness of extraterritorial laws. The series of articles by Salbu referred to were all published between 1997 and 1998. In a decade, there have been considerable changes to the approach towards international bribery. Extraterritorial laws are not officious or overreaching because they apply to nationals of an enforcing state (or persons with connection) and help curb corruption, which is a global goal.

Moreover, where matters of international bribery are concerned, and senior public officials and governments are often involved, the effectiveness of domestic legislation and/or enforcement to combat such bribery is at best highly questionable and at worst slim. It appears that Salbu did not give sufficient thought to developing countries where international bribery is most prevalent and the domestic laws or enforcement procedures are inadequate or ineffective to counter this phenomenon. Persuasion and the emergence of a civil society which he promotes are highly commendable, but inadequate.

To illustrate the point, in the developing world, countries with extractive industries often breed corruption. In the 1960s and 1970s,
Nigeria’s oil sector was the major source of foreign exchange, generating more than 90 per cent of the foreign exchange earnings. The oil boom of the 1970s led to government corruption, uneven distribution of wealth and political crises. The prevalence of corruption led to many domestic laws in Nigeria punishing corruption. Needless to say, corruption is still rampant in the country, the domestic laws appear to be ineffective and enforcement is highly problematic.

From 1999 to 2007, the former president of Nigeria, Olusegun Obasanjo, attempted to rid the country of corruption. This led to the enactment of the Corrupt Practices Act in 2000 and re-enactment of the Economic and Financial Crimes Establishment Act (EFC Act) in 2004. The re-enactment of the EFC Act brought the EFCC into existence. The EFCC aims to promote a policy platform of accountability and transparency. Between its inception and September 2006, the EFCC prosecuted about eighty-eight people and recovered assets and cash worth over US$ 5 billion.

As a result of the attempts of the Nigerian government, perhaps, now it may even be said that Nigeria has an ‘independent’ enforcing body and domestic laws preventing corrupt practices. Nevertheless, the use of domestic law for curbing overseas bribery would be inadequate because domestic laws in Nigeria tend to focus on the demand side of bribery; rarely are the laws applied towards the supply side, in which MNCs are guilty of being the chief participants. Through the use of extraterritorial applications of bribery laws, MNCs can be more effectively held accountable for the corrupt practices they carry out in other countries, especially developing countries with inadequate or ineffective laws.

In any event, arguments such as Salbu’s suggest the need to consider other mechanisms for curbing international corruption. Part II will consider such attempts from a CSR perspective.

144 Mallam Nuhu Ribadu, ‘Interim investigation report on cases of financial misappropriation, and money laundering against some states and local governments’, address to the Nigerian senate on 27 September 2006.
CONCLUSION

Anti-corruption is a CSR standard, the fulfilment of which entails the use of voluntary and mandatory rules. In this chapter, the focus has been on international corruption involving international business and payment of bribes to foreign public officials. International corruption knows no boundary. It is rampant in the developed and developing world.

However, patterns suggest international corruption most likely involves payment of bribes in emerging or transitional markets by MNCs in pursuit of business contracts. These payments are distributed in the hands of a few, creating instability, conflicts and injustice for the majority of the citizens in affected countries. The impact of corruption in developing countries is well documented, and as a result, there is a pressing need to improve or revamp the mechanisms currently in place to discourage corruption.

From the perspective of corporate responsibility, there is a need to examine voluntary and mandatory rules applicable for curbing corruption. Voluntary or non-binding rules, which are the preferred norms, are clearly inadequate and ineffective for holding corporations responsible for corrupt giving. Mandatory or binding rules provide better scope for corporate responsibility. However, as shown from the selected countries’ current domestic laws, such laws are inadequate to deal with international corruption not because of a lack of applicable laws but because of the problems of enforcement and/or a focus on the demand side of bribery.

Extraterritorial laws are therefore useful tools in combating corruption because they typically aim to address liability for the supply side of bribery. Nevertheless, extraterritorial laws have detractors and are not universal. To date, the US FCPA is the most effective extraterritorial legislation and even then it has its limitations. It applies to US corporations only, leaving the possibility for other MNCs to still engage in corrupt practices. It was due to the adverse effects of corrupt practices by other MNCs on US corporations that the US lobbied extensively for international conventions which would apply to other corporations. The UK Bribery Act is still in its infancy and its effect is yet to be seen.

The Nigerian Corrupt Practices Act’s extraterritorial reach is applicable only for corrupt offences listed in the Act. It does not
extend to criminality for overseas bribery of foreign public officials by Nigerian nationals, including corporations.

The examination of these laws demonstrates the inadequacy of domestic criminal laws to address international corruption; and indicates the improvements necessary in order to achieve effective corporate responsibility for international corruption. Part II will examine other mechanisms useful for curbing international corruption from a CSR perspective.
PART II

Special focus on mechanisms for curbing international corruption from a CSR perspective
Global governance aims to address common global concerns through the activities of governments, intergovernmental networks and relationships, and non-state actors. These actors are involved in interactive decision making and considerations of multiple policies and practices in the creation of instruments to address global concerns. International, regional and domestic instruments have been created to address the issue of corruption as a global concern. The previous chapter examined selected domestic instruments. This chapter will examine international and regional instruments.

Governance is primarily concerned with governments. However, governance is increasingly also interested in the role non-state actors can play in the management of global issues. The changing dynamics in the global political, economic and social spheres brought about by globalisation suggests that governance is no longer just about national governments and intergovernmental networks; non-state actors are playing a bigger role. The development of policies and practices by non-state actors for the elimination of corruption are examples of the role non-state actors are playing in governance.¹

This chapter will concern the policies and practices of global governance actors aimed at eliminating corruption. From a CSR perspective, it will consider how global governance is leading to improved corporate behaviour. Is global governance making corporations more mindful of the increased necessity to comply with societal needs for corporate sensitivity to human welfare and economic progress? A discussion on global governance would not be complete without consideration of the impact of the emerging principle of

¹ For instances, see Chapter 2 above, pp. 41ff.
global administrative law. Global governance is increasingly being associated with global administrative law. This chapter will therefore examine the relationship between the two and explore the problems encountered in regulating global governance through the use of administrative law mechanisms. The impact of global governance on developing countries will be considered.

What is Global Governance?

The Commission on Global Governance sees global governance as a broad, dynamic, complex process of interactive decision making that is constantly evolving and responding to changing circumstances.² It involves a wide range of actors and partnership building for developing joint policies and practices on matters of common concern.³ It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.⁴ Global governance extends to the command or control mechanisms of social systems including private enterprise and does not necessarily include legal or political authority.⁵ The possession of information and knowledge, the pressure of active or mobilisable persons, use of careful planning, good timing, clever manipulation and hard bargaining are examples of actions which foster control mechanisms sustaining governance without government.⁶

Global governance aims to create a better world through the activities of multiple actors establishing multiple policies and practices. However, the complexities of the modern world make governance very difficult.⁷ Interdependence and co-operation are necessary assets in the process of interactive decision making. Intergovernmental institutions and national governments are unable to address common global concerns and increasingly call for partnership with non-state actors. Compromises

⁴ See Commission on Global Governance, ‘A new world’.
⁶ Ibid.
⁷ Ibid.
Global governance

will have to be made where there are opposing views. Order and priorities will need to be established.

The multilevel partnership building in global governance creates formal and informal rules which may be structured or otherwise. Such a system leaves little room for consensus or the establishment of a single institution to regulate the rules which evolve. However, there is a need for consensus in global governance and for the appointment of bodies, preferably international institutions, to co-ordinate global efforts for the common good.

In the area of corruption and in the context of CSR, the next section will discuss the reform and strengthening of institutions for curbing corruption and the co-ordination of anti-corruption collaborative efforts. The goal is to showcase the effectiveness of global governance in curbing corruption and to highlight how global governance could be better utilised.

GLOBAL GOVERNANCE AND CORRUPTION

Most writings on governance and corruption focus on governments or national mechanisms. In many situations, corruption is linked to governance or government in the sense that bad governance or government decisions lead to corruption. Here, the attempt is to explore how global governance – decision making involving multiple actors – impacts on corruption. The global society is showing increasing awareness of the need to curb corruption. There is no lack of instruments – national, regional and international – to curb corruption. The problem lies with enforcement mechanisms for implementing such instruments. Reformed and strengthened institutions – public, private and intergovernmental – are needed to ensure effective adherence. There is also a need to co-ordinate collaborative efforts for curbing international corruption.

Reform and strengthening of institutions for curbing corruption

The reform and strengthening of institutions is beginning to happen. The World Bank and United Nations Office on Drugs and Crime (UNODC) launched a partnership in September 2007 to help developing countries recover stolen assets. The initiative called Stolen Asset
Recovery (StAR) operates on the premise that both developed and developing countries must work in partnership. In a press report publicising the initiative, StAR called for the ratification by all countries of the United Nations Convention against Corruption (UNCAC) and the essential collaboration of multilateral and bilateral agencies, civil society and the private sector. The initiative will help member states who have signed the UNCAC strengthen their capacity to implement chapter V on asset recovery. Therefore, although the initiative is not regulatory, it will be of assistance to UNCAC, which is regulatory.

The StAR initiative aims to address the ‘other side of the equation’ on corruption, which ‘ignores that stolen assets are often hidden in the financial centers of developed countries, bribes to public officials from developing countries originate from multinational corporations; and the intermediary services provided by lawyers, accountants, and company formation agents, which could be used to launder or hide the proceeds of asset theft by developing country rules, are often located in developing country financial centres’. This is welcomed and is a good example of how global governance can impact positively on corruption. The initiative acknowledges that hitherto the focus of the international development community has been on addressing corruption and weak governance.

Many countries, both developing and developed, have shown an interest in participating in StAR. It will be interesting to see what effect StAR will have in the near future. The initiators have noted that developing countries will face serious obstacles in recovering stolen

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11 Ibid.

assets. This is because of the limited legal, investigative and judicial capacity available in such countries. Inadequate financial resources and the failure of developed countries harbouring stolen assets to render legal assistance are other reasons cited for difficulties in recovering stolen assets.\textsuperscript{13}

An interesting press report highlighted by Transparency International in October 2007 illustrates the difficulties developing countries currently face in attempts to recover stolen assets. The report recounts Indonesia’s struggle to recover assets stolen by its business persons as a result of its extension of US$16 billion in liquidity assistance to banks affected by the East Asian financial crisis. Hendra Raharja, an Indonesian businessman, was arrested in Australia while trying to cross over from Hong Kong. Indonesia’s attempt to recover US$800 million of Raharja’s property from Hong Kong is proving futile. Hong Kong has requested that Indonesia pay a 20 per cent administrative fee and split the rest of the 80 per cent between the two countries. Australia has been involved in the negotiations to persuade Hong Kong to return the money to Indonesia. As of 2004, Indonesia has only been able to recover AUS$642,000.\textsuperscript{14} It is hoped that StAR will address situations such as this and others that developing countries may face.

At this juncture, it is useful to recall earlier efforts by governments of other developing countries such as Nigeria and the Philippines to recover stolen assets. Although such countries have enjoyed some success in asset recovery, the process has been time-consuming and costly.\textsuperscript{15} In the case of Nigeria, it is reported that ex-military dictator General Sani Abacha looted between US$2 billion and US$5 billion.\textsuperscript{16} Upon his sudden demise in June 1998, attempts were made to recover the stolen assets. First, the interim military administration set up following his death and headed by General Abdulsalmi Abubakar was able to recover US$800 million from the Abacha family.\textsuperscript{17} Then, in 1999, the newly elected democratic government headed by General Olusegun Obasanjo sought to recover assets stashed abroad. The assets were laundered

\textsuperscript{13} See UNODC and World Bank report, ‘Stolen Asset Recovery (StAR) Initiative’.
\textsuperscript{15} See UNODC and World Bank report, ‘Stolen Asset Recovery (StAR) Initiative’.
\textsuperscript{16} Ibid.  \textsuperscript{17} Ibid.
through banks and companies in the UK, Switzerland, Luxembourg, Liechtenstein, Jersey and the Bahamas.\(^{18}\) Letters requesting mutual assistance were sent to a number of these states. As a result, the Swiss authorities issued a general freezing order on Abacha’s assets. However, Swiss law required Nigeria to present the Swiss authorities with a final forfeiture judgment reached in the Nigerian courts. This proved legally and politically problematic. Fortunately, the Swiss legal firm of Monfrini and Partners, whom the Nigerian government had engaged to assist with the tracing and recovery of assets abroad, was able to successfully argue that the Swiss authorities could waive the final forfeiture requirement.\(^{19}\) This was because there was adequate proof of the criminal origin of the Abacha funds. Between 2005 and early 2006, US$500.5 million was finally repatriated, with the assurance that the World Bank would monitor the recovered assets.\(^{20}\)

In the case of the Philippines, it is reported that President Marcos looted between US$5 billion and US$10 billion.\(^{21}\) In 1986, the Presidential Commission on Good Government (PCGG) was launched to recover the assets stolen by Marcos. The assets had been laundered abroad through shell corporations, which invested the funds in real estate in the US, or by being deposited in offshore banks. Letters requesting mutual assistance were issued to the US and the Swiss authorities.\(^{22}\) As a result, the Swiss authorities froze Marcos’ assets in Switzerland. After a series of legal battles in Switzerland relating to the issue of repatriating the assets even before a final forfeiture judgment required by the Swiss courts was obtained, the Swiss authorities transferred the deposits to an escrow account in the Philippines. It was only in 2004, after the Philippine Supreme Court had issued a forfeiture decision in July 2003, that the PCGG remitted the deposit of US$624 million recovered to the Philippine Bureau of the Treasury.\(^{23}\)

\(^{18}\) Ibid.\(^{19}\) Ibid.\(^{20}\) Ibid.\(^{21}\) Ibid.\(^{22}\) Ibid.\(^{23}\) Ibid. Other reports cite a much higher figure of US$27 billion. See Colin Nicholls, Timothy Daniel, Martin Polaine and John Hatchard, *Corruption and Misuse of Public Office* (Oxford University Press, 2006), para. 7.57.
Governments of developing countries face a multitude of problems in their attempts to recover stolen assets. The bilateral relations such states have with other states are important. Where there is mutual legal assistance, it may take many years before documents are handed by assisting state to requesting state. In the Abacha case, it took the UK four years to hand over documents. A reason cited for this delay was the judicial review proceedings which the Abacha family sought in order to challenge the British Home Secretary’s decision to give assistance. The absence of compliance with norms of international mutual assistance, including standards of human rights, and lack of independent judiciary may also thwart the recovery process.

The actual tracing of stolen assets is extremely difficult now because of the mobility of wealth and sophisticated modes of laundering money. In the Marcos case, the Philippine government was able to locate some of the stolen assets deposited in Swiss banks because of the overwhelming documentary evidence Marcos left behind after his deposition and flight from the country. Without those documents it would have been difficult to trace the assets. Bank secrecy and third-party claims may also hinder or prolong the recovery. However, it must be said that increasingly, bank secrecy is no longer an obstacle to money laundering investigations. In the case of Swiss banks, although there are reports of the misuse of secrecy, recent reports suggest Switzerland is no longer a financial haven for illicit money.

Where proprietary or tracing claims are concerned in the recovery of assets, there have been significant developments in common law


24 Ibid. 25 See Nicholls et al., Corruption and Misuse of Public Office, para. 7.61.

26 Ibid. 27 Abacha v. The Secretary of State for the Home Department [2001] EWHC Admin 787. See also Nicholls et al., Corruption and Misuse of Public Office, para. 7.59–7.61.

28 Ibid. 29 Ibid. 30 See Chaikin, ‘Tracking the proceeds of organised crime?’.

31 For more on bank secrecy, see David Chaikin, ‘Policy and fiscal effects of Swiss bank secrecy’ (2005) 15 Revenue LJ 90.


jurisdictions such as Singapore and Hong Kong. The Singapore case of Sumitomo Bank Ltd v. Kartika Ratna Thahir and others, where Lai Kew Chai J held that a proprietary remedy was available to a victim of bribery for an employee’s breach of fiduciary duty, paved the way for developments in this area. In such cases, the fiduciary is a constructive trustee of the profits.

The Sumitomo Bank case involved grand corruption. Pertamina, an Indonesian State Corporation, was entrusted with the task of developing a number of projects vital for Indonesia. This included constructing infrastructure facilities for steelworks in West Java. Vast amounts of public funds were entrusted to and used by Pertamina to implement these projects. General Thahir, an employee of Pertamina, entrusted with extensive responsibility and general assistant to Pertamina’s president director from 1968 until his death in 1975, was found to have accepted bribes. The bribes in question were paid by two German contractors, Klockner Industrie Analgen and Siemens AG, in order for the companies to obtain better contractual terms and preferential treatment where payments were concerned. Thahir deposited the proceeds into nineteen Asian Currency Unit accounts in Sumitomo Bank, Singapore. Seventeen accounts were denominated in DM53 million, while two accounts were denominated in US dollars each having US$593,249.31 and US$608,959.42 respectively. Following the death of Thahir, three different parties, namely his wife, his estate and Pertamina, were claiming entitlements to the proceeds of his accounts. The court held that the seventeen accounts denominated in Deutschmarks were bribes paid by Siemens and Klockner to Thahir. However, with regards to the other two accounts, Pertamina had failed to discharge its legal and evidential burden of proof.

The case is important for Lai Kew Chai J’s assessment of the English case of Lister v. Stubbs, which held that there is no proprietary or tracing claim against a bribed agent with regards to

34 The cases which will be discussed are technically not binding on the English courts; however, it has been noted that if the points come before the House of Lords, it is likely Lister & Co v. Stubbs will be overruled. See Philip H. Petit, Equity and the Law of Trusts (Oxford University Press, 2006), p. 144. See also Daraydan Holdings Ltd and Others v. Solland International Ltd and others [2005] 4 All ER 73, where Lawrence Collins J discusses Lister & Co v. Stubbs in the light of constructive trusts. Robert Goff and Gareth Jones, The Law of Restitution (London: Sweet & Maxwell, 2007), para. 33–025.
35 [1993] 1 SLR 738. 16 (1890) 45 Ch.D 1.
bribes. In *Lister v. Stubbs*, an employee had taken secret commissions from a company which sold goods to his employers as an inducement and reward for his purchase of goods on behalf of his employers. It was alleged he received the bribes over a period of nine years. He used some to buy land, invested some of the money in other ways and held some as cash. On discovery by his principal of the receipt of bribes, the plaintiffs unsuccessfully sought to follow the bribes into the investments. The court held that the employee was personally liable to account for the bribes but the relationship between him and his employer was that of debtor and creditor not trustee and *cestui que trust*.\(^{37}\)

Lai Kew Chai J said *Lister v. Stubbs* was wrong and its undesirable and unjust consequences should not be imported and perpetuated as part of Singapore law. When a Singapore court exercised its equitable jurisdiction, it must reflect the mores and sense of justice of the society which it served. Furthermore the authority of the case was so extensively undermined and questioned that it should be confined to its special facts.\(^{38}\)

In the Privy Council case of *A-G for Hong Kong v. Reid*,\(^{39}\) the Privy Council affirmed the earlier decision given by Lai Kew Chai J in Singapore and held that the victim of bribery is entitled to assert a proprietary interest in any assets into which the bribe money can be traced.\(^{40}\) The *A-G for Hong Kong* case involved a crown prosecutor for the Hong Kong government who, in the course of his employment as servant of the crown, had received bribes as an inducement for exploitation of his official position by obstructing the course of justice.

**Co-ordination of anti-corruption collaborative efforts**

There are important questions to be asked in situations involving collective co-operative actions against corruption. How will such

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\(^{40}\) For discussion on the implications of the *A-G for Hong Kong* case beyond bribery, see Peter Birks, ‘Hitting bribery hard: A-G for Hong Kong v. Reid’ (1994) 6 Asia Bus. L Rev. 54.
efforts be co-ordinated? Is there a need to co-ordinate efforts? Is the United Nations Office on Drugs and Crime (UNODC) or some other UN institution the appropriate institution? Is there a real role for third world countries or developing countries with limited technological and media resources? In many developing countries the internet, which is a great source of information for civil society, is underutilised due to a number of factors. Such factors include poor network connections, limited access to computers and electrical failures. How can it be ensured that the voices of the relevant sectors of society are heard and their participation is sought, particularly in poor developing countries?

The UNODC collaborates with international, regional and bilateral agencies and NGOs. It provides technical assistance to state parties to ensure implementation of the UNCAC, shares good practices and develops strategies for fighting corruption. In 2002, the UNODC initiated the international Group for Anti-Corruption Coordination (IGAC). The IGAC co-ordinated the efforts of organisations involved in anti-corruption work, such as the United Nations Development Programme (UNDP), the World Bank, the OECD and NGOs such as TI. The UNODC also has a series of useful publications regarding the fight against corruption. An example is a 153-page report entitled ‘Global Action against Corruption: the Merida Papers’.

The Merida papers were collated from a side event during the signing of the UNCAC in 2003. The event had four panels. Panel one was on ‘Preventive Measures against Corruption: the Role of Private and Public Sectors’. It had representatives from the European Union, countries like Kenya, Korea, Norway and Venezuela as well as Shell Mexico to relay their experiences in tackling  

44 The other three panels were ‘The Role of Civil Society and the Media in Building a Culture against Corruption’, ‘Legislative Measures to Implement the UNCAC’ and ‘Measures to Combat Corruption in National and International Financial Systems’ respectively, www.unodc.org/documents/corruption/publications_merida_e.pdf.
corruption. The panel concluded that the fight against corruption required an integrated and long-term strategy involving changes affecting the political, social and economic spheres. The fight against corruption also required an integrated system of collaboration and active participation by the private sector and civil society.\textsuperscript{45}

The need to identify and emphasise the role of civil society organisations and NGOs in co-operative actions is increasingly being canvassed. An example of the need and complexities of ensuring collective co-operative actions can be gleaned from the case of the New Partnership for Africa’s Development (NEPAD).\textsuperscript{46} Civil society complained that African governments did not engage them to participate meaningfully in the NEPAD process. Some saw it as a western concept imposed on Africa.\textsuperscript{47} Government representatives claimed NGO participation was limited because of the disorganisation and failure of NGOs to send representatives. However, government representatives agreed on the need for co-ordinated actions involving NGOs, governments and other actors.\textsuperscript{48} Transparency and accountability are necessary not just with governments, but also in co-operative actions. Global collective responsibility is a necessity.\textsuperscript{49}

The Commission on Global Governance for one believes the United Nations must continue to play a central role in global governance. ‘The UN should serve as the principal mechanism through which governments collaboratively engage each other and other sectors of society in the multilateral management of global affairs.’\textsuperscript{50}

There have been criticisms of the UN’s record in achieving effective governance. Rosenau notes, particularly in relation to the UN’s primary functions of preventive diplomacy, peacekeeping and peace-making, that the readiness to implement multilateral goals and

\textsuperscript{45} Ibid.
\textsuperscript{46} NEPAD is a partnership formed by a group of African leaders to foster economic growth and development, eradicate poverty and prevent the marginalisation of Africa, www.nepad.org/2005/files/home.php.
\textsuperscript{47} Emmanuel Koro, ‘Linking conservation with development: NEPAD sets goal at WSSD, development outreach’, World Bank Institute, fall 2002.
\textsuperscript{48} Ibid.
\textsuperscript{49} The term ‘global collective responsibility’ is used to suggest what the developed world, MNCs, international financial institutions and donors can do to promote governance and anti-corruption. See Daniel Kaufmann, ‘Back to basics – 10 myths about governance and corruption’, IMF journal \textit{Finance and Development} (2005) 42:3.
\textsuperscript{50} Commission on Global Governance, ‘A new world’, p. 28.
enhance the UN’s authority to achieve effective governance is woefully lacking. The UN may have a pivotal role to play in traditional governance issues, but the question remains whether the UN is the preferred institution to play a vital role where matters of other governance concerns such as anti-corruption, economics and global trade are at hand. In such situations should the focus be on one of its other agencies, which have separate member states, governing bodies, executive heads and secretariats?

In the area of corruption, the UNODC is proving to be an effective co-ordinator of anti-corruption co-operative actions. It has the potential to play a central role in addressing corruption matters which properly fall under global governance. This may be because such a role falls within its mandate. Other international specialised agencies involved with economics and global trade such as the World Trade Organization (WTO) or International Monetary Fund (IMF) are unlikely to be able to co-ordinate anti-corruption co-operative actions. This may be because of the structure and set up of such organisations.

Many scholars have argued for and against the use of the WTO as an avenue for curbing corruption. While it may be concluded that the use of the WTO as the main avenue for anti-corruption is in doubt, the involvement of such organisations in making rules for addressing bribery and corruption should not be questioned.

However, it would seem that the WTO agenda has not given prominence to rule making to address bribery and corruption. In the 1990s when international rules against corruption were evolving, the WTO took no action aimed at bribery and corruption. Abbott

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52 Examples of such agencies include the WTO, IMF and World Bank. Each in its own way addresses corruption issues.
53 UNODC, ‘Promoting health, security and justice’.
has commented on three reasons for this. First, he cites the lack of influential private or public actors willing to initiate and wage sustained campaigns for new international rules.56 Secondly, in relation to this, he points out that the WTO has restricted transparency and participation by civil society compared to many other international organisations.57 Thirdly, the institutional character of the WTO, which is based on reciprocal concessions rather than mutual interests, stalled serious considerations for rules on bribery and corruption. Accordingly, although rules on bribery and corruption would have been in the interest of all, negotiations for such rules would have been at the expense of other rules seen as more concrete.58

The WTO stance on corruption and bribery is confined to issues relating to government procurement.59 Government procurement, i.e. the purchase of goods and services by governments, is relevant for traditional governance notions which focus on good governance and governments. At the Singapore ministerial conference in 1996, a working group was established to look into transparency in government procurement. One reason given for introducing this was an attempt to smuggle anti-corruption measures into the WTO agenda.60 This may be because the goal of public procurement regulation is to control corruption, and transparency in procurement addresses the demand side of corruption.61 Others have seen transparency in procurement as a trade issue or as an attempt to facilitate market access. In any case, even if transparency in procurement is seen as an anti-corruption measure, the WTO working group has failed to produce results.62 In 2004, the WTO general council decided to put this work on hold.63

The IMF for its part also links corruption to governance. It sees governance as encompassing all aspects of the way a country is governed including economic policies and regulatory frameworks. Poor governance provides great scope and incentives for corruption; hence the IMF believes that by promoting good governance, corruption will be combated. Other aspects of good governance the IMF is concerned with include ensuring the rule of law and improving the efficiency and accountability of public sectors in member states. The governance the IMF is chiefly concerned

56 Ibid., 282. 57 Ibid., 294. 58 Ibid., 286. 59 Ibid., 278. 60 Ibid., 286. 61 Ibid. 62 Ibid., 278. 63 See www.wto.org/english/tratop_e/gproc_e/overview_e.htm.
with is that pertaining to governments and national administrations. However, there is awareness of the need for good corporate governance which will aid the smooth functioning of a country’s business and financial sectors. By virtue of its mandate and expertise, the IMF is concerned with economic aspects of governance. Therefore, it looks at the economic policies of member countries to see how they comply with international economic standards and practices. It also considers the transparency and accountability of policy makers in its member states.

The IMF tackles corruption indirectly. It focuses on governance which, if carried out effectively, will reduce corruption. While this is true especially for developing countries, it must be accepted that good governance does not necessarily equate to less corruption. There are perhaps many countries in which it may be said that the governance is good, yet corruption is prevalent. An example is the United States, where there have been increased opportunities for corruption at all levels of government. The politicisation of senior civil service and personnel management, the privatisation of government services and reduced control over government functions are examples of situations seen as breeding corruption. However, there are also countries with good governance and low corruption. An example is Singapore, which has a meritocratic civil service and the control of government functions by government is high. A well-functioning civil service has been cited as an example of transparency in good governance. Other principles of good governance include transparency in decision making and implementation of institutional and operational decisions, participatory decision making, access to information, appropriate reporting and evaluation mechanisms, and financial management.

Like the IMF, the World Bank sees corruption as a symptom of failed governance. However, unlike the IMF, the World Bank

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65 Ibid.
addresses corruption directly. This may be because the World Bank’s overarching mission is to reduce poverty, and the harmful effects of corruption on the poor in society have been widely appreciated. In 1997, the World Bank developed an anti-corruption strategy focusing on prevention of fraud and corruption in bank projects, mainstreaming corruption concerns and lending active support to international efforts to address corruption. The StAR initiative already discussed is an integral part of the anti-corruption strategy. 68

To accomplish these strategies, the World Bank lends active support to international efforts through sponsorship of major conferences and support for the adoption of international conventions. 69 The World Bank has procurement guidelines in place and carries out intensive audits of projects. The World Bank has more than 350 firms and individuals debarred from carrying out World Bank projects for periods lasting from a year to permanent debarments. 70

On the whole, it may be said that of the three institutions discussed above, the World Bank is the most active in curbing corruption both directly and indirectly. As a result, there may be a valid argument for the World Bank to play a pivotal role in co-ordinating efforts to curb corruption. Indeed, its work with the UNODC suggests it is already playing this role. It is submitted that the efforts of the IMF and WTO, which focus primarily on good governance in relation to national administration, are inadequate.

Corruption lurks in both developing and developed states. States with good governance may still have significant corruption. While it is useful to consider corruption in the light of traditional notions of governance, governance is broader than national administration or government and discussions should not be limited to that aspect of governance. The World Bank’s approach is more prospective. Its attempts to eliminate corruption, which spans governments, developed and developing countries and the private sector, is commendable and should be encouraged.

The World Bank’s focus on providing financial and technical assistance to developing countries to combat poverty aids its cause

69 Ibid.
to fight corruption. The World Bank’s reach into the developing as well as developed world broadens the scope and boundaries of its potential effect in the anti-corruption fight. It is therefore perhaps best that a UN organ such as the UNODC co-ordinates corruption efforts with the help of an organisation such as World Bank. The WTO and IMF are unlikely to be able to co-ordinate such efforts.

REGULATION AND CONTROL OF GLOBAL GOVERNANCE THROUGH THE USE OF GLOBAL ADMINISTRATIVE LAW

In recent times, there have also been writings about the rise of global governance and global administrative law.\(^{71}\) It has been said that the regulation and control of global governance is addressed by an emerging area of law called global administrative law.\(^{72}\) In national settings, administrative law refers to the branch of law that disciplines public administration and governs its relationship with private parties.\(^{73}\) It relates to the control of governmental power and aims to keep governments within their legal bounds and protect citizens against governmental abuse.\(^{74}\) Administrative law demands that governments respect the rule of law and democracy.

Global administrative law refers to regulation and administration on a global level. Kingsbury, Krisch and Stewart, who have undertaken major work in the area of the emergence of global administrative law, refer to global administrative law as comprising ‘the mechanisms, principles, and practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions these bodies make’.\(^{75}\) These global administrative bodies include intergovernmental institutions, informal intergovernmental

\(^{71}\) See Nico Krisch and Benedict Kingsbury (eds.), *Symposium: Global Governance and Global Administrative Law in International Legal Order*, special issue (2006) 17 EJIL.

\(^{72}\) Ibid.


networks, national governmental agencies acting pursuant to global norms, hybrid public–private bodies engaged in transnational administration, and purely private bodies performing public roles in transnational administration.\textsuperscript{76}

There has been talk of the emergence of a global administrative space in which the strict dichotomy between domestic and international has broken down, administrative functions are performed in often complex interplays between officials and institutions on different levels, and regulation may be highly effective despite its predominantly non-binding forms.\textsuperscript{77} The multiplication of the possible exercise of public power in global governance brings issues of legitimacy, accountability and transparency to the forefront. Legitimacy, accountability and transparency are principles synonymous with administrative law.

Global administrative law therefore aims to hold global regulatory governance accountable through administrative-law-type mechanisms. It calls for the need for governance of the conduct of international entities and national governments in international matters through mechanisms of administrative law such as accountability, fairness, protection of individual rights, and democratic decision making.\textsuperscript{78} The principles of domestic administrative law such as procedures of legality and due process, the rule of law, good governance and rights-based values are therefore relevant in global administrative law.\textsuperscript{79}

\textit{Classification of global governance}

It is difficult to determine exactly what constitutes global governance, because it includes legal or political authority, formal and informal rules as well as actions of social systems. For example, the activities of organised groups such as NGOs who mobilise others to subscribe to a

\textsuperscript{76} Ibid. See also Kingsbury \textit{et al.}, ‘Foreword: global governance as administration – national and transnational approaches to global administrative law’ (2005) 68,3 Law & Contemp. Probs. 1, 5.


particular view may be classified as global governance. While such NGO activities should be welcomed, it is necessary to set some parameters before classifying these activities as global governance. It is not often clear whether it is the rules that may emanate from such activities which should be properly classified as global governance or the mere action of social systems which may or may not lead to rules.

The large number of actors on the global governance scene often leads to a proliferation of rules with no coherence or agreement. Global governance is concerned with the process of creating frameworks and seldom focuses on ensuring that such frameworks are coherent and agreed upon by the large group of actors concerned. Governments, international organisations, NGOs and business entities are all actors engaged in the creation of rules in global governance, and their actions are not streamlined. The authority and legitimacy to make rules affecting global affairs is not scrutinised. The growing perception is that global governance consists of formal and informal rules aimed at addressing common concerns.

Global governance takes away the need to address issues in international law such as international legal personality. It legitimises the rights of non-state actors to participate on the global scene. In other words, it removes the pitfalls that international lawyers would ordinarily argue prevent non-state actors from participating in global affairs. It brings an informal air to global affairs.

**Multiplicity of actors**

The number of actors on the global scene is vast, which makes accountability through administrative law mechanisms problematic. The global scene includes international organisations, governments, public and private bodies including NGOs and MNCs. Except for governments and international organisations, it may be difficult to pinpoint how other entities may be held accountable, whether there will be agreement on the need for accountability, and who such entities are accountable to. In national administrative law, it is easy to determine that governments need to be accountable to their citizens who have elected them into office. Arguably, in global administrative law, governments are still accountable to their citizens.

However, it may not be easy to transport principles of national administrative law into global administrative law because global
governance is all encompassing, accommodating and subject to multiple actors, formal and informal. Some areas of global regulatory governance in which accountability through administrative-law-type mechanisms have been canvassed include global banking regulation, UN Security Council sanctions administration, international administration of refugees and domestic regulation of transboundary environmental issues.

These areas can easily be identified as involving international organisations and specialised agencies and governments. In such situations, global administrative law is workable. These institutions can be held accountable to their members and society, and there is agreement on the need for them to be accountable. In many instances, they have a legitimacy to act on behalf of governments and citizens in global affairs. However, it should be noted that even in such situations, the level of transparency, participation and review will vary.

Global governance challenges

The development of global administrative law through the systems of international organisations such as the UN, international specialised agencies such as the WTO, transnational networks of administrative actors engaged in agenda-setting and other joint (governmental) enterprises, groups of private institutions or hybrid groupings with delegated regulatory functions such as the Commission on Food Safety Standards, and self-regulatory schemes of private bodies such as the International Olympic Committee have been advocated. While this may be welcome, the application of global administrative law may be problematic.

Where international organisations are involved in the standard-setting for global affairs, the voluntary nature of many of the rules emanating from international systems may make the regulation of global governance through administrative law mechanisms more difficult to achieve; for instance, see the Global Compact. Where private parties are involved in standard-setting for global affairs, accountability through administrative-law-type mechanisms in the traditional sense may simply be unworkable.

81 See ibid. and Kingsbury, Krisch and Stewart, ‘The emergence of global administrative law’.
82 See discussion on UNGC in Chapter 1.
The Equator Principles (EP) are an example of private-party standard-setting for global affairs where administrative-law-type mechanisms are proving unworkable. The EP are a very useful benchmark for a common standard in the approach private institutions involved in project financing should take towards environmental and social risks. The EP were originally developed in June 2003, based on the policies and guidelines of the World Bank and International Finance Corporation (IFC). In 2006, the principles were revised (EP II) to incorporate new performance standards set by the IFC in its review of environmental and social standards. The aim of the principles is to ensure projects financed by private financial institutions are developed in a socially responsible manner reflecting sound environmental management practices. However, the implementation of the principles has raised many questions.

Currently, seventy-two financial institutions have signed up to the Equator Principles, which they are required to implement through individual internal social and environmental policies, procedures and standards relevant for project-financing activities. The freedom of banks to implement and monitor fulfilment of the principles has given rise to much criticism. There have been calls particularly by NGOs for more transparency and information on implementation. In an attempt to address these issues, the EP II, principle 10 requires EPFIs to report on the progress and performance of Equator Principles’ implementation on an annual basis. The reports in their current format do not appear to fully address transparency concerns. For instance, ABN-AMRO’s sustainability report for 2010 simply states that eleven projects were assessed using the Equator Principles. The assessment figures are classified under project category, region and sector.

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84 Ibid.
Moreover, confidentiality agreements prevent banks from disclosing information concerning projects which failed to meet the EP standards. Each bank has the freedom to decide whether a borrower has complied with its social and environmental policies, procedures and standards. The quality and comprehensiveness of some environmental management systems have also been questioned.  

Different banks have different environmental management systems. Therefore, a glaring weakness in implementation is the lack of commonality in the approach banks must take. Some EPFIs have independent verification of their implementation. Others rely on internal specialist units and senior management.

The EPFIs are not international institutions to which national administrative law systems should be extended. They are simply private institutions interested in setting global standards on how financial institutions should behave. There is obvious difficulty in subjecting private parties to administrative law mechanisms. Administrative law is intended to protect citizens against governmental abuse. It is not meant to protect citizens against the acts or abuses of other citizens.

So far, this chapter has discussed the regulation of global governance through administrative law mechanisms. This is based on the assumption that administrative law principles, which are western constructs, are desirable for developing and developed countries. In the light of questions which have been raised as to whether administrative law principles are acceptable or desirable for developing countries, the remainder of the chapter will consider the potential impact of global governance on developing countries.

**IMPACT OF GLOBAL GOVERNANCE ON DEVELOPING COUNTRIES**

The activities of governments, intergovernmental networks and non-state actors directly or indirectly help curb corruption. In many

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92 For instance see section on Global Governance and Corruption in this chapter.
situations, corruption is linked to bad governance. To address this problem, ‘good governance’ is promoted in development literature.\textsuperscript{93} International organisations such as the IMF promote good governance, which includes aspects such as accountability, effectiveness and efficiency, participation, the rule of law and transparency.\textsuperscript{94}

Global governance raises issues of accountability, democracy, good governance, legitimacy, the rule of law and transparency. These principles are often seen as western constructs, and in some situations developing countries are reluctant to embrace them. Many developing countries objected to proposals put forward for the multilateral agreement on transparency in government procurement in the WTO on the basis that they could undermine the ability of the states to use procurement for socio-economic goals.\textsuperscript{95} Malaysia fiercely resisted the creation of the multilateral agreement because of fears that the agreement would adversely affect national domestic policies of granting preferences to Bumipetra.\textsuperscript{96}

Writers have sounded loud and clear warnings that the transportation of western legal principles such as democracy and good governance from western or developed countries to developing countries may impact unfavourably on developing countries or be unsuitable for such countries. Attention must be given to these cautionary voices\textsuperscript{97} warning of the adverse consequences that could result from transporting principles applicable to western countries directly to developing countries.

To illustrate the point, attempts are constantly being made to transport the western principles of free markets and ‘democracy’ to developing countries. There are writings suggesting that such imports

\textsuperscript{93} See United Nations Economic and Social Commission for Asia and the Pacific, ‘What is good governance?’ online: www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.pdf.
\textsuperscript{94} See Schroth, ‘Corruption and accountability of civil service’.
\textsuperscript{96} Ibid., p. 176.
\textsuperscript{97} Ibid. See also Amy Chua, World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability (New York: Doubleday, 2003); Robert Kaplan, The Coming Anarchy: Shattering the Dreams of the Post Cold War (New York: Random House, 2000), p. 60, where he submits that the democracy encouraged in many poor parts of the world is an integral part of a transformation towards new forms of authoritarianism.
lead to ethnic conflagration. Amy Chua, in her bestseller, suggests there is a relationship between markets, democracy and ethnic hatred. She talks about the phenomenon of ‘market-dominant minorities’ that turn free-market democracies into engines of ethnic conflagration. Market-dominant minorities include groups like the Chinese in South-East Asia, Jews in Russia, whites in Zimbabwe and Indians in Fiji and East Africa. The market concentrates wealth in their hands, while democracy increases the political power of the impoverished majority.

In such situations, ‘the pursuit of free market democracy becomes an engine of potentially catastrophic ethno-nationalism, pitting a frustrated “indigenous” majority, easily aroused by opportunistic vote seeking politicians against a resented wealthy ethnic minority’. McCrudden and Gross have tested Chua’s thesis and cite Malaysia as a paradigmatic example of the problems countries face as a result of a market-dominant minority. In this instance, the Malay Chinese are the ethnic minority dominating the indigenous majority economically under market conditions. Interestingly, the authors discuss the problems Malaysia faces in managing the backlash from free-market democracy in the light of Malaysia’s reluctance towards the WTO’s proposed multilateral agreement on transparency in government procurement. Malaysia’s reluctance stems chiefly from the impact such transparency will have in hampering preferences for particular ethnic groups in government.

Chua’s thesis will also be expanded here in relation to the problems happening in the Niger Delta region in Nigeria. The indigenous majority in the resource-rich area are protesting against the activities of MNCs and the government’s failure to ensure development and proper revenue allocation. These protests raise issues of democracy, governance and free markets while producing ethnic rivalries and conflicts. The MNCs can be referred to as the market-dominant minority. Although Chua made no express reference to MNCs in her book, she refers to foreign investors. According to Chua, market-dominant minorities, along with their foreign investor partners, invariably come to control the crown jewels of the economy, often

symbolic of the nation’s patrimony and identity. MNCs are the vehicle and driving force for foreign investment. They are the essence of free markets.

However, it is not all gloom and doom to have western principles play a part in development. Participation, equality, transparency and accountability are useful principles for development. To illustrate the point, the conflicts in the Niger Delta do not simply demonstrate a failure or inability to implement such principles, but also highlight the need for caution in applying western-constructed principles such as democracy, free markets and other principles including administrative principles.

During the height of the Niger Delta crisis in the 1990s, poverty, lack of community participation and equality in distribution processes gave rise to conflicts. Corporations’ approach to issues such as governance, corruption, revenue transparency and expenditure, contribution to environmental damage and human rights abuses was deficient. Principles dealing with these issues were ignored and companies enriched certain parts of the region to the detriment of other parts. This created tension among the people and led to fights for a share of the wealth and to violent protests against MNCs. Government took the side of the corporations when dealing with tense situations, giving rise to catastrophic events such as the killing of Ken Saro-Wiwa and eight others. Since then, many corporations have admitted that their practices fuelled violence. The Extractive Industry Transparency Initiative was established to tackle issues of poverty, corruption and conflict resulting from failure to account for receipts and payments pertaining to oil.

Currently, the situation in the Niger Delta is still alarming. There is still a struggle for political and economic power. Economic development in the area is slow and violence is continuing. There is a need for participation, transparency and accountability from both state and non-state actors. Overall, the situation in the Niger Delta calls for

concerns to be voiced more forcefully to ensure western principles are not adopted abstractly and to the detriment of developing countries.

Other cautionary voices against the use of administrative and other western principles in developing countries point to colonisation and cultural imperialism. Harlow states that administrative law is a western construct biased towards Anglo-American legal systems. Its agenda seeks to constitutionalise values such as openness, participation, transparency and accountability in respect of the legitimacy of standard-setting in global space. Harlow opines that the agenda represents a double colonisation and furthers cultural imperialism. The first colonisation occurs when an administrative law system absorbs as a principle background values of global governance, notably the ideals of democracy, participation, transparency and accountability. The second colonisation involves a complex process of ‘cross-fertilisation’ or legal transplant, whereby principles from one administrative law system pass into another. In particular, the stance is that where developing countries are concerned, the transplant of a western ideology of administrative law represents a further wave of cultural imperialism.

There are arguments that the western principle of neoliberalism exemplifies colonisation, specifically economic colonisation, and is detrimental to developing countries. Dave Whyte, writing in the context of the legality or otherwise of western-based economic rule in Iraq after the invasion and occupation by the US and UK in 2003, refers to a neoliberal rule which promotes a value system that elevates entrepreneurialism and the pursuit of self-interest above other social values. In his view, the importation of such a rule into the Iraqi system should be understood as part of a wider strategy of political and economic domination.

Whyte also notes that the transportation of neoliberal rules to economies dominated by state enterprise gives rise to a phenomenon known as ‘neoliberal shock therapy’. He argues that the restructuring of the Iraqi economy carried out by the Coalition Provisional Authority appointed by the American government resulted in

widespread corruption caused by ‘neoliberal shock therapy’.\textsuperscript{110} Neoliberal shock therapy occurs when an economic system dominated by state enterprise such as Iraq moves towards a private-based economy such as the US and as a result there is a rapid process of reregulation.\textsuperscript{111} Such reregulation involves the removal of regulatory controls on individual economic actors and creation of new sets of rules that encourage intense economic activity in particular sectors of the economy.\textsuperscript{112} Neoliberal shock therapy creates spaces in which corruption is allowed to breed and eventually manifests itself.

CONCLUSION

This chapter examined the activities of states, international organisations and non-state actors in curbing international corruption as a global concern. Global governance is relevant for CSR because it is a means whereby corporate misbehaviours can be seen on a global scale, and global attempts by multiple actors can be made to address these issues. However, there is a need for consensus in global governance, reform and strengthening, and co-ordination in global efforts to address global concerns.

The work of international organisations aimed at curbing corruption was examined. The work of the UNODC, which is at the forefront of reforming, strengthening and co-ordinating efforts to curb corruption, was discussed. Of the three specialised institutions reviewed – the IMF, WTO and World Bank – the World Bank is the only one which addresses corruption directly. The IMF and WTO address it indirectly, and as a result, they are unlikely to be able to coordinate anti-corruption efforts.

The chapter also examined the emergence of global administrative law, which seeks to regulate global governance. Global governance involves a diverse group and network of private and public actors vying for power and space in rule making in global affairs. The chapter showed that the regulation of global governance through the use of global administrative law may not be workable for some actors involved in rule making in global affairs. The voluntary nature of many rules in global governance makes regulation through

\textsuperscript{110} Ibid. \textsuperscript{111} Ibid. \textsuperscript{112} Ibid.
administrative law mechanisms more difficult to achieve. The development of global administrative law through the systems of international organisations may be problematic.

The discussion on global administrative law led to general considerations of the impact global governance may have on developing countries in relation to curbing international corruption. The imposition of administrative law and other western principles (which are attributes of global governance) in developing countries may produce ethnic tensions. It also points to colonisation and imperialism, which in the broad scheme of things countries do not ordinarily want to be associated with. Such association may reveal ugly scars from centuries past. Such imposition may also promote neoliberalism and other capitalist ideologies without considering the impact these principles have on developing countries.

Nevertheless, the global governance principles discussed are useful for development and curbing corruption. What is required is caution in abstract applications of these principles to developing country contexts.
Numerous multilateral treaties have been enacted to address the problem of corruption. The chapter will examine five treaties, classified into regional and multiregional laws. The regional laws are the Organization of American States Inter-American Convention against Corruption (Inter-American Convention), Council of Europe Criminal Law Convention and African Union Convention on Preventing and Combating Corruption (AU Convention). The multiregional laws are the Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) and United Nations Convention against Corruption (UNCAC). The focus will be on the approach of such treaties with regard to transnational bribery and the grounds of jurisdiction for prosecuting the crime of transnational bribery.

There has been extensive discourse on attempts to hold corporations responsible for violations of international law norms through civil liability. Such cases are dealt with in domestic courts.¹ For example, in 2001, a class action lawsuit was filed in the United States by five Holocaust victims against International Business Machines for allegedly aiding and abetting crimes against humanity and violations of human rights.² Attempts to hold corporations

¹ See Chapter 1, section on ‘Global changes to CSR’, subsection on ‘Legal action’, where the US ACTA cases are discussed in the context of corporate violations of international human rights norms.

directly responsible for violations of international law norms are, however, controversial.

One aspect of the call for direct corporate responsibility which seems uncontroversial is that which relates to international crimes such as crimes against peace, war crimes and crimes against humanity (core crimes). The consensus of distinguished experts is that corporations can be held responsible for such core crimes. International criminal law recognises that corporations can be held responsible for the core crimes, albeit still only through domestic jurisdictions. Currently, no international court addresses corporate responsibility even for ‘serious’ international crimes.

This chapter will review the approach of current international law towards corporate liability for international corruption. Corporate responsibility in international law for such crimes is primarily recognised indirectly, through state mechanisms put in place to enforce relevant laws and soft-law initiatives. International corruption differs from the core crimes for which direct corporate responsibility is now being recognised; nevertheless, direct corporate responsibility is no less relevant for international corruption.

The failure of states to hold corporations liable for the crime of international corruption calls for direct corporate responsibility. The possibility and implications of making corporations directly responsible under international law for the crime of international corruption will therefore be explored in this chapter. It must be said, however, that the state-centric structure of international law militates against the evolution of an international regime of corporate responsibility and liability.

**CURBING INTERNATIONAL CORRUPTION**

The impetus to curb international corruption gained momentum in the 1990s when the Clinton administration in the United States...
stepped up efforts to seek multilateral action against foreign corrupt payments because of the belief by many US corporations that the Foreign Corrupt Practices Act (FCPA) put them at a disadvantage in comparison to their counterparts in other developed countries.\(^5\) The success of the FCPA in deterring corruption through the increased use of civil and criminal prosecutions has been discussed in Chapter 2.\(^6\) Some criticisms of the Act will be addressed in this chapter.\(^7\)

The efforts of the US administration in rallying support for a multilateral treaty against foreign bribery were successful in 1994, when the OECD issued recommendations to its members to criminalise foreign bribery because it distorts international competitiveness and all countries share a responsibility in combating bribery in international business transactions. In 1997, the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.\(^8\)

Regional efforts to curb corruption carried out by the Organization of American States and the African Union dealt more with corruption in the performance of public functions and acts of corruption specifically related to such performance. The focus of these efforts was not on transnational bribery involving corporations. A regional effort which did address such transnational bribery was the Council of Europe Conventions; however, these conventions have a geographical limitation which further limits their scope.

At least until the negotiations for the adoption of the United Nations Convention against Corruption, it seemed that the developed world saw corruption as primarily a barrier to trade.\(^9\) On the

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\(^7\) See discussions below in this chapter on the OECD WGB review of the FCPA.

\(^8\) OECD Doc. DAAF/IME/BR(97) 20.

\(^9\) In a statement attributed to Mickey Kantor, a former US Trade Representative and Commerce Secretary, it was said that US businesses cite bribery, corruption and the
adoption of the UNCAC by the General Assembly, former secretary-general of the UN Kofi Annan said corruption undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish. The preamble to the UNCAC notes concerns about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice, and jeopardising sustainable development and the rule of law. This clearly suggests corruption is more than a barrier to trade; it has serious negative impacts on many aspects of societal life.

The chapter examines in more detail selected regional and multi-regional laws in place to combat international corruption. It identifies the pros and cons of such laws in eradicating international corruption.

Regional laws

The Organization of American States Inter-American Convention against Corruption (Inter-American Convention)
The Inter-American Convention is the first regional convention on corruption. It was adopted on 29 March 1996 in Caracas, Venezuela, and entered into force on 6 March 1997 in accordance with article xxv of the treaty. As of June 2011, all the acting members of the OAS except Barbados have either ratified or acceded to the convention.

The Inter-American Convention’s objective is to (a) promote and strengthen the development by each of the state parties of the mechanisms needed to prevent, detect, punish and eradicate lack of transparency in government procurement as among the most difficult barriers they confront in the real world. See Bialos and Huisian, The Foreign Corrupt Practices Act.


OAS Doc B-38. Article xxv states: ‘This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification. For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.’

For the most current information on ratification and ascension, see www.oas.org/juridico/english/Sigs/b-38.html.
corruption and (b) promote, facilitate and regulate co-operation among the state parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.\(^{13}\)

The Inter-American Convention is applicable to a list of corrupt acts stated in article vi. This includes the act of passive and active bribery.\(^{14}\) Transnational bribery is only an act of corruption among states that have established it as an offence. States which have not established transnational bribery as an offence are only required to provide assistance and co-operation with respect to the offence.\(^{15}\) Transnational bribery should have been included in the list of corrupt acts which all state parties should have been required to adopt legislative or other measures to establish as a criminal offence.\(^{16}\) Transnational bribery is a serious deterrent to anti-corruption measures which should be tackled aggressively by all states. Unfortunately, the only reference to deterrence of transnational bribery applicable to all state parties is found in article iii, which deals with the preventive measures states should consider. Article iii (10) states:

Deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.\(^{17}\)

While such measures are useful, they by themselves are unlikely to deter corruption. There is a need to address accounting and transparency mechanisms to combat corruption as well as a need to criminalise

\(^{13}\) See article ii of the Inter-American Convention.

\(^{14}\) Article vi(1)(a) states: ‘The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions’; article vi(1)(b) states: ‘The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions.’

\(^{15}\) See article viii of the Inter-American Convention.

\(^{16}\) Article vii states that the acts of corruption listed in article vi are the acts requiring legislative or other measures.

\(^{17}\) See article iii of the Inter-American Convention, para. 10.
transnational bribery across all state parties. Many treaties enacted after the Inter-American Convention, with the exception of the African Union Convention, require states to make transnational bribery a criminal offence. On the whole, it appears the Inter-American Convention does not effectively deal with the issue of curbing transnational bribery.

A commonly cited criticism of the Inter-American Convention relates to its late reference to monitoring and follow-up. It appears these important acts were not considered until 2001 when the Mechanism for Follow-up on the Implementation of the Inter-American Convention Against Corruption (MESICIC) was established.\textsuperscript{18} The MESICIC is an instrument that allows the member states of the OAS who have ratified the convention to promote its implementation and follow up on the commitments agreed to in the convention. It also facilitates technical co-operation activities, the exchange of information, experiences and best practices, and the harmonisation of legislation.\textsuperscript{19}

The MESICIC comprises two bodies: the Conference of the States Parties and the Committee of Experts. The Conference of States Parties is made up of representatives of all the states and has the authority and general responsibility for implementing the Mechanism, while the Committee of Experts is made up of experts appointed by each state party and is the body responsible for the technical analysis of how states implement the convention.\textsuperscript{20} In June 2006, the Committee of Experts produced a first hemispheric report on the progress against corruption in the countries of the OAS. The Committee selected specific provisions of the Inter-American Convention for this first round of reviews, namely articles \textsuperscript{iii} (1), (2), (4), (9) and (11), \textsuperscript{xiv} and \textsuperscript{xviii}.\textsuperscript{21}

\textsuperscript{18} See Plan of Action at 3rd Summit of the Americas, Quebec City, Canada, April 2001, which called for the establishment of a follow-up mechanism, www.summit-americas.org/Quebec-Democracy/democracy-eng.htm. MESICIC is the Spanish acronym. In May 2001, MESICIC was established at a conference of the state parties in Argentina; see www.oas.org/juridico/english/followup_corr_arg.htm.

\textsuperscript{19} See OAS, Secretariat for Legal Affairs, www.oas.org/juridico/english/mesic_intro_fn.htm.


\textsuperscript{21} \textit{Ibid.}
Article III (10) of the Inter-American Convention, which deals with measures for the deterrence of bribery of domestic and foreign government officials through the use of proper accounting and auditing mechanisms by companies and other associations, was not a focus of the Committee of Experts. As a result, it is not surprising that deterrents to transnational bribery were not addressed in the report. This is unfortunate. It is submitted that the opportunity to evaluate useful information which would have been provided by twenty-eight member states on their approach to the deterrence of transnational bribery through the use of proper accounting was missed. It is hoped that considerations of article III (10) measures would be made in subsequent progress reports.

Council of Europe Criminal Law Convention on Corruption

The Council of Europe Criminal Law Convention on Corruption was adopted on 4 November 1998 by the Council of Ministers. It opened for signature in January 1999 in Strasbourg and entered into force on 1 July 2002. As of May 2011, it had 42 ratifications from the 47 member states of the Council of Europe. Although the convention is open to non-member states, Belarus is the only non-member state party which has ratified the convention. Mexico and the US, which have observer status, have signed but not ratified the convention.

The objective of the convention is to criminalise specific forms of corruption, although it does not define corruption as such.

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23 See Criminal Law Convention on Corruption, ETS no. 173. The Council of Europe has both Civil and Criminal Law Conventions. This chapter will be concerned with the Criminal Law Convention simply because it deals with rules of civil litigation that victims of corruption can use to sue. The Civil Law Convention is mentioned in Chapter 5.
24 Austria, Germany, Italy, Spain, San Marino and Ukraine have signed but not yet ratified the convention. Liechtenstein has neither signed nor ratified the convention. For most current information on ratification and ascension, see conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=8&DF=&CL=ENG.
25 Ibid. Belarus is a country applying for membership of the Council of Europe. However, the special guest status of Belarus has been suspended because of lack of respect for human rights and democratic principles; see www.coe.int/T/e/com/about_coe/member_states/e_Belarus.asp.
26 However, the explanatory notes state: ‘Even if no common definition has yet been found by the international community to describe corruption as such, everyone seems at least to agree that certain political, social or commercial practices are corrupt.’ See above n. 23.
The forms of corruption include, but are not limited to, active and passive bribery of domestic public officials, foreign public officials and officials of international organisations, and bribery in the private sector. This makes the convention broader in scope compared to the Inter-American Convention. The convention also goes further than the Inter-American Convention because it makes transnational bribery a punishable crime, which all state parties are required to criminalise through legislative and other measures under their domestic law.

State parties are also required to ensure that sanctions for natural and legal persons are effective, proportionate and dissuasive. Legal persons may be held liable for criminal or non-criminal sanctions, including monetary sanctions. State parties are required to adopt legislative and other measures to establish jurisdiction for crimes by way of territorial or nationality principles subject to reservations.

The convention specifically deals with corporate liability. It requires state parties to adopt measures to ensure legal persons can be held liable for active bribery. Any natural person acting individually or as part of an organ of the legal person with a leading position based on power of representation of the legal person, or authority to take decisions on behalf of the legal person, or authority to exercise control within the legal person can make the legal person liable. This form of liability is similar to the identification doctrine in the UK, which has been the subject of much criticism. However, an extra provision in the convention provides that a legal person can also be held liable for the lack of supervision or control of a natural person which has made the commission of the criminal offence possible. This provision can be seen as an additional measure to ensure corporate liability. The application of this provision by state parties would be useful and is therefore welcome.

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27 Articles 2 and 3, Criminal Law Convention.
28 Article 5, Criminal Law Convention.
29 Article 9, Criminal Law Convention.
30 See article 19(1), Criminal Law Convention.
31 See article 19(2), Criminal Law Convention.
32 See article 17, Criminal Law Convention.
33 Article 1(d) defines a legal person as any entity having such status under the applicable national law, except for states or other public bodies in the exercise of state authority and for public international organisations.
34 See article 18(1), Criminal Law Convention.
35 See Chapter 3 for discussions on the identification doctrine for corporate liability.
36 See article 18(2), Criminal Law Convention.
Monitoring and follow-up are ensured by the Group of States against Corruption (GRECO).\(^{37}\) GRECO is currently made up of 46 member states. Membership is not limited to Council of Europe member states and, presently, the United States along with the 45 Council of Europe States are members. GRECO is a body called to monitor, through a process of mutual evaluation and peer pressure, the observance of the guiding principles in the fight against corruption and the implementation of international legal instruments adopted in pursuance of the Programme of Action against Corruption.\(^{38}\) GRECO has completed two evaluation rounds and is currently on the third.\(^{39}\)

The Criminal Law Convention addresses transnational bribery better than the Inter-American Convention. Unlike the Inter-American Convention, GRECO has addressed the theme of legal persons and corruption. As mentioned above, it has been argued that the Inter-American Convention needs to consider making transnational bribery a crime applicable to all. The Criminal Law Convention recognises corporate liability and addresses many of the issues relevant for corporate liability. It requires states to address transnational bribery. However, because the parties to the convention are made up of European states, there are geographical limits to the applicability of the convention and arguably its effectiveness.

More importantly, like other regional and international conventions dealing with corporate liability for corruption and transnational bribery, it relies on the state parties to adopt legislative measures to comply with the convention. The question is whether such state legislative measures are proving effective in the anti-corruption campaign. Are states effectively addressing the issue of corporate liability and transnational bribery? The discussions in Chapter 3 suggest that some states are not addressing the problem adequately.

\(^{37}\) See article 24, Criminal Law Convention.


The AU Convention is a relatively new regional convention on corruption. It was adopted on 11 July 2003 in Maputo, Mozambique, and entered into force on 5 August 2006. Of the 53 member states of the African Union (AU), the AU Convention has received 43 signatories and 27 ratifications. Interestingly, almost half of the African states constituting the African Union have not ratified the convention. This is rather unfortunate, especially when it is apparent that corruption is endemic in many African states.

The convention’s objectives are multifold. It aims to promote and strengthen the development of mechanisms to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors in African states. It also aims to facilitate and regulate co-operation to ensure the effectiveness of measures and actions used in the fight against corruption, and co-ordinate and harmonise member state policies and legislation to combat corruption.

The convention is applicable to a list of corrupt acts. These include active and passive bribery of public officials and private-sector leaders; illicit benefits obtained by public officials; illegal diversion of public property by public officials; and the use or concealment of proceeds derived from any of the acts. The acts relate to public- and private-
sector corruption. With regard to bribery of foreign public officials, the convention is silent. One observer notes:

[the Convention might be contemplating such further acts of corruption like the bribery of foreign public officials by large multinational corporations (MNCs). The Convention ought to have dealt specifically with this, because the offering of bribes to foreign public officials, including officials of public international organizations, is at the root of many corrupt administrations in Africa. Such corrupt practices usually are intended to retain business or other undue advantage in relation to the conduct of international business, including the provision of international aid.]

The AU Convention needs to address the problem of transnational bribery and corporate liability in its aim to deter corruption. It is worthwhile to note that article 22(5)(e) of the convention requires the advisory board on corruption to collect information and analyse the conduct and behaviour of MNCs operating in Africa. This information is then to be disseminated to national authorities designated under article 18(1). However, at present the impact of article 22(5)(e) on transnational bribery and corporate liability cannot be appreciated. This is because it does not appear that an advisory board on corruption has been elected as yet.

Article 22 of the convention states that an advisory board on corruption shall be established within the African Union. The board is to be made up of eleven members elected by the executive council. Appointment to the board will be for a period of two years, renewable once. It is not clear whether the advisory board is functioning effectively. In a reminder sent by the AU commission to member states of the convention in March 2008, the election of members of the advisory board was deferred from January 2008 to June/July 2008 because of the failure of member states to submit a sufficient number of candidates. It is not known if the election was

46 See article 22(1) of the AU Convention.
47 See article 22(2) of the AU Convention.
48 See article 22(4) of the AU Convention.
held during the 13th Ordinary Session of the Executive Council, which took place in Sharm El-Sheikh, Egypt.\textsuperscript{50}

State parties are required to communicate to the board their progress in implementing the convention within a year of the instrument coming into force. Thereafter, state parties are required to ensure that national anti-corruption authorities report to the board at least once a year.\textsuperscript{51} Without the election of the advisory board, it is unlikely that state parties will be able to fulfil these requirements. This failure puts the whole monitoring and follow-up process of the AU Convention into question. Follow-up and monitoring are very important in the effectiveness of any treaty or regulation and the AU commission needs to pay serious attention to this issue. On a more general note, the overall effectiveness of the convention is yet to be seen as it has just recently entered into force.

So far, it appears that regional laws are not very effective against transnational bribery. The Inter-American and the AU Conventions discussed above do not address this phenomenon. The Council of Europe Convention, which does, is limited by geography. Furthermore, even countries which have ratified the Council of Europe Convention may have significant issues with implementation. For example, the UK, which has ratified the convention, has significant issues with the implementation of its corruption laws for corporate liability.\textsuperscript{52}

\textbf{Multiregional laws}

\textit{The Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention)}

The OECD Anti-Bribery Convention was adopted on 27 November 1997 by the negotiating conference consisting of twenty-nine OECD member states and five non-member states.\textsuperscript{53} The convention was signed

\textsuperscript{50} In a draft agenda dated 30 May 2008, the election of an advisory board on corruption is not listed as an item. See draft agenda of the Executive Council at the 11th AU Summit, www.africa-union.org/root/au/Conferences/2008/june/summit/summit.htm. No reference is found on the AU website to suggest the election took place.

\textsuperscript{51} See article 22(7) of the AU Convention.

\textsuperscript{52} See Chapter 2 for discussions on UK corruption laws and corporate liability.

\textsuperscript{53} The five non-member states were Argentina, Brazil, Bulgaria, Chile and the Slovak Republic. The Slovak Republic became an OECD member in December 2000, bringing the number of
on 17 December 1997 and entered into force on 15 February 1999.\textsuperscript{54} As of March 2009, thirty-eight countries have ratification status.\textsuperscript{55}

The OECD Anti-Bribery Convention aims to end bribery in international business transactions by requesting state parties to take measures to establish the crime of bribery of a foreign public official.\textsuperscript{56} The convention deals with the ‘active bribery’ or ‘supply side’ of corruption, which is the offering of bribes by natural or legal persons to foreign public officials in international business transactions.\textsuperscript{57} The convention stipulates that bribes of foreign public officials shall be punishable by ‘effective, proportionate and dissuasive criminal penalties’, but where the legal system of a party does not recognise criminal responsibility for legal persons, non-criminal sanctions may be used.\textsuperscript{58} Jurisdiction is by way of the generally accepted territorial and nationality principles.\textsuperscript{59}

OECD states to thirty. The twenty-nine member states at the negotiation conference were Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States. See OECD Convention/Texts, www.oecd.org.

\textsuperscript{54} Ibid.

\textsuperscript{55} For the most current information on ratification and ascension, see www.oecd.org/dataoecd/59/13/40272933.pdf. Estonia, Slovenia and South Africa are three other non-member states that have ratified the convention.

\textsuperscript{56} The offences set out in articles 1(1) and (2) of the convention constitute the crime of bribery of public officials. Article 1(1) states:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

Article 1(2) states:

Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.


\textsuperscript{58} See articles 1(1) and (2) of the OECD Anti-Bribery Convention.

\textsuperscript{59} See article 4 of the OECD Anti-Bribery Convention. Article 4 also states that where two or more parties have jurisdiction on an alleged offence, the parties shall consult ‘with a view to determining the most appropriate jurisdiction’. 
Monitoring and follow-up for implementation of the convention is vested in the OECD Working Group on Bribery in International Business Transactions (WGB).\textsuperscript{60} The working group is composed of government officials from all countries committed to implementing the anti-corruption instruments. Such officials are typically from the ministries of justice or economics and finance. The working group monitors implementation of the convention and related recommendations. It also examines specific issues relating to bribery in international business transactions and engages in outreach events to broaden awareness of the convention and its objectives.\textsuperscript{61}

The working group's monitoring and implementation involve two evaluative phases which are peer reviewed. Phase 1 began in April 1999 and involves an examination of the relevant laws and secondary legal sources of each party to determine whether they conform to the requirements under the convention. Phase 2 focuses on application laws in practice.\textsuperscript{62} Of the thirty-eight state parties to the OECD who are required to comply with the evaluative phases, the focus here will be on two member states – the United Kingdom and the United States.\textsuperscript{63}

The working group's phase 1 evaluative report showed that the applicability of UK laws to the OECD convention was uncertain. The UK common law and statutory offences did not expressly apply to foreign bribery. There was no reported case where the common law applied to foreign bribery and only one reported case where statutory offences were cited in relation to foreign bribery. Jurisdiction was limited to bribery acts which partly took place within the UK.\textsuperscript{64} This led to a phase I bis report which showed improvements by the UK to strengthen compliance with the convention. In 2001, the UK

\textsuperscript{60} See article 12 of the OECD Anti-Bribery Convention.


\textsuperscript{63} The domestic and extraterritorial laws of both states were discussed in Chapter 2.

implemented part 12 of the Anti-terrorism, Crime and Security Act (ATCSA), which clarified the application of UK laws to foreign bribery and introduced nationality jurisdiction.\textsuperscript{65}

However, there were still issues which the working group recommended that the UK look into. This included addressing the uncertainties of the language of UK law as to determining which category of public officials are covered by which offence.\textsuperscript{66} There were also uncertainties as to whether the UK laws conformed to article 1(i) of the convention.\textsuperscript{67} Article 1(i) of the convention covers the offering, promising and giving of any undue pecuniary or other advantage. UK common law on the other hand referred to the offering of undue award with no reference to giving or promising. The UK laws had different definitions applicable for common law and statutory law. The UK Bribery Act, enacted in 2010 and in force from 1 July 2011, addressed these issues.\textsuperscript{68}

The UK phase 2 evaluation considered whether the law officer’s consent which is required for prosecution of a bribery offence under UK statutory law is an obstacle to effective implementation of the convention, particularly article 5.\textsuperscript{69} The working group believes the exercise by prosecutors of discretion based on public interest and the exercise by the attorney general or solicitor general (law officers) of the right to grant or withhold consent to prosecute may be in breach of article 5. In the phase 2 reports, the UK attorney general stated that none of the considerations prohibited by article 5 would be taken into account as public interest factors not to prosecute. Nevertheless, the working group has called for more awareness by

\textsuperscript{65} Ibid. Nationality jurisdiction means any UK national or company or other entity incorporated under UK law can now be prosecuted in the courts of England, Wales and Northern Ireland for bribery even if no part of the offence took place in the UK.

\textsuperscript{66} Ibid., 14ff. For instance, the working group raised the question whether under UK law, public international organisations will be regarded as public authorities for the purpose of statutory definitions and whether agents and officials of such organisations will be regarded as occupying public office.

\textsuperscript{67} Ibid.

\textsuperscript{68} See ‘Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, United Kingdom’ (information as of 12 April 2011), www.oecd.org/dataoecd/17/30/42103577.pdf.

\textsuperscript{69} Article 5 states that 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’.
relevant agencies and law officers of the UK’s commitment to article 5

An interesting case which relates to the UK’s compliance with
article 5 of the OECD Anti-Bribery Convention is the judicial review
brought by Corner House and others in relation to the BAE corrup-
tion case.\footnote{71 R (on the application of Corner House Research and Others) (Respondents) v. Director of the Serious Fraud Office (Appellant) (Criminal Appeal from Her Majesty’s High Court of Justice) [2008] UKHL 60.} In the case, the director of the SFO had declared publicly
that he was acting in accordance with article 5. However, the director
said he did not believe his decision to terminate the investigations,
which was based on national security concerns, was in breach of article
5 of the OECD Convention. He went on to say that even if his
decision had been incompatible with article 5, he would still have
discontinued the investigation. The House of Lords declined to
address the problems of interpretation raised by the director’s
reasoning.\footnote{72 Ibid., para. 47.}

One of the grounds on which the claimants challenged the direc-
tor’s decision was that the director had misinterpreted article 5 of the
OECD Convention. The claimants argued that the director’s decision
was taken because of the potential effect of the investigation upon
relations with another state. Therefore, the ground upon which the
decision was taken was contrary to the prohibition in article 5. The
defendant argued that the court had no jurisdiction to interpret or
apply article 5 because the convention is an international instrument
which does not form part of English law.\footnote{73 See The Queen on the Application of Corner House Research and Campaign Against Arms Trade (Claimants) v. The Director of the Serious Fraud Office (defendant) and BAE Systems PLC (Interested Party) [2008] EWHC 714, paras. 49, 105 and 106.}

The High Court held that in the instant case, because the director
chose to justify the decision by invoking compatibility with the
convention, the court could review the legality of the director’s
decision under ordinary domestic law principles. Further, the court
held that it could interpret the convention because the UK had
enforced section 109 of the ATCSA in compliance with the UK’s obligation under article 1 of the OECD Convention. The court felt the exercise of discretion whether to continue to investigate or prosecute in a manner which undermines the very purpose for which the offence was created is a matter susceptible to the review of the courts. The court then went on to consider the approach to be taken regarding interpretation. However, the High Court decided that a ruling on the interpretation of article 5 was not necessary as it had concluded that under conventional domestic law principles, the director’s decision was unlawful. The court concluded it was up to the OECD working group to determine the interpretation of article 5. The House of Lords affirmed the decision of the High Court and opined that it was questionable for the court to interpret an unincorporated provision which had no judicial authority.

The phase 2 follow-up report also noted that the UK had failed to replace the existing statutory requirement for the attorney general’s consent for prosecution in cases of foreign bribery with a requirement for the consent of the public prosecutor or a nominated deputy, despite public announcements to that effect. Statements that the director of the SFO should be empowered to give consent were also not initially acted upon. The new UK Bribery Act fulfils this requirement.

With regard to the US evaluation process, the working group stated that the amendments to the FCPA carried out in 1998 generally implement the standards set by the OECD Convention. However, there are certain problem areas in which recommendations have been made to the US. These include the need to clarify that the offence of offering, giving or promising bribes is in order to obtain or retain business or other improper advantage in the conduct of international business. The working group felt that the way the FCPA dealt with the issue of ‘other advantage’, which comes before ‘obtaining or retaining business’, may give rise to problems in the prosecution

74 Ibid., paras 119, 120, 121, 130, 153 and 154.
75 Above n. 71 at paras. 44, 45 and 46.
77 See above n. 68.
of offences. Calls were also made for clear statements identifying the criteria applied in determining the priorities of the Department of Justice and Securities Exchange Commission in carrying out FCPA prosecutions.

Other issues which the working group seeks to follow up include that relating to the offence of bribery of foreign public officials where the foreign official directs benefits to third parties; the question whether directors, officers or employees of state-controlled enterprises are also classified as public officials is on the list for follow-up too. There are also questions of whether the nationality jurisdiction, which gives the US authority to hold US nationals and businesses liable for foreign bribery acts committed abroad, is effective in combating bribery of foreign public officials.

On the whole, the working group’s approach to monitoring and follow-up is to be commended. The process is systematic and transparent. Reports of state parties and actions of the working group are easily accessible and where necessary critical of the lapses in national implementing law. This is unlike the AU Convention, which has yet to establish a functioning advisory board responsible for monitoring and follow-up.

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79 Ibid., para. 22. Article 1(i) of the Convention requires state parties to establish as a criminal offence under its laws for any person to offer, promise or give any undue pecuniary or other advantage. The FCPA makes it an offence for any issuer or domestic concern to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorisation of the payment of any money, or offer, gift, promise to give, or authorisation of the giving of anything of value to

(i) any foreign official for purposes of

(a) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(b) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person. See sections 78dd-1 and 78dd-2 of the FCPA, www.usdoj.gov/criminal/fraud/docs/statute.html.


81 Ibid.

82 See discussions in this chapter under the AU Convention and references to the Advisory Board.
Nevertheless, doubts have been raised as to whether transnational laws such as the US anti-corruption legislation and the OECD Anti-Bribery Convention are leading to higher standards of corporate conduct among foreign investors. Susan Hawley suggests three reasons why the OECD has had so little impact: lack of prosecutions; slow monitoring of implementation; and omission of anti-bribery laws to deal with the problems of corporate liability for acts of agents and subsidiaries.

Writing in 2003, Hawley noted that with the exception of the US, no company in any OECD country had been prosecuted for or convicted of bribery since the convention came into effect. This is changing and, with the entering into force of the UK Bribery Act, may no longer be the case.

With regard to monitoring, Hawley noted that the OECD was meant to have reviewed the effectiveness of state parties implementing legislation by 2005 and opined that it would take up to 2010 at the earliest before all the signatories had been assessed. With the benefit of hindsight, it seems that the phase 1 and 2 assessments have been speedy, with all thirty-eight members reviewed by March 2009.

Hawley sees the omission of anti-bribery laws to deal with the problems of corporate liability for the acts of agents and subsidiaries as the main reason why the OECD has such little impact. This reason still has much validity. Corporate liability for the acts of foreign subsidiaries is problematic because the issue of how to deal with foreign subsidiaries is linked to how countries deal with notions of corporate responsibility in their national company laws.

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84 Hawley, *Turning a Blind Eye.* 85 Ibid. 86 Ibid.

of foreign subsidiaries is also a concern which might hamper effective implementation and lead to uneven application of the convention.\textsuperscript{88}

The OECD Convention sets out the common elements of the offence of bribery as follows: the offer, promise or giving of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.\textsuperscript{89}

This would suggest that measures taken by state parties should include criminalising indirect bribery through intermediaries such as agents and foreign subsidiaries.

In 1997, six days before the OECD Convention was adopted, the decision of the council concerning further work on combating bribery in international business transactions included amongst others the need for the WGB to examine on a priority basis the role of foreign subsidiaries in bribery transactions with a view to reporting conclusions at the 1999 OECD council meeting.\textsuperscript{90} The WGB through a series of questionnaires asked state parties what action they would take against a corporate headquarters if it ‘authorised’, ‘should have known’, ‘knows’ or ‘had knowledge’ of the bribery transactions. A majority of the countries had no problem holding the corporate headquarters liable if it authorised the bribery as there would be sufficient territorial link. However, if the corporation headquarters had no knowledge, they could not hold it liable.\textsuperscript{91}

As regards ‘should have known’ or ‘knows’, many of the states said it depended on whether the state had a concept of corporate responsibility which could hold the corporation headquarters liable for civil law offences such as breach of duty, gross negligence, or reckless disregard of legal provisions concerning corporate organisations and control of parent companies over their subsidiaries. For those countries with criminal corporate liability, in order to find the headquarters liable, the offences of complicity or conspiracy had to be applicable.

\textsuperscript{88} Ibid.  
\textsuperscript{89} Article 1(1) of the OECD Anti-Bribery Convention.  
\textsuperscript{90} See ‘Decision of the Council concerning further work on combating bribery in international business transactions’, 11 December, 1997, c(97)240/Final.  
\textsuperscript{91} Above n. 87, paras. 34 and 36.
However, some states replied that they could not hold the headquarters liable because the act of bribery occurred in a foreign jurisdiction.\footnote{Ibid., para. 35.}

The WGB noted that experience with the implementation of the convention might clarify the extent to which this problem would require further action.\footnote{Ibid., para. 40.} Indeed, the implementation of the convention and continuing work of the WGB are clarifying the extent of the problem. For example, in the US, if the act of the foreign subsidiary occurred outside the US, the FCPA would not apply unless the parent company authorised, directed or controlled the foreign subsidiary, or a finding of reckless disregard was possible.\footnote{US: Phase 2. Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 recommendation on combating bribery in international business transactions’, October 2002, para. 17, www.oecd.org/dataoecd/52/19/1962084.pdf.}

In the case of the UK, the phase 2 report of 2005 notes that if a wholly owned foreign subsidiary of a UK company is the offender, the UK parent company would not generally be liable. It would be necessary to show direction or authorisation by a directing mind, which, as will be recalled, has been highly criticised.\footnote{Above n. 70, para. 203.} The WGB has recommended that the UK broaden the level of persons engaging the criminal liability of legal persons for foreign bribery.\footnote{Ibid., para. 206.} This recommendation has been reiterated in the 2007 phase 2 follow-up and 2008 phase 2 bis reports.\footnote{Above n. 76. See also ‘UK: Phase 2bis. Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 recommendation on combating bribery in international business transactions’, October 2008, www.oecd.org/dataoecd/23/20/41515077.pdf.} The new UK Bribery Act does not change the UK’s corporate criminal liability, but rather creates a new offence of failure of commercial organisations to prevent bribery.\footnote{See ‘UK: Phase 1ter. Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 revised recommendation on combating bribery in international business transactions’, December 2010, para. 35ff., www.oecd.org/dataoecd/58/43/46883138.pdf. See also above note 52.}

A careful analysis of the work of the WGB shows that the requirement that states solely determine legislative and enforcement measures for corporate liability needs some commonality. This is because of the diversity of state parties’ approach in determining corporate
liability (criminal or otherwise), difficulties of holding parent companies responsible for the acts of foreign subsidiaries, and country reluctance in holding companies responsible for foreign bribery. The commentary to the OECD Convention emphasises the functional equivalence which the convention seeks to assure in that it does not require uniformity or changes in fundamental principles of a party’s legal system.

In January 2007, the OECD secretary-general, Angel Gurría, stated the intention of the WGB to review the anti-bribery instruments, the convention and related recommendations. In 2009, the OECD provided good practice guidance on implementation of specific articles of the Anti-Bribery Convention, including article 2. It urged member countries to be flexible in determining the level of authority of the person whose conduct triggers the liability of the legal person; or, where liability is triggered by the highest level of managerial authority, increases the likelihood of corporate liability. It also addressed the issue of responsibility through intermediaries.


Annex I: Good practice on implementing specific articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Article 2 of the OECD Anti-Bribery Convention: Responsibility of legal person:

Member countries’ systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.

Member countries’ systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or

b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:

– A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;
– A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and
– A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise
The UN Convention against Corruption (UNCAC)\textsuperscript{101}

The UNCAC is the clearest indication to date that the international community is serious in its fight against corruption, not simply because it affects international trade but also because of the effect it has on other aspects of international life. It is perhaps the first truly binding international treaty to address corruption. The UNCAC was adopted on 31 October 2003 and entered into force on 14 December 2005. As at May 2011, it has 140 signatories and 152 parties.\textsuperscript{102}

The convention aims to prevent and combat corruption efficiently and effectively on a global scale. It also aims to ensure international co-operation and technical assistance in the fight against corruption, and to promote integrity, accountability and proper management of public affairs and public property.\textsuperscript{103} It is divided into eight chapters covering preventive measures (chapter ii); criminalisation and law enforcement (chapter iii), international co-operation (chapter iv) and asset recovery (chapter v). This section will be concerned with chapters ii and iii in relation to corporations.

The preventive measures include anti-corruption policies and practices.\textsuperscript{104} Article 5(3) requires the state party to endeavour to establish and promote effective practices aimed at the prevention of corruption, and to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption. State parties are also required to take measures to

\begin{itemize}
  \item establish and promote effective policies and practices aimed at the prevention of corruption;
  \item periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption;
  \item take appropriate measures to prevent corruption in the private sector;
  \item ensure that public officials act with integrity and upheld the highest standards of conduct;
  \item ensure that public institutions and financial institutions take measures to prevent and combat corruption;
  \item ensure that public procurement is carried out in a transparent and competitive manner;
  \item ensure that financial information is properly recorded, maintained and disclosed;
  \item ensure that the judiciary and law enforcement agencies are independent and impartial;
  \item ensure that public reporting is transparent and accountable;
  \item prevent and combat corruption in the private sector;
  \item prevent and combat money laundering and other related financial crimes;
  \item provide for the protection of persons who expose corruption.
\end{itemize}

\textsuperscript{101} UN Doc A. Res/58/4.
\textsuperscript{102} For the most current information on ratification and ascension, see www.unodc.org/unodc/en/treaties/CAC/signatories.html.
\textsuperscript{103} See chapter i, article 1 of the UNCAC.
\textsuperscript{104} See chapter ii, article 5 of the UNCAC. Other preventive measures are the use of anti-corruption bodies to prevent corruption (article 6); proper adoption and maintenance of public sector (article 7); code of conduct for public officials (article 8); public procurement and management of public finances (article 9); public reporting (article 10); measures relating to judiciary and prosecution services (article 11); prevention of private-sector corruption (article 12); participation of society (article 13); and prevention of money laundering (article 14).
prevent corruption involving the private sector by enhancing accounting and auditing standards using civil, administrative or criminal penalties where necessary to ensure compliance.¹⁰⁵ Tax deductibility for bribes is disallowed.¹⁰⁶ The application of the UNCAC to private-sector corruption and the discouragement of tax deductions for bribes confirm the approach of the international community to eradicate corruption in all sectors.

Chapter iii of the UNCAC criminalises certain offences. These include the bribery of national public officials, foreign public officials or officials of public international organisations, which state parties are required to adopt legislative and other measures to establish as offences.¹⁰⁷ State parties are also required to establish liability of legal persons (corporations) for participation in any offence established by the convention. Such liability may be criminal, civil or administrative. In particular, legal persons held liable are to be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.¹⁰⁸

Similarly to the OECD Convention, state parties have jurisdiction over the offences established mainly by way of the more common forms of jurisdiction, namely territorial and nationality jurisdictions.¹⁰⁹ The convention also notes that it does not exclude the exercise of any criminal jurisdiction established by a state party in accordance with its domestic law.¹¹⁰

Like the OECD Anti-Bribery Convention and the Council of Europe Criminal Law Convention, the UNCAC has great potential to be a useful tool in ensuring corporate responsibility or liability for corporate corrupt practices. However, the strong emphasis on legislative measures and enforcement emanating from domestic law

¹⁰⁵ See chapter ii, article 12(1) of the UNCAC.
¹⁰⁶ See chapter ii, article 12(4) of the UNCAC.
¹⁰⁷ See chapter iii, articles 15 and 16 of the UNCAC. Other offences which should be criminalised include embezzlement, misappropriation or other diversion of property by a public official (article 17); intentional laundering of proceeds of crime (article 23); intentional obstruction of justice (article 25). Offences which state parties should consider criminalising include trading in influence (article 18); abuse of functions by a public official (article 19); illicit enrichment (article 20); bribery in the private sector (article 21); and embezzlement of property in the private sector (article 22).
¹⁰⁸ See chapter iii, article 26 of the UNCAC.
¹⁰⁹ See chapter iii, article 42 of the UNCAC.
¹¹⁰ See chapter iii, article 42(6) of the UNCAC.
creates major hurdles in the fight against corruption. The discussions already presented in relation to corporate liability of legal persons under the OECD Convention are applicable to the UNCAC and will not be repeated here.

So far, the discussions have focused on curbing international corruption through the use of regional and multiregional laws heavily dependent on domestic law, including extraterritorial laws for enforcement.\textsuperscript{111} No doubt, while domestic law if effective remains by far the most suitable means for these purposes, there is a need to look at international law, particularly when domestic law is ineffective. With this in mind, the following section will consider the merits for and against direct corporate responsibility under international law, particularly the possibility of having direct corporate responsibility for transnational bribery transactions.

Direct corporate responsibility under international law

Some have argued that the home states of MNCs should exert control over the activities of their corporate nationals operating overseas. Sornarajah believes that the home states of MNCs have responsibilities to ensure their corporate nationals do not act to the detriment of their host states while abroad.\textsuperscript{112} He argues for an extension of the law on state responsibility to hold home states responsible for not preventing MNCs from engaging in corporate misconduct in international law.\textsuperscript{113} Currently, it does not appear that home states can be held responsible for failing to ensure their corporate nationals behave responsibly, at least in the area of corruption.

The central argument here is that when host states and home states are ineffective in holding corporations responsible for violations of international law, arguments for direct corporate responsibility in international law become necessary. A problem this line of argument faces is that international law is state-centred and holds states responsible for violations of international law. Traditionally, states were the

\textsuperscript{111} For discussions on extraterritorial laws, see Chapter 2.


\textsuperscript{113} Ibid., pp. 189, 200.
primary duty bearers in international law. They had legal personality and so could enforce rights and duties under international law. Later, it became accepted for international organisations such as the United Nations to have legal personality under international law as well. However, this recognition has not been extended to corporations.

International law recognises corporations as objects of international law, rather than as subjects with full legal personality. The limited personality corporations currently have is in the area of foreign investment law by virtue of the International Centre for Settlement of Investment Disputes (ICSID). The ICSID gives MNCs legal personality to bring arbitration cases. For the most part, the legal personality of corporations and other non-state actors is still suspect in international law, although it is increasingly becoming clear that corporations and other entities such as NGOs are worthy of limited personality in international law.

The thrust of the argument is that direct corporate responsibility would have serious consequences because it would admit the need to make corporations the subjects of international law. A counterargument is that corporations need not be given full legal personality. States may choose to enter into multilateral treaties which clearly map out what corporations should be responsible for and ways to enforce such responsibility. Effective enforcement would include such treaties recognising that MNCs have limited capacity for responsibility matters and allowing international organisations or NGOs with recognised status and limited capacity to report erring corporations before specialised agencies or bring cases in specialised courts. The major hurdles will be convincing states to recognise such capacity in clearly defined situations involving corporate responsibility and to sign such treaties. The role any NGO with recognised status would play must be carefully scrutinised so as to address the problems of NGO authority, legitimacy and regulatory capture in international law.

So far the discussion has centred on how corporations could obtain limited legal personality for corporate responsibility in international law. Now the focus will shift specifically to corporate responsibility for international corruption in international law. Is there a strong case for direct corporate responsibility in international corruption cases? The involvement of corporations in bribery is more straightforward than, say, their involvement in human rights, but does this fact make the
case for direct corporate responsibility stronger? Many treaties dealing with international corruption such as the OECD Ant-Bribery Convention and UNCAC require states to hold legal persons guilty of bribery liable through civil, criminal or administrative measures. However, many states fail to hold corporations liable. This begs the question, if states are not addressing their responsibility to ensure corporate liability, is there a valid argument for direct corporate responsibility under international law? How will such direct responsibility be addressed and applied?

One argument could be that responsibility should come via emerging international criminal law. At first glance, this seems contradictory because international law focuses on individual responsibility, while the aim here is to find ‘corporate responsibility’. International criminal law is the accumulation of international legal norms on individual criminal responsibility. Individuals have duties not to commit international crimes. A famous quote from a judgment of the International Military Tribunal in Nuremberg says ‘Crimes against international law are committed by men, not by abstract entities, only by punishing individuals who commit such crimes can the provision of international law be enforced.’

On closer scrutiny, however, it becomes clear that corporate responsibility in international criminal law is now being recognised, although such recognition is limited to ‘serious’ international crimes. The basis for this scrutiny stems from an examination of the proposals attempting to give the International Criminal Court (ICC) jurisdiction over legal persons. The ICC has jurisdiction over natural persons and concerns the most serious crimes and criminals, which generally include leaders, organisers and instigators.


At the Rome conference in 1998, proposals that the ICC also exercise jurisdiction over corporate bodies were seriously considered, but, in the end, were not implemented. During the ICC deliberations, the whole notion of ‘corporate’ criminal responsibility was simply ‘alien’, raising issues of complementarity. The different approach of states to corporate criminal liability was particularly problematic.\(^\text{118}\) Some states did not even have a domestic concept of corporate criminal liability and so for such states, a notion of international corporate criminal liability would be difficult. Other procedural issues raised by corporate responsibility related to assets and third-party rights.\(^\text{119}\)

Although the ICC does not have jurisdiction over legal persons, there has been talk of the prospect of holding corporations liable for complicity in human rights crimes. The Rome Statute of the ICC makes officers and employees of private companies who facilitate, aid or abet a crime covered by the court criminally liable.\(^\text{120}\) However, as yet, in international law, corporate criminal responsibility has not been extended to the corporation as a whole entity.\(^\text{121}\) Clapham believes corporations may have duties similar to individuals under international criminal law as they ‘have enough legal capacity to enjoy rights and duties on the international stage’.\(^\text{122}\)

Nevertheless, the relevance of corporate criminal liability for international crimes, albeit in domestic jurisdictions, is now being recognised. The use of international criminal law against corporations is not dependent on an amendment to the ICC statute. Clapham argues that this branch of international law is already applicable against corporations, even if jurisdiction is limited for the moment to domestic courts.\(^\text{123}\) An international crime is considered to be an offence


\(^{119}\) Kamminga and Zia-Zarifi (eds.), *Liability of Multinational Corporations*.

\(^{120}\) ‘Talisman advised – further abuses could result in prosecution in ICC’, *Corporate Watch*, 30 April 2002.

\(^{121}\) See Bomann-Larsen and Wiggen (eds.), *Responsibility in World Business*, p. 160. See also Kamminga and Zia-Zarifi (eds.), *Liability of Multinational Corporations*.

\(^{122}\) See Bomann-Larsen and Wiggen (eds.), *Responsibility in World Business*, p. 52. See also Clapham, *Human Rights Obligations*, p. 79.

\(^{123}\) *Ibid.*
whose repression compels international dimensions. They typically include crimes against peace, war crimes and crimes against humanity. These crimes fall under the jurisdiction of the ICC. A characteristic of such crimes is the gravity with which they are viewed. Schabas notes that the crimes over which the ICC has jurisdiction are ‘international’ not so much because international co-operation is needed for their repression, but because their heinous nature elevates them to a level where they are of concern to the international community.

There are other international crimes which are still only investigated and tried through domestic courts. These include corruption, money laundering, drug trafficking, offences against the environment, fraud and tax offences, organised crime, maritime and aviation security offences and terrorism. It is anticipated that certain of the listed international crimes may be included in the ambit of the ICC or some other specialised international court which could be established with jurisdiction over particular international crimes not covered by the ICC.

This raises the question, does the justification for extending direct corporate liability to international crimes such as crimes against humanity hold for the offence of international corruption? In other words, is the crime of international corruption so serious as to warrant direct corporate responsibility in international law? The simple answer is that there is no reason why international corruption should not be seen as a serious crime. As Bantekas and Nash have commented, ‘It is obvious that bribery of foreign public officials has been finally recognized as a contemporary scourge, an international offence being a threat to commerce, stability and the enjoyment of human rights.’ However, it is one thing for international corruption to be seen as a serious crime and another for it to be deemed to warrant measures such as recognition of the liability of legal persons by international institutions or universal jurisdiction.

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124 See Bomann-Larsen and Wiggen (eds.), Responsibility in World Business.
125 Ibid., p. 21.
Precedent shows that international corruption has not been equated with *jus cogens* norms, which must be protected by international law institutions and mechanisms. It cannot yet be said that the offence of international corruption is seen as so heinous or repugnant that international law itself would want to punish it directly. Punishment for the time being is left to states with territorial or national links. The international crime of corruption is presently tried in domestic courts. Such crimes do not fall under the jurisdiction of the ICC and it seems unlikely that they will in the near future. The ICC deals with a different category of international crimes, such as genocide, crimes against humanity, war crimes and crimes of aggression. Therefore, it is unlikely that corporations would be held directly responsible in international law for international corruption. Moreover, as the writers of the *International Criminal Law Deskbook* succinctly put it, ‘the present international criminal law regime is focused on and directed towards, domestic criminal courts – and no amount of wishful thinking will make it different in the future’.  

A more appropriate approach for international law regarding corruption might be a comparison with new international crimes such as terrorism, money laundering and drug trafficking. These are all serious international crimes which are tried domestically through national courts.

In summary, individual criminal responsibility and corporate criminal responsibility for ‘serious’ crimes such as crimes against peace, war crimes and crimes against humanity are being recognised in international criminal law. Many such crimes come before domestic courts. The ICC deals with a different type of crime and is currently limited to individual criminal responsibility. The international crime of corruption, like many other crimes, does not qualify as such a crime and needs to be dealt with through domestic jurisdiction.

The following sections will seek to establish ways direct corporate responsibility could be addressed and applied.

*Model of international corporate responsibility*

There have been many attempts to address international corporate responsibility. Many such attempts focus on civil liability claims.

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brought under domestic courts, albeit for violations of international norms. They focus on a myriad of soft-law initiatives which aim to hold corporations responsible. The focus here is on a model of international corporate responsibility law which recognises that corporations have limited international personality in clearly identified responsibility matters. Such matters include those pertaining to international corruption and human rights. The need for state consent or practice for the success of any such law is unquestionable.

In essence, direct corporate responsibility would really only be possible if states could be convinced of the need to reach agreements or carry out practices directly imposing responsibility on corporations. A failure of states to reach such agreements or practice is the central reason why corporations cannot be held directly responsible under international law.

Such a model would need to devise a means for attributing corporate liability. It would be concerned with questions such as whose acts would constitute responsibility for the corporation. This has proved to be a challenge for some domestic laws and would continue to be a challenge in international law, unless it is effectively dealt with. For instance, there is much disquiet with the UK common law doctrine of identification for corporate criminal liability. The doctrine is seen as unsatisfactory. Other common law jurisdictions such as Canada and New Zealand are working out formulations of the attribution test.

Canada criminalises on the basis that a senior person with policy or operational authority commits an offence personally, or has the necessary intent and directs the affairs of the corporation in order that lower-level employees carry out the illegal act, or fails to take action to stop criminal conduct of which he/she is aware or wilfully blind. New Zealand asks whether the natural person in question has real control on behalf of the legal person over the activities which relate to the alleged offence.

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131 See Adefolake Adeyeye, ‘Corporate responsibility in international law: which way to go?’ (2007) 11 Singapore Year Book of International Law 141.
133 Ibid. at para 10.78.
The US approach follows the theory of imputation, which holds corporations vicariously liable for acts and intents of its employees acting on behalf of the corporation which are then imputed to the corporation.\textsuperscript{134} When international law considers corporate responsibility, it is perhaps best to use the controlling mind doctrine or a variant of that doctrine. Such an approach may be better suited for corporate responsibility in international law because it would target senior officials, in line with individual responsibility for international crimes which targets senior state officials.\textsuperscript{135} It is worthwhile to note the WGB recommendations to the UK, in which the real need to extend the group of people to which the doctrine applies has been highlighted.

Such a model would also need to deal with the thorny issue of corporate responsibility for the acts of subsidiaries. Subsidiaries and agents play an important role in the crime of international corruption. An oft-cited 1997 survey by the Control Risks Group found 56 per cent of European companies and 70 per cent of US companies occasionally used middle men such as agents, joint-venture partners or subsidiaries to make corrupt payments. Of these companies, 44 per cent of the European firms and 22 per cent of the US firms admitted to using agents regularly.\textsuperscript{136} The OECD Convention’s omission of this issue has been cited as a major weakness. The previous discussions relating to this issue in the section on the OECD Convention are relevant for addressing the problems of subsidiaries at the international level.

Finally, such a model would need to address enforcement. The process would typically be started through states with territorial or national links. However, where such states fail to enforce, enforcement could be through specialised agencies to which IGOs or recognised NGOs can take erring corporations. The need to create such agencies stems from the need for international corporate responsibility in the sense of the international community demanding responsibility and creating avenues to ensure such responsibility.


\textsuperscript{135} Scott (ed.), \textit{Torture as Tort}, pp. 157, 158. See also above n. 100.

\textsuperscript{136} See Hawley, \textit{Underwriting Bribery}. 
The question may be asked, why create such a model of international corporate responsibility? Why not argue for the creation of universal jurisdiction in relation to such crimes so that domestic courts can impose liability? The answer is that the numerous international laws on corruption specifically deal with jurisdiction, which tends to be territorial or national in nature. It is unlikely that states would be willing to accept the need for universal jurisdiction where there is no territorial or national link.

Sornarajah has argued that states are under a duty to ensure that they punish international crimes, especially *jus cogens* norms. He continues that where states refuse to prevent the violation of international law norms, such states should lose their right to diplomatic protection of their nationals. This chapter is concerned with the situation where states fail to enforce the duty of ensuring corporations comply with international corruption norms. Current international law practice does not suggest that states without links to the crime will prosecute the nationals of the disobeying state. Moreover, states seem to have adequate problems addressing international corruption even in situations where there are clear territorial or national links.

In the area of civil liability, domestic courts may be more willing to exercise extraterritorial jurisdiction. An interesting recent parallel is the prevention of child sex tourism. Here a duty is created to proscribe the behaviour through national laws. Scott has raised the question ‘if Australia began to allow civil suits against Japanese corporate sex-tour operators organizing trips to Bangkok or Phuket, would Japan or Thailand accept this as a reasonable exercise of extra-territorial jurisdiction?’ The answer is not so clearcut. Precedent shows that that all treaties to date addressing corruption do not advocate universal jurisdiction for such crimes. Universal jurisdiction tends to apply for *jus cogens* norms, of which international corruption is not one.

Moreover, the complexity of some of the issues which would need to be addressed on a transnational or international level may make it more appropriate for IGOs or NGOs to bring the case before a specialised agency created to deal with such issues. However, the use of non-state actors such as NGOs as ‘police’ raises critical questions, particularly in

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138 Ibid.
139 Ibid., p. 56.
relation to the basis of their authority and legitimacy to ‘police’ MNCs
and the possibility of regulatory capture by such NGOs. The term
NGO is frequently used interchangeably with ‘civil society organi-
sation’ (CSO) but it is important to note there is a difference. The term
‘non-governmental organisation’ (NGO) was first coined in 1945 to
denote groups and organisations in consultative status with the UN’s
main body, the Economic and Social Council, and its subsidiary bodies
(with the explicit exclusion of the UN General Assembly, Security
Council and the International Court of Justice). NGOs are organisa-
tions that are independent of government.

CSO more aptly refers to any organisation that is not public and
the category of organisations under this term is broader than NGO.140
Richter adds that the term ‘civil society organisation’ crept into UN
policy documents as part of the governance discourse and is rarely
distinguished between citizen and business groups. Today, ‘NGOs’ or
‘CSOs’ cover a range of groups and organisations including business
interest organisations. Calls have been made to exclude the business
sector from the category of CSOs.141 It would seem unreasonable to
heed such calls in a discussion on the need to hold corporations
directly responsible for international corruption. However, there is a
need to streamline organisations that would be recognised to ‘police’
MNCs.

There is also a need to address the authority and legitimacy of such
streamlined NGOs as they do not have international legal personality.
Early attempts to develop international law on NGO recognition have
proved futile.142 Nevertheless, authority for NGO action in taking
erring MNCs before specialised courts or agencies may be based on
the approach in human rights law.

The African Commission on Human and Peoples’ Rights allows
states, individuals and NGOs with observer status to submit commu-
nications alleging a violation of the African Charter. For example, in

140 See Judith Richter, Holding Corporations Accountable: Corporate Conduct, International
the term NGO actually goes back to just after World War I and cites comments by Dwight
W. Morrow in 1919; see Steve Charnovitz, ‘Nongovernmental organizations and interna-
141 Richter, Holding Corporations Accountable, p. 34.
142 See Charnovitz, ‘Nongovernmental organizations and international law’, p. 356.
the well-publicised Ogoni case, the legal communication to the African Commission on Human and Peoples’ Rights was jointly submitted by the Centre for Economic and Social Rights, which is US based, and the Economic Rights Action Centre, a Nigeria-based human rights organisation, on behalf of the victims of human rights violations.

The protocol of the African Court on Human and Peoples’ Rights gives NGOs recognised by the African Union standing to institute cases directly, provided that at the time of ratifying the protocol or thereafter, the state at issue has made a declaration accepting the jurisdiction of the court to hear such cases.\(^{143}\) This can be distinguished from the European Court of Human Rights, which only allows an NGO to bring a case if the NGO itself claims to be a victim.\(^{144}\)

Likewise, avenues would be created whereby streamlined NGOs can institute a case against an MNC provided state parties accept the jurisdiction of the specialised court. The key to such authority lies in state consent or practice. The engagement of NGOs in the review and promotion of state compliance with international obligations and monitoring of human rights, humanitarian and environmental law is now common.\(^{145}\) NGO engagement may be extended to other areas of international law including corporate compliance.

Rory Sullivan notes that the debate on business and human rights has broader implications as one set of non-state actors (NGOs) work to define norms and legal obligations for another set of non-state actors (companies), with limited involvement of government. He adds: ‘this contest of influences, which is duplicated in many other corporate social responsibility debates, is likely to be an ever more common approach to the development of soft, and probably hard, international law obligations’.\(^{146}\)

\(^{143}\) See articles 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

\(^{144}\) See article 34 of the Convention for the Protection of Human Rights and fundamental Freedoms, ETS no. 155. See also Charnovitz, ‘Nongovernmental organizations and international law’, p. 354.

\(^{145}\) See Charnovitz, ‘Nongovernmental organizations and international law’.

One other important aspect of NGOs and their authority to police MNCs which needs to be addressed concerns the question of regulatory capture. It has been noted that corporate interests and NGOs try to capture the emergence of new binding standards of corporate responsibility by being involved in the drafting and adopting of non-binding codes and guidelines. Many have raised the point that NGOs are unaccountable bodies exercising influential power and sometimes not working in the best interest of the society, but are subject to their own agendas. These are legitimate concerns which require awareness. It is hoped the streamlining of recognised NGOs may go some way in countering such arguments.

Unintended consequences of international corporate responsibility

So far, the model of international corporate responsibility has left little to be said for the role of states in enforcement. Where states fail to enforce the laws, the model requires IGOs and NGOs to bring erring corporations before specialised agencies. Such a model may create unintended consequences whereby states can free-ride on corporate responsibility. It cannot be overemphasised that international corporate responsibility is not meant to take the place of state responsibility. Rather, international corporate responsibility will ensure that corporations are held responsible in situations where states will not or cannot enforce the laws. There is a valid argument for holding corporations responsible other than through the non-complying state. However, this does not diminish the fact that states still have the responsibility in international law to ensure international law norms are observed, including responsibility for failure to ensure corporations behave responsibly. It simply means that state responsibility and international corporate responsibility will be recognised in international law.

The area of international corruption is a good illustration of how this argument works. There are manifold reasons why many states do not prosecute guilty corporations. Where the bribery occurs overseas

the desire to prosecute is less enticing. The application of extraterritorial overseas bribery laws has not been as effective as desired. The cost and length of such prosecutions is also a critical reason why countries may not prosecute guilty parties. The well-publicised Lesotho Highland Water Project trials, which held many foreign corporations responsible for bribery, illustrate the immense cost of prosecuting bribery, especially foreign bribery.

The Lesotho government, aware of the costs, requested international community assistance. Although the World Bank, other development and commercial banks, EU and several government representatives promised financial assistance, it was reported that this never materialised. Lesotho, a very poor African country, had to undertake the trials on its scarce resources. Commentators have pointed out the punitive effect such undertakings may have on a country like Lesotho.

Without the commendable political will of the Lesotho government, which was determined to prosecute the case, the trials may never have materialised. It is possible that should such corruption occur in other poor countries, the insurmountable cost of prosecution may deter trials. While the Lesotho trials are a victory for advocating corporate responsibility through state enforcement, the reality is that many poor states in the same situation may be unwilling to go the extra mile.

Hence the need for international corporate responsibility, which allows corporations to be brought to trial through IGOs, and streamlined NGOs, which may have the means for raising required support for the trials. Furthermore, the specialised agencies would have the skills required to address the complex issues which would arise, and be funded by international community support. This would distribute

148 For example, see discussions on the OECD Anti-Bribery Convention above. See also discussion on usefulness of extraterritorial laws in Chapter 2.
149 See Hawley, Underwriting Bribery, p. 3. Hawley notes that there are significant resource implications for law enforcement agencies in addressing overseas corruption.
the burden of providing financial assistance amongst a large pool of states which have all invested in eradicating corruption.

Critics might say, how does one then distinguish between a state which is free-riding and a state which cannot or will not comply? The answer, though somewhat superficial, is that in many instances a free-riding state would have the mechanisms in place to hold corporations responsible, but simply chooses for various reasons not to enforce corporate responsibility. On the other hand, the state which cannot or will not hold corporations responsible may fail to do so because of a genuine lack of resources or as a result of government involvement in corruption and bad governance.

When states refuse to hold corporations responsible for reasons other than corruption and bad governance, should they be put in the category of free-riding states? Free-riding or not, there is a valid argument for direct corporate responsibility in international law which uses international institutions to defray the cost and length of prosecutions which may be too burdensome for one country. Such responsibility would also be appreciative of the limitations of developing countries with limited resources or corrupt governments to address international corruption.

Some states may have justifiable fears of a race to the bottom, or poor resources to create and enforce laws. The race to the bottom implies that states competing for foreign investment capital from MNCs will provide lax regulatory standards, especially in the area of environmental and labour laws, in order to attract prospective investors or for fear that the capital they desire will be transferred to a more favourable state.152

In the case of international corruption, it has been noted that developing countries have come under pressure from the international community to drop investigations into allegations of corruption by OECD companies. An example which has been given is that of Pakistan in 1998, when there were pressures for it to stop allegations of corruption against the Hubco power plant.153 Hawley has cited the argument that litigation against OECD countries will deter foreign

153 See Hawley, Underwriting Bribery, p. 6.
investment as a reason why developing countries do not prosecute for bribery.\footnote{154} On the other hand, issues of a race to the bottom may not be very important where anti-corruption laws are concerned, because many countries already have anti-corruption laws. However, the problem with this line of reasoning is that not many countries enforce their extraterritorial anti-corruption laws for foreign bribery, thus creating a situation whereby corporations operating outside their jurisdiction may not be held accountable for international corruption misconduct.

A more substantial reason why issues of a race to the bottom may not be very important is because numerous scholars have doubted its existence amidst claims to the contrary by many.\footnote{155} The chapter will not go into the merits or otherwise of such claims. The point of adducing fears of a race to the bottom here is to highlight the fact that a call for direct corporate responsibility in international law may prevent a race to the bottom by creating avenues whereby the guilty MNCs would not be able to run to a more ‘conducive’ environment. This is because most environments would take bribery seriously and the corporations would know there are serious mechanisms to enforce the laws which are not limited to the under-resourced country, to cite an example.

Another unintended consequence may be the perceived uncertainty international corporate responsibility would bring to international law. In response to this, suffice it to say that this chapter does not argue for a complete revamp of international law. Rather, it asserts that state consent is required for direct corporate responsibility and there are justifiable reasons which should compel states to consent. The propositions presented here would work under a state-centred approach to international law and so the perceived uncertainty may be more apparent than real. Under a state-centred approach, the primary sources of international law – treaty law and customary law – would still be needed for corporate responsibility.

The chances of direct responsibility of MNCs for international crimes such as international corruption being included in customary

\footnote{154} Ibid.

\footnote{155} See Richard Revesz, ‘Rehabilitating interstate competition: rethinking the “race-to-the-bottom” rationale for federal environmental regulation’ (1992) 47 NYUL Rev. 1210.
international law are very slim because major powers in international law cannot agree on the need and parameters for such responsibility. For a custom to be accepted and recognised in international law, it must have concurrence of the major powers in that particular field. Customary international law is thus established by virtue of a pattern of claim, absence of protests by states particularly interested in the matter at hand and acquiescence by other states.\textsuperscript{156} Principles involved in custom must be obligatory and express an \textit{opinio juris}.

Currently, the principles in international law which arguably fall under customary international law are pretty rigid. They include most sections of the Universal Declaration of Human Rights.\textsuperscript{157} The acceptance and recognition under customary international law of the need for direct corporate responsibility will be difficult. Different countries have different expectations and the reality is that the need for direct responsibility is most obvious when considering developing countries. Therefore, it would be difficult to generate the support of a large number of diverse states and to ascertain whether a new rule has emerged.\textsuperscript{158} Perhaps what is needed is a change in states’ perception that state responsibility is adequate, because such perception ignores the situation in reality that states cannot or will not enforce anti-corruption laws.

Treaty law, on the other hand, stands a better chance of succeeding because treaties are usually between states participating to bind themselves legally to act in a particular way or to set up particular relations between themselves. As a general rule, international treaties provide a source of law only for contracting states. Nations that have not signed, ratified or acceded to a treaty are not obliged to adhere to its terms unless the treaty codifies or constitutes customary international law.\textsuperscript{159}

Currently in international law, there are no relevant multilateral treaties regulating MNCs directly. The International Centre for

\textsuperscript{156} M. Shaw, \textit{International Law}, 5th edn (Cambridge University Press, 2003), pp. 76, 84.
Settlement of Investment Disputes (ICSID) to date is the only convention directly relevant to MNCs. Nevertheless, the use of the ICSID is limited as it is merely a procedural convention, setting up machinery for the settlement of investment disputes through arbitration between states and foreign investors. States should sign treaties which would directly hold corporations responsible. The Rome Statute of the International Criminal Court is precedent for this argument – it holds individuals responsible for violations of egregious crimes, even though the parties to the treaty are states. The dilemma is overcoming states’ reluctance to sign such treaties.

Many states prefer to hold on to the traditional notion that state responsibility is adequate. They also fear their sovereignty being eroded. State sovereignty is a basic principle of international law which gives a state power to rule over matters considered to be within its internal sphere of national jurisdiction. Article 2(7) of the UN Charter states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.\(^{160}\)

International corruption cuts across internal affairs and requires international interventions. The need for more international interventions in curbing corruption is now widely accepted. Many multilateral treaties such as the OECD Anti-Bribery Convention and the UNCAC address the need for international co-operation to prevent and control corruption. The UNCAC also calls for the active participation of civil society.\(^{161}\)

Where states will not or cannot ensure that international law obligations are fulfilled, it is not proper for them to adduce state sovereignty. Reasons for such state failure typically include corruption, bad governance, fear of a race to the bottom and genuine inability due to poor resources. One other reason states may fail to enforce corporate responsibility may be because of the impact this would have

\(^{160}\) Charter of the United Nations, 24 October 1945.

\(^{161}\) See chapter II, article 13 of the UNCAC.
on the sovereignty of another country. This fear of impinging on the sovereignty of another state appears unjustified because international law in many instances puts mechanisms in place to ensure this does not happen. Most extraterritorial laws respect the principles of jurisdiction and cannot apply directly to nationals of a sovereign state. The UNCAC requires state parties to carry out their obligations under the convention in a manner consistent with the principles of sovereign equality and territorial integrity and that of non-intervention in the domestic affairs of other states.\textsuperscript{162}

CONCLUSION

Some transnational laws on bribery project the view that measures ensuring transparency and accountability of corporate books and records will deter bribery of foreign or domestic public officials. While such measures would go a long way in combating bribery, by themselves they are insufficient. There is a need to add legislative measures which criminalise the act of bribery with appropriate sanctions. One such measure that has repeatedly been encountered in this chapter is the use of domestic laws which establish transnational bribery as a criminal offence punishable by criminal or non-criminal sanctions.

The chapter examined the adequacy of international laws to hold corporations responsible. Any law, regional or multiregional, which aims to ensure corporate responsibility solely through domestic laws will face the same hiccups – problems of enforcement – which domestic or extraterritorial laws face. The possibility of direct corporate responsibility in relation to international corruption was therefore considered.

The arguments for direct corporate responsibility veered from the well-trodden path of universal jurisdiction, state enforcement and responsibility for accomplishing international law. Instead, the focus was on the need for international law to respond to the failure of states to enforce international legal norms via the impact such a response will have on corporate responsibility.

\textsuperscript{162} See chapter 1, article 4 of the UNCAC.
On the whole, international law primarily works through state intervention. Direct corporate responsibility in relation to international crimes is highly unconventional and would require state consent to be developed. The issues raised in this chapter would need to be given further consideration in future attempts to regulate corporations in international business.
Most writings on attempts to curb corruption focus on criminal law enforcement. In many countries, corruption is a crime. Nevertheless, criminal enforcement is inadequate to curb corruption and may not be the most suitable form of deterrence. Moreover, it is generally accepted that curbing corruption involves a multifaceted approach. Civil law remedies have the potential to act as deterrents against international corruption.

There have been calls for a closer examination of the use of non-criminal legal tools, including private rights of action, to complement the work of public prosecutors in the fight against corruption.¹ Attempts have been made to examine civil law impacts on corruption.² This chapter explores the use of civil law remedies as an avenue for curbing corruption in the context of CSR. It will focus on cases brought by or against corporations, thus addressing CSR issues.

Civil law enforcement occurs when private parties bring disputes for resolution before a court of law or arbitration tribunal. The discussions in this chapter will focus on the enforceability of international contracts tainted by illegality, particularly contracts tainted by bribery. It will also focus on the development of private rights of actions for damages by victims of corruption. The chapter will examine (1) decisions of English domestic courts in enforcing awards granted by arbitral tribunals where the defendant contends that the underlying contract is illegal and contrary to public policy; (2) decisions of international commercial arbitrations which have dealt with the validity of contracts tainted by

bribery; and (3) decisions of English or US courts in civil suits brought by competing bidders alleging bribery and claiming damages. An analysis of the decisions of the courts and tribunals is useful for determining the impacts of civil law remedies in the fight against corruption.

Corruption and the Enforceability of International Contracts

When a contract is tainted by illegality, its enforceability is subject to public policy considerations. Public policy is difficult to define; however, for it to come into play there must be some element of illegality or suggestion that enforcement of the contract would be clearly injurious to public good or offensive to the ordinary reasonable and fully informed person. In many countries, the bribery of domestic and foreign public officials to obtain business is a crime and therefore illegal. Any contract which arises from such payments would be tainted with illegality and unenforceable.

Illegality is a complex subject in contract law. For the purposes of this chapter, discussions on illegality are limited to allegations of bribery in international contracts. The context in which the issue will be addressed is firstly in relation to enforcement of arbitral tribunal awards in domestic courts in situations where the contract’s governing law is different from the law of the place of enforcement. Discussions on enforcement of foreign arbitral awards tainted with bribery will be limited to enforcement of such awards in England. Secondly, the issue will be addressed in relation to the approach of arbitral tribunals in the determination of the validity of contracts tainted by illegality.

Enforcement of foreign arbitral awards tainted with bribery

To put the issue in context, if an arbitral tribunal’s award is to be enforced in English courts, but the defendant contends enforcement

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3 In English law, an illegal transaction is one which involves the commission of a legal wrong in its formation, purpose or performance or conduct which is otherwise contrary to public policy. See Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, Consultation Paper no. 154, p. 2.


on the grounds that the underlying contract is illegal and therefore contrary to public policy, what is the position of the English courts? The answer would depend on a number of factors.

First, it is important to stress that in these situations, the courts are concerned with enforcing an arbitral award as opposed to enforcing a contract. When the courts are enforcing an arbitral award, they must pay attention to the facts and the reasoning of the arbitrators as they appear from the award. The court is considering the enforcement of the award not the underlying contract. In the OTV v. Hilmarton case, Walker J stressed he was not adjudicating the underlying contract but deciding whether or not arbitration awards should be enforced. However, the underlying contract is not isolated from the award. English courts would take cognisance of the fact that the underlying contract, on the facts as they appear from the award and the arbitral tribunal’s reasoning, does not infringe one of those rules of public policy where English courts would not enforce it whatever its proper law or place of performance. Such rules were referred to as universal principles of morality in Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd.

In Lemenda, the court was concerned with enforcing an English contract which was to be performed abroad, but if performed in England would have been contrary to public policy. The court held that because the contract was against English public policy and the public policy in the place of performance, the contract was unenforceable. The court had to decide whether the fact that it was against public policy in England barred enforcement when the place of performance was Qatar. The judge considered the subject headings for public policy in England and concluded some are based on universal principles of morality. Where the contract infringes such rules, it will not be enforced whatever the proper law of contract or place of performance. However, the judge did not go as far as to say the particular case fell under such headings. The Lemenda case involved parties entering into a contract to pay for the use of personal

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influence to procure renewal of a contract, in a situation where the party to be influenced was unaware of the pecuniary motive. Where the case does not fall under this heading, other principles of public policy based on purely domestic considerations apply. Such considerations may or may not lead to refusal to enforce. In this instance, the judge based his decision on principles of morality of general application. He refused to enforce the contract because he felt international comity and English domestic public policy militated against enforcement.

In *Westacre Investments Inc. v. Jugoinport SPDR Holding Co. Ltd*, Waller L J, referring to the *Lemenda* case, said that where contracts did not fall into the first category in *Lemenda*, and the place of performance was not England, English courts would not enforce the contract only if the place of performance as well as the English courts found the contract unenforceable. Waller L J concluded that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view. Therefore, it is not only the public policy of England, the place of enforcement, which needs to be considered, but the public policy of the place of governing law, place of performance and curial law.

Second, it is also important to point out what happens if on the face of the award, the tribunal finds no illegality, but the defendant in a court of enforcement claims the contract is illegal and therefore against public policy and should not be enforced. This is what happened in *Westacre*; the question the court sought to answer was whether a defendant should be allowed to go beyond the facts and reasoning of the arbitral tribunal award. In other words, should the facts as found by the arbitrators be re-examined? In *Westacre*, Colman J, the trial judge, said that if the arbitral tribunal considered the issue of illegality and concluded the contract was not illegal, the court would enforce the award.

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In the Court of Appeal, Waller LJ was quick to point out that there may be situations where the court would inquire into an issue of illegality even if the arbitrator found no illegality.\textsuperscript{16} He stated that there were exceptional cases where the courts would allow a party to reargue. One such case is where illegality is raised and the evidence is so strong that if not answered it would be decisive of the case.\textsuperscript{17} The nature of the illegality, strength of the case for illegality and extent to which the asserted illegality was addressed at the arbitral tribunal were important factors he mentioned.\textsuperscript{18}

Waller LJ felt the \textit{Westacre} case called for reargument. Unfortunately, the other members of the court did not agree with him in this regard. Mantell LJ felt the allegation of bribery had been made, entertained and rejected in the arbitral award and this was clear from the award itself.\textsuperscript{19} Applying the criteria suggested in \textit{Soleimany v. Soleimany},\textsuperscript{20} he concluded that even if a preliminary inquiry was necessary, on the facts of the case it would lead to the same conclusion that the facts should not be reopened. In Mantell LJ’s opinion the \textit{Westacre} tribunal was a straightforward commercial contract. The arbitrators had specifically found that the underlying contract was not illegal. There was nothing to suggest incompetence on the parts of the arbitrators and no reason to suspect collusion or bad faith in rendering the award. Therefore, the decision of the arbitrators was unquestionable.

In the High Court, Colman J had also said that if enforcement is resisted on the basis that facts not placed before the tribunal demonstrates the contract is illegal, the courts would consider whether the public policy against the enforcement of illegal contracts outweighs the countervailing public policy in support of finality of awards.\textsuperscript{21}

\textsuperscript{16} \textit{Ibid.}, 310H–311A. \textsuperscript{17} \textit{Ibid.}, 311G. \textsuperscript{18} \textit{Ibid.}, 314G. \textsuperscript{19} \textit{Ibid.}, 316F.
\textsuperscript{20} [1999] QB 785. Waller LJ had suggested obiter in \textit{Soleimany v. Soleimany} that if the arbitrator held there was no illegality, an enforcement judgment if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Inquiry should include whether there is evidence on the other side to the contrary; whether the arbitrator expressly found the underlying contract was not illegal or it is fair to infer he did not reach that conclusion; whether there is anything suggesting the arbitrators were incompetent; whether there has been collusion or bad faith in order to procure the award despite illegality. See paras. 800E-G of judgment.
\textsuperscript{21} \textit{Westacre Investments Inc. v. Jugoimport SPDR Holding Co. Ltd} [1999] QB 740 at 767H–768A.
Colman J concluded that the public policy of sustaining international arbitration awards on the facts of the case outweighed the public policy in discouraging international commercial corruption.\textsuperscript{22} However, he felt that if it had been a case of drug trafficking the court should go behind the judgment in the interest of public policy.\textsuperscript{23} In the Court of Appeal, Waller LJ preferred to place commercial corruption on the same level as drug trafficking, and perhaps rightly so. More importantly, he felt that if the defendants were allowed to reopen their case, the allegation of commercial corruption would fall within category 1 in \textit{Lemenda} – contracts against universal principles of morality which English courts would not enforce.\textsuperscript{24}

Therefore, from the foregoing, it can be said that if an international contract is tainted with illegality, a party seeking to enforce an arbitral award on account of the contract will be unsuccessful on the grounds of public policy if the rules of public policy infringed are those which, whatever the proper law and whatever the place of performance, English courts will not enforce, i.e. if the infringements fall under principles of universal morality. Such infringements would apply to universally condemned activities such as terrorism, drug trafficking, prostitution, paedophilia, fraud and corruption.\textsuperscript{25} However, if the rules of public policy infringed are based on purely domestic public policy, the rules of the place of performance, governing law and place of enforcement are important factors to be considered.\textsuperscript{26} The courts also have to factor in whether the arbitral tribunal considered illegality or not. If they did consider illegality and found none, the award will be enforced subject to the enforcing court being able to carry out a preliminary inquiry where evidence is adduced that an award is based on illegal contract.\textsuperscript{27}

Applying the aforesaid to situations of bribery and corruption, it seems clear that in cases where on the face of the award there is undisputable illegality, such a finding gives rise to obvious policy considerations. Further, such policy considerations would fall under \textit{Lemenda} category 1, where English courts will refuse to enforce. In

\textsuperscript{22} Ibid. 773C. \textsuperscript{23} Ibid.
\textsuperscript{24} Westacre Investments Inc. v. Jugoinport SPDR Holding Co. Ltd, CA [2000] 1 QB 288 at 315A-B.
\textsuperscript{25} Westacre Investments Inc. v. Jugoinport SPDR Holding Co. Ltd [1999] QB 740 at 775B.
\textsuperscript{26} [1988] QB 448. \textsuperscript{27} [1999] QB 785.
Hilmarton v. OTV, Walker J made it clear that Soleimany v. Soleimany was the kind of case which fell into the category of cases where as a matter of public policy no award would be enforced by an English court. In Soleimany v. Soleimany, it was clear from the face of the award that the arbitrator was dealing with an illegal enterprise for smuggling carpets out of Iran. However, the arbitrator considered the illegality of no relevance under the applicable Jewish law. The court held that the enforcement was governed by the public policy of the lex fori and refused to enforce the contract as it was against public policy.

The difficulty lies where an arbitral tribunal decides there is no bribery or, in other words, it does not appear from the face of the award that there was bribery. In such cases, the judgments suggest English courts would enforce the award if a foreign proper and or curial law holds there is no corruption. This is despite the fact that had the decision been made in England, the English courts may have concluded the underlying contract was against public policy and therefore unenforceable.

International commercial arbitration and the validity of international contracts tainted with bribery

International commercial arbitration tribunals have had to consider the effect of corruption on international contracts. These have raised issues about the role of arbitrators in addressing international corruption, which is an international crime that the international community is seriously and aggressively trying to curb. Transnational public policy is emerging which aims to ensure that corrupt contracts are not upheld, and such policy is evident in anti-bribery conventions. Increasingly, tribunals are relying on the anti-bribery conventions as the basis for such policy.

In the International Centre for Settlement of Investment Disputes (ICSID) case of World Duty Free Company Ltd v. The Republic of Kenya, the claimant had obtained a contract for the construction,
maintenance and operation of duty-free complexes at international airports in Kenya. At the arbitral tribunal, the claimant contended that the government of Kenya expropriated its property and destroyed its rights under the investment agreement, and requested restitution or alternative compensation. During the proceedings, it was discovered that the claimant had paid US$1 million to the then president of Kenya as bribes to obtain the contract. The respondent contended that the investment agreement was unenforceable and requested the dismissal of the claims on the grounds that bribery of foreign public officials was against international public policy. Further, the respondent added that under the applicable English law the investment contract was voidable as a result of the bribery and it, as the injured party, had validly avoided the contract.

The tribunal in reaching a decision considered first, whether a bribe had been paid; and second, whether the investment contract in dispute had been procured as a result of the payments. The answers to both considerations were affirmative. As a result, the tribunal had to consider the consequences of the bribe on the enforceability and validity of the agreement under international public policy and applicable laws. It concluded that in the light of domestic and international conventions relating to corruption and decisions of courts and tribunals, bribery is contrary to transnational public policy and cannot be upheld by the tribunal. In reaching this conclusion, the tribunal examined two concepts of international public policy: one narrow concept, which relates to domestic public policy applied to foreign awards, and a broader concept, which may be more appropriately called ‘transnational’ or ‘truly international’ public policy as it relates to a universal conception of universal standards and accepted norms.

Concerning narrow domestic public policy, the tribunal considered procedural and substantive applicable English law. Procedurally, domestic public policy prevents enforceability. The tribunal affirmed the decision of Mr Justice Phillips in Lemenda, where he held that English law should not enforce a contract to be

31 A relevant article in the contract had stipulated that applicable law in any arbitral tribunal would be English.
performed abroad which is contrary to English public policy and where the same policy applies in the country of performance. Substantively, English contract law on the avoidance of contracts was the relevant law. English contract law provides that a contract procured by bribery is voidable and the innocent party must take positive actions to set it aside. The tribunal applied the statement of general principle derived from the legal opinion of Lord Mustill that the agreement was voidable at the insistence of the respondent and accordingly the respondent had validly avoided the contract.\textsuperscript{33}

The \textit{World Duty Free} case is unusual. It involved the claimant alleging that money secretly paid to the Kenyan head of state to obtain a contract was not a bribe, but part of the consideration. Bribes are usually paid in secret and are not included as part of the contract consideration. The claimant also alleged that such payments were culturally accepted in the country where payment took place. The claimant’s case was that the personal donation made by its agents was sanctioned by customary practices and regarded as a matter of protocol in Kenya. It was not a bribe. The payments therefore fell within the concept of Harambee, which was a cultural practice of pulling resources together to finance community projects.

In addressing this claim, the tribunal referred to the 2003 report of a Kenyan Task Force on Public Collections or Harambees, where it was noted that ‘over the years, the spirit of Harambee has undergone a metamorphosis which has resulted in gross abuses. It has been linked to the emergence of oppressive and extortionist practices and entrenchment of corruption and abuse of office.’\textsuperscript{34} In the light of international attempts and actions to curb bribery, it is significant to note that a system which creates a situation where corruption can be entrenched is unlikely to be acceptable. Customs are changing and it would be very difficult to hold in these present times that such donations are not bribes but culturally accepted. This is because of the manifest and gross corrupt vices such concepts create or enhance. Reference to such systems should be very carefully scrutinised to see if they entrench corruption. In this case, the tribunal was right to refer to the 2003 report and highlight the link between the Harambee concept and gross abuse of the concept by senior officials in the

\textsuperscript{33} ICSID case no. ARB/00/7. \textsuperscript{34} \textit{Ibid.}, para 134.
country. Such abuse was one of the factors which tilted the payment towards bribery.

Most cases with bribery and corruption issues that come before arbitral tribunals involve payments of fees or commission where a resisting party would allege the agreement was actually for the payment of bribes and is therefore void, negating the arbitration agreement as well. An early international arbitration case of this more usual type is the 1963 ICC case no. 1110. The relevant facts of the case involved an agreement concluded between two parties whereby the respondent promised to pay a commission of 10 per cent of the price of an electrical equipment contract between the respondent and the Argentine authorities. The sole arbitrator, Judge Lagergren, concluded that agreements between the parties contemplated bribing Argentine officials for the purpose of obtaining business, and a major part of the commission to be paid to the claimant was to be used for bribes. He therefore declined jurisdiction on the grounds that the case seriously violated international public policy and would not be entertained in courts in France, Argentina or any other civilised country or arbitral tribunal.

Primarily, ICC case no. 1110 is notable for Judge Lagergren’s decision to decline jurisdiction. However, the decision is noted here for the judge’s observations in the light of witness testimony that, during the Perón regime, everyone wishing to do business in Argentina was faced with the question of bribes, and that the practice of giving commissions to persons in a position to influence or decide upon public awards of contract seems to have been more or less accepted or at least tolerated in Argentina at that time. The judge felt the amounts of money involved were huge and the episodes of corruption were contrary to good morals and to international public policy.

Commentators have stated that Judge Lagergren may have gone too far in 1963 by pronouncing that a general principle of law existed which made contracts seriously violating international public policy invalid or at least unenforceable. The case points to significant

milestones that have occurred in the international public policy arena. Now there is transnational public policy which makes corrupt contracts unenforceable.\(^{38}\) Transnational public policy occurs where there is international consensus as to universal standards and accepted norms of conduct. The current international initiatives and instruments on bribery and corruption, which have already been discussed in previous chapters, illustrate rather nicely the development of such transnational public policy.

The issue whether arbitral tribunals should be allowed jurisdiction in matters involving allegations of bribery and corruption which seriously violate international public policy have been dealt with in many commentaries.\(^{39}\) Commentators have stated that Judge Lagergren failed to distinguish between the separability of the main contract and arbitration agreement.\(^{40}\) However, Gillis Wetter has pointed out that Judge Lagergren had no need to consider the separability doctrine because the arbitration agreement in that case was separate and independent of the main contract, and the judge was aware of this fact.\(^{41}\)

A case which considered the questions of separability and arbitrators’ jurisdiction is the ICC case no. 6401 (1991), *Westinghouse International Projects et al. v. National Power Corporation and the Republic of the Philippines*.\(^{42}\) The case involved two separate contracts. The first contract was between National Power Corporation (NPC) and Burns & Roe for engineering and consulting services provided by Burns & Roe. The second contract was between NPC and Westinghouse Electric, a Swiss company, for the construction of a Philippine nuclear power plant. Westinghouse Electric assigned the contract to two other members of the Westinghouse group. Westinghouse was claiming payments for monies owed to it under the contract while Burns & Roe wanted a declaration that disputes relating to its consulting contract be decided by arbitration. The

\(^{38}\) ICSID case no. ARB/00/7.

\(^{39}\) Lew *et al.*, *Comparative International Commercial Arbitration*. See also Wetter, ‘Issues of corruption before international arbitral tribunals’.


\(^{41}\) See Wetter, ‘Issues of corruption before international arbitral tribunals’, 280.

defendants counterclaimed that the claimants had committed fraud in procuring the contract, amongst other claims. The defendants sought to rescind both contracts and recover restitutionary sums.

The tribunal had to decide whether the arbitration clauses for both contracts were obtained in such a manner as to render the clauses invalid. The tribunal also had to decide whether the contracts were obtained in such a manner as to render them invalid. The defendants’ main allegation was that the contracts and arbitration clauses were invalid because they were procured by bribery and as a result the arbitrators did not have jurisdiction. The defendants’ case was that a Mr Disini, employed as a special representative to both Burns & Roe and Westinghouse, had bribed then president Marcos of the Philippines for the contracts to be awarded to them.

On the issues of arbitrators’ jurisdiction and existence of the doctrine of separability, the parties did not dispute. The tribunal affirmed the basic principle that the tribunal had jurisdiction to determine its own jurisdiction. This is known as the doctrine of Kompetenz-Kompetenz: it recognised the arbitrators’ power to determine their own competency. What the parties disputed was the effect of the arbitration clause on the nullity or invalidity of the main contract resulting from bribery. The claimants’ contention was that the doctrine applied in all events. The defendants argued that if they established that the main contracts were obtained by bribery, the tribunal would have to accept that the doctrine of separability was not absolute.

The tribunal concluded that there may be instances where a defect going to the root of an agreement between parties affects both the main contract and the arbitration clause. The example cited was contract obtained by threat. With regards to the impact of bribery, the tribunal said ‘it would remain to be seen whether bribery if proved, affects both the main contract and the arbitration clause and renders both null and void’. Unfortunately, the tribunal did not consider the impact of bribery as it held onto the facts presented to it that the defendant had failed to prove their allegations of bribery.

43 Other claims of the defendant were that the claimants carried out defective and deficient work, improperly drew a line of credit and abandoned the defective plant before it was complete. Ibid., 4.
Another case which considered the questions of separability and whether arbitral tribunals should have jurisdiction in matters of bribery and corruption in violation of international public policy is the ICC case no. 7047 (1994). The case involved a consultancy agreement for the sale of military equipment to Kuwait between Westacre and the Federal Directorate of Supply (FDS), Yugoslavia. Jugoimport was the successor to FDS. Westacre was to receive a substantial percentage of the value of the contracts entered into between FDS with the Kuwaiti Ministry of Defence. Payment was to be guaranteed by a bank. The agreement submitted to Swiss law and provided for ICC arbitration in Geneva. FDS terminated the contract and Westacre commenced arbitration in Switzerland. The arbitrators awarded Westacre US$50 million plus interest.

During arbitration, FDS and the bank contended that the agreement was void on the grounds that it violated international public policy. FDS suggested that Westacre had bribed persons in Kuwait for the purpose of persuading those persons to exercise their influence in favour of entering a contract with FDS. These suggestions were not presented in the facts brought before the arbitrators. This proved to be a fatal mistake because the arbitrators felt that the failure to plead bribes in the facts meant they did not have to investigate the claim. However, the arbitral tribunal was of the opinion that they had a right to address issues involving bribery and corruption.

A majority of the tribunal found that FDS had not established bribery or that the activities of Westacre were illicit or that there was anything which rendered the agreement unenforceable as violating international public policy. Attempts to overturn the tribunal’s decision in Switzerland, where arbitration was held, and England, where enforcement was to be carried out, were unsuccessful.

It is interesting to note that in ICC case no. 1110, the judge concluded that the contracts contemplated bribery and declined jurisdiction. In ICC case no. 6401, the arbitrators confirmed their right to jurisdiction. Although bribery was presented in the facts, the

52 See Lew et al., Comparative International Commercial Arbitration, p. 216.
arbitrators concluded that it was not proved. In ICC case no. 7047, bribery, although not presented in the facts, was considered by the arbitrators and they decided bribery had not been proved. When the defendants sought to overturn the arbitrators’ award in Switzerland, they pleaded that Westacre in seeking to enforce the contract were claiming a bribe for a member of the Kuwaiti government. The Swiss court requested the comments of the arbitrators, who stated that the defendants had not put their case across that way in arbitration. In arbitration, they had merely suggested that Westacre had bribed officials.

The cases discussed show that arbitration tribunals have jurisdiction to adjudicate matters involving bribery and corruption. In so doing, arbitrators are in a position to have a positive impact upon the fight against corruption. Where corruption is proved, it may very well be that the contracts would be unenforceable. ICC cases no. 6401 and no. 7047 show the need to plead and prove bribery allegations adequately. Successful pleas and proof of bribery allegations will impact on decisions of both the arbitration tribunal and any domestic court which may be required to enforce the award.

In domestic decisions concerning ICC case no. 7047, both the Swiss and English courts were not willing to challenge the arbitrators’ finding of fact. In the European Gas Turbines SA (France) v. Westman International Ltd (UK) case, the Paris Court of Appeal rejected European Gas Turbines’ request to annul an agreement on the grounds of public policy. European Gas Turbines argued that enforcement would violate both French public policy and morality in international commerce. Therefore, the contract should be declared null and void because its real object was traffic in influence or bribery. The Paris Court of Appeal held there was no proof the contract was illicit.

Bagheri notes that there has been a shift in the pattern of contractual disputes from controversies over private rights to a more public-law-oriented model of contractual failure. He argues that the rule of contract law such as those relevant for illegality should not be used to

54 See the dissenting judgment of Waller LJ discussed above, notes 15–18.
achieve distributional objectives.\textsuperscript{58} According to Bagheri, the aim of distributive justice is to determine the boundaries of an individual's freedom and autonomy as justified restrictions to ensure the welfare of the public at large.\textsuperscript{59} He says bribery and similar offences fall into the category of distributive justice.\textsuperscript{60} In his opinion, the notion of international public policy, which reflects a public sense of justice, can effectively undermine the validity of an arbitration agreement.\textsuperscript{61} Bagheri feels that the most advantageous aspect of arbitration is its capability of maintaining the validity of a contract in the face of its incompatibility with economic regulation.\textsuperscript{62}

Bagheri sees public policy as relevant for distributional objectives or public interests as well as individual interests. In relation to individual interests, public policy applies to principles applied as a moral shield enabling the forum to protect the sanctity of certain values and a minimum standard of justice amongst individuals.\textsuperscript{63} He notes that there has been a failure to substantiate the content of public policy, and its application has been vague and indiscriminate causing confusion and complexity. He calls for the need to detach the justice in international contracts from distributional or welfare considerations.\textsuperscript{64}

Since the publication of Bagheri's book, clear international or transnational public policy in the area of international corruption has emerged. This calls for arbitration tribunals to adhere to public policy which sees international bribery in contract bidding as a crime, and therefore hold such contracts illegal and unenforceable. Where such bribery is proved, arbitral tribunals have a duty to hold the contract unenforceable or invalid. The cases discussed illustrate the recognition of this transnational public policy by arbitral tribunals and should be welcomed.

Arguably, the vast majority of cases which come before arbitration which are tainted by corruption may not even address issues of corruption. Thus in cases where the issues do not involve payment of commission or the case is not a kind similar to the \textit{World Duty Free} case, the issue of corruption may not even be considered. Take a situation where a contract between two parties comes before arbitration. One of the parties procured the contract through bribes but the

\textsuperscript{58} Ibid., p. 53.  \textsuperscript{59} Ibid., p. 14.  \textsuperscript{60} Ibid., p. 241.  \textsuperscript{61} Ibid., p. 125.  \textsuperscript{62} Ibid., p. 242.  \textsuperscript{63} Ibid., p. 126.  \textsuperscript{64} Ibid., p. 127.
issue before arbitration involves breaches of the contract and no reference is made to the bribery implications, perhaps because the other party is not aware of the payment or because bribery being paid in secret tends to be kept secret. In such situations, it is unlikely that the bribery implication would be considered. Therefore, it may be that the role arbitrators may play in the fight against corruption is limited. Nevertheless, it is useful to highlight situations in which they may play a role and to see the impact if any of their role in curbing corruption and ensuring CSR.

PRIVATE RIGHTS OF ACTION FOR DAMAGES BY VICTIMS OF CORRUPTION

Victims of corruption fall into many different categories. They include citizens of states, individuals and corporations. The focus here will be on corporations as victims and perpetrators of international corruption in contract bidding. In international business, corporations usually compete to bid for contracts and there may be instances where one corporation obtains the bid as a result of corrupt practices. The cases which will be discussed suggest that in such cases the losing bidder may be able to initiate a civil suit claiming damages.

Article 3 of the Council of Europe Civil Law Convention on Corruption requires member states to provide in their internal laws private right of action by persons who have suffered damages as a result of corruption. Such persons have rights to initiate actions to obtain full compensation for such damage. Article 35 of the UNCAC also provides a similar private right of action. It requires states to take measures in accordance with domestic law principles to ensure entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for the damage in order to obtain compensation.

One author has noted that the broader reach of the UN convention will accelerate the trend for civil liability in recent years for parties who

claim injury from another’s corrupt practices to bring civil suits.\textsuperscript{67} Whether this will be the case is yet to be seen. The US has noticeable civil liability cases for damages as a result of corrupt practices. The US has noted that its current laws and practices are in compliance with article 35 of the UNCAC.\textsuperscript{68} It is therefore unlikely, at least in the case of the US, for the trend to be accelerated. This is because the US does not plan to adopt new federal legislation establishing a cause of action for damages suffered from corruption.\textsuperscript{69} Rather, avenues for civil liability would still need to rely on existing practice. Indeed, the FCPA, which is a major piece of legislation dealing with the criminality of transnational bribery, does not create a private right of action for damages.\textsuperscript{70} This is despite the numerous calls for the FCPA to include private rights of action.\textsuperscript{71}

**Private actions against corrupt competitors in international commerce**

In the UK, discussions on civil remedies for corruption focus on rights available under agency law and fiduciary relationships.\textsuperscript{72} A very well-cited case dealing with corruption, agents and civil remedies is *Attorney General for Hong Kong v. Reid*\textsuperscript{73} in which the Privy Council held that an agent holds a bribe as a constructive trustee for his principal. Reid was liable to the Hong Kong government for breach of fiduciary obligations. The Hong Kong government, the


\textsuperscript{68} Ibid.


\textsuperscript{72} See Nicholls et al., *Corruption and Misuse of Public Office*, chapter 6. See also Berg, ‘Bribery-transaction validity and other civil law implications’.

\textsuperscript{73} [1994] 1 AC 324.
victim of the bribe, was entitled to assert proprietary interest in any assets in which the money can be traced. Many commentaries have addressed the issues raised by the Attorney General case. The concerns here are with civil remedies for corporations which are victims of corruption in the contract bidding process. Can such companies recover damages for the loss of the contract? It is recognised that a company which tenders for a contract but fails to procure it because of bribery, can make a civil claim for damages for loss suffered. Actual cases brought before English courts where companies sue for damages for failing to procure contracts as a result of the bribes of a competitor are very limited. Across the Atlantic in the United States, there are more cases reported of companies suing one another for damages resulting from the loss of contracts due to the bribery activities of competitors. Many such claims are filed under breaches of federal laws such as the Racketeer Influence and Corrupt Organization (RICO) and Robinson-Patman Act.

A well-known case which involved claims for damages for bribery by competitors is Kirkpatrick v. Environmental Tectonics Corporation International. In that case, Environmental Tectonics Corporation (ETC) alleged that Kirkpatrick obtained a construction contract as a result of bribes they paid to public officials of the Nigerian government. ETC sought to recover damages for loss of contract from Kirkpatrick for violations under two federal laws, namely RICO and the Robinson-Patman Act, and relevant state laws. Kirkpatrick sought to dismiss the


75 See Nicholls et al., Corruption and Misuse of Public Office, para. 6.04; Berg, ‘Bribery-transaction validity and other civil law implications’, p. 36. In English law, the claim would be based in tort for ‘illegal means’ conspiracy action.

76 See Nicholls et al., Corruption and Misuse of Public Office, para. 6.21. See also Berg, ‘Bribery-transaction validity and other civil law implications’, p. 62, which cites one English case, Lonrho v. Fayed [1992] 1 AC 448. The actual case deals with conspiracy but there were no allegations of bribery.


78 The RICO claim was under 18 USCS sections 1962–1968. The Robinson-Patman claim was under 15 USCS section 13(c), which states under the heading ‘Payment or acceptance of commission, brokerage or other compensation’:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in
complaint on grounds, inter alia, that the suit was barred by the act of state doctrine. The district court dismissed the suit, holding that it was barred by the Act of State Doctrine. The Court of Appeal for the third circuit held that the Act of State Doctrine did not apply to this case because adjudication of the claims would not require the courts to pass judgment on the validity of the foreign government’s action within its own borders. ETC was claiming damages from Kirkpatrick not the Nigerian government. Rather, the case involved a determination as to a factual matter of whether Kirkpatrick’s alleged bribery motivated the award of the contract. The Supreme Court affirmed that position.79

Although the Kirkpatrick case is better known for the Supreme Court’s judgment regarding the Act of State Doctrine, the decision of the Court of Appeal and Supreme Court that the Act was inapplicable called for a decision on the claims of ETC. The claim was based on violations of federal laws, which if proved would result in substantial damages to ETC. It has been noted that a private RICO action could be wielded as a business weapon by an envious party alleging that a competitor’s foreign bribery gave rise to an award of a contract.80 However, it must be said that the success or otherwise of such cases is subject to rigorous proof and so the use of RICO for such purposes may be very burdensome and expensive.

In the US, claims may also be brought under tort law for intentional interference with prospective economic advantage.81 In the Korea Supply Co. v. Lockheed Martin Corp., the Supreme Court of California affirmed the elements of the tort of intentional interference

connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

The court of appeal said a direct competitor of a company that obtains a contract through bribes has standing to press a section 2(c) claim against the bribery. For more on regulation of anti-competitive effects of bribery, see Note, ‘Bribery and brokerage: an analysis of bribery in domestic and foreign commerce under section 2(c) of the Robinson-Patman Act’, 76 Mich. LR 1343.

Ibid.


See 29 Cal. 4th 1134 (2003). The case also involved claims under California’s Unfair Competition Law, but this claim was unsuccessful in the Supreme Court.
with prospective economic disadvantage, which it had laid down in *Buckaloo v. Johnson*. The Supreme Court also found the elements present in the case and concluded that Lockheed Martin was guilty of the tort. The facts involved the Republic of Korea’s desire to purchase military equipment and solicitation of bids. Loral Corporation and MacDonald Detwiller and Associates Ltd were competing bidders. Korea Supply Co. (KSC) represented MacDonald Detwiller in its bid and stood to receive a substantial commission of over $30 million if the bid went to MacDonald Detwiller. Loral, which is now Lockheed Martin, got the bid. KSC contended that although its client’s bid was lower and its equipment superior, Loral got the contract because it had offered bribes and sexual favours to key Korean officials.

**CONCLUSION**

Civil law remedies have a substantial role to play in the anti-corruption campaign and there is some awareness of the possibilities of civil remedies. However, much still needs to be done to raise this awareness. Studies on corruption focus on criminal remedies. In this chapter, the impact of arbitration tribunal decisions on contract validity tainted by bribery was considered. Where such tribunals have awarded contracts in situations tainted with bribery, courts have had to decide whether such awards should be enforced. The process involves applications of contract laws and private international laws carried out through civil litigation.

With the development of transnational anti-bribery standards derived from international laws which arbitrators are increasingly required to adhere to, the roles of arbitrators in the anti-corruption campaign is gaining recognition. However, there is the view that arbitrators should uphold contracts, public interests should be distinguished from private interests and arbitration may not be suitable for

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82 *Buckaloo v. Johnson* 14 Cal.3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865. These elements are usually stated as follows: ‘(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant’, *ibid.*, 950.

83 See 29 Cal. 4th 1134 (2003), 1140.
addressing public interest concerns. Arbitration has an important role to play in bringing civil remedy to the fore-front of anti-corruption attempts. There is a need for arbitrators to adhere to global condemnation of anti-corruption and where possible do their part to address these concerns.

The chapter also considered the impact of domestic decisions in civil suits brought between parties competing for contract awards. There is recognition that such parties may be able to sue under tort laws. In the US such actions may be successful under the tort of intentional interference with prospective economic advantage. In the UK, such actions may be successful under tort law for ‘illegal means’ conspiracy. Cases in the UK have not been as forthcoming as cases in the US. Nevertheless, for either tort law to be successful, parties alleging the tort need to provide satisfactory evidence to fulfil the burden of truth.
Some have argued that any attempt to improve corporate behaviour should focus on a change in perception of corporate governance and corporation law.¹ Presumably, this is because corporations are the products of public policy and legislative actions.² International corruption, the focus of this book, is not typically addressed via corporate governance; rather, it is addressed via the laws, frameworks, principles and standards which have been discussed in previous chapters.

However, in recent times the relationship between CSR and corporate governance has been the subject of much scrutiny. The main thrust of this book is to position international corruption squarely within the CSR discourse. Accordingly, this chapter will examine the impact of corporate governance in curbing international corruption from a CSR perspective. It will consider the roles of shareholders and institutional investors in curbing international corruption.

The chapter will also seek to clarify whether the current approach of corporate governance towards broad CSR issues such as international corruption, human rights and environmental issues is adequate or even capable of addressing such issues. Internal CSR issues, which include regulation to prevent corporate fraud, corruption and other vices internal to the company, will not be discussed in any detail in this chapter.

**WHAT IS CORPORATE GOVERNANCE?**

Primarily, corporate governance deals with the relationship between shareholders and directors in managing the affairs of the company. The UK Cadbury Report on the Financial Aspects of Corporate Governance refers to corporate governance as the system by which companies are directed and controlled.\(^3\) The Cadbury definition has most successfully stood the test of time and is most widely adopted.\(^4\) Generally, corporate governance focuses on the system of controlling and directing a corporation, particularly the structure and process of governance. The structure includes the make-up of boards, numbers of and types of non-executive directors, and board committees, while the process includes the provision of information, internal controls, financial reporting and terms of service agreements.\(^5\)

Corporate governance also addresses the core areas of board responsibility such as strategy, performance, conformance and accountability to shareholders.\(^6\) The UK Corporate Governance Code consists of principles and provisions aimed at guiding effective board practice.\(^7\) The US Sarbanes-Oxley Act aims to protect investors by improving the accuracy and reliability of corporate disclosures.\(^8\) These issues are all internal to the company, although they may have external consequences. If a company collapses, creditors may be affected, employees will lose jobs with dire consequences for their families and communities may feel the impact.

Generally, corporate governance does not focus on ‘values’ or other behavioural matters which CSR is typically concerned with. However, the need to give attention to broader values is becoming an essential part of good governance, and the part values and other ‘softer’ issues should rightly play in the approach to good corporate governance is now being considered\(^9\) in the governance literature. Smerdon’s

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5 Ibid., p. 2.

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explanation is premised on the purpose of corporate governance. He discusses two shareholder theories, namely the shareholder value theory, which has been developed into the enlightened shareholder value theory, and the stakeholder or pluralist theory.\textsuperscript{10}

The shareholder value theory, as the name suggests, is concerned with profit maximisation for the benefit of the owners. The enlightened shareholder value theory seeks to generate long-term shareholder value, but requires companies to consider the interests of wider groups including employees, suppliers, customers, the environment and society.\textsuperscript{11} This view is based on the Company Law Review, which recognises that the company needs to foster relationships with its employees, customers and suppliers; maintain its business reputation; and consider the company’s impact on the community and the working environment.\textsuperscript{12} The stakeholder theory on the other hand sees the company serving a range of wider interests such as employees, suppliers, local communities and the environment as a means of achieving shareholder value.

The enlightened shareholder value theory is the more widely accepted view. In the UK, the Companies Act 2006 imposes a new duty on directors to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to (a) the likely consequences of any decision in the long term; (b) the interests of the company’s employees; (c) the need to foster the company’s business relationships with suppliers, customers and others; (d) the impact of the company’s operations on the community and the environment; (e) the desirability of the company maintaining a reputation for high standards of business conduct; and (f) the need to act fairly as between members of the company.\textsuperscript{13} However, there has been widespread concern regarding the codification of directors’ duties and there are fears this will give rise to a plethora of litigation.\textsuperscript{14}

In parliamentary debates about section 172, there was considerable concern that the clause gives rise to uncertainty as to exactly what such a duty involves and to whom it is owed and how it is to be discharged.

\textsuperscript{10} Ibid., p. 19.
\textsuperscript{12} Modernising Company Law, CM 5553, July 2002.
\textsuperscript{13} Section 172(1), Companies Act 2006.
\textsuperscript{14} Smerdon, A Practical Guide to Corporate Governance, p. 17.
Under the common law formulation, directors’ duties were owed to the company and section 170(1) of the Companies Act 2006 repeats this formulation.\textsuperscript{15} This means that only those who can act on behalf of the company can enforce these duties. Section 172 sought to address the issue of whose interests directors are required to pursue in the exercise of their powers. Section 172 makes it clear that the shareholders’ interests are the primary objects of the directors’ efforts.\textsuperscript{16} It remains to be seen what effect this new duty will have on CSR standards, but at the present time it has generated a spate of controversy. For the time being, it seems that models of corporate governance in the UK and US, at least, focus on shareholder primacy.

**CORPORATE GOVERNANCE AND CORRUPTION**

From a CSR perspective, it appears that corporate governance has a limited role to play in attempts to curb international corruption. There are a number of reasons for this limitation. For one, it appears that any role corporate governance may have is linked to shareholder value and the business case for CSR. The problem here is that CSR involves more than corporate governance. Corporate governance primarily deals with the relationship between managers and shareholders, particularly as it relates to shareholder value. CSR deals with the relationship between the company and multiple stakeholders.

However, in the governance literature, there is now talk of a business-focused objective and values-based understanding of corporate governance.\textsuperscript{17} The business-focused objective aims to increase shareholder value, consider legitimate interests of stakeholders, control financial, business and operational risks and reduce the cost of capital, while the values-based understanding aims to promote honesty, integrity, openness and transparency amongst other values. Models of corporate governance structures which are embracing CSR matters are developing. An example is HSBC, which has a corporate


\textsuperscript{16} Ibid.

\textsuperscript{17} See Smerdon, *A Practical Guide to Corporate Governance*. See also Nester, ‘International efforts to improve corporate governance’.
Financial reporting requirements mandate listed companies to report on CSR-type information such as environmental, employees, social and community issues. Many corporations now produce sustainability reports, which give information on their economic, social and environmental performance. Sustainability reporting enables companies to measure, disclose and be accountable to internal and external stakeholders.

CSR in an era of globalisation is international in outlook, while corporate governance traditionally is confined to domestic law. Corporate governance is a domestic attempt at regulating or promoting good corporate behaviour through corporate best practice. Corporate governance issues are typically addressed in a domestic setting. A mechanism which focuses on domestic law is clearly inadequate for regulating corporate behaviour in an era of expanding corporate power and influence. The principles guiding traditional corporate governance are therefore inadequate for the CSR issues at hand.

Another commentator notes that on the transnational and international level, the fields of international law and increasingly human rights law are the core fields within which corporations are discussed. At this level, the domestic law framing of the issue of CSR – the extent to which the corporation may or must take into account effects of its actions on others, and the fundamental limitation of ultimate corporate purpose to shareholders – is increasingly rejected.

The OECD Principles on Corporate Governance, which are international in focus, note that issues relevant to a company’s decision-making process, such as environmental, anti-corruption and ethical concerns, although taken into account, are treated more explicitly in

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19 For example, see Companies Act, 2006 section 417.
20 For example, see Shell Sustainability Report 2010, www.shell.com/home/content/environment_society/reporting/s_reports/.
other OECD and international organisation instruments, such as the OECD Anti-Bribery Convention and the UNCAC. These broad CSR issues are not addressed in any detail in the OECD Principles on Corporate Governance, despite the fact that many corporations are global in outlook, with networks of operations in different countries, and that CSR issues are typically relevant for such corporations.

CSR issues which are external to the company, such as bribery of public officials (domestic and foreign), human rights and environmental abuses, are not effectively covered by corporate governance. Primarily, this is because the origins of corporate governance stem from the need to respond to the problems caused by separation of ownership and control. It is only recently that corporate governance recognises that corporations have obligations to multi-stakeholders and developments in this area may still be at the evolutionary stage.

There is not much scope for other stakeholders to participate in the internal aspects of corporate governance. Any possibility of widening participation seems limited to creditors and employees, who can be said to have a long-term interest in the business of the corporation. One commentator notes that corporate governance focuses on the suppliers of capital (creditors and shareholders) and the managers or those who control management.

However, a broader view of corporate governance, which would focus on multi-stakeholders, has been canvassed by some commentators because the governance of large corporations has an impact on other interests and such interests have a role to play in corporate governance. It is hotly debated whether models of corporate governance should include a role for stakeholders other than shareholders.

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26 See Horrigan, 'Comparative corporate governance developments'. See also Nicholas Bourne, 'Corporate governance in the UK and overseas' (2007) 28 Bus. L Rev. 292, which notes that current thinking on corporate governance recognises corporations' obligations to stakeholders. See also Report of the Committee on the Financial Aspects of Corporate Governance, 1 December 1992, which discusses the shareholder value theory and the stakeholder theory.
Stakeholders are persons who affect or are affected by the actions and activities of organisations and who corporations should be responsible to. They include shareholders, employees, creditors and the society as a whole. Commentators who hold this view say that the role of stakeholders can be viewed from an external or internal perspective. An external perspective sees stakeholders as outside the purview of internal corporate governance and may suggest that their interests be protected by the concept of corporate social responsibility. An internal perspective, on the other hand, aims to include stakeholders more directly in corporate governance.

The prospect of including some categories of stakeholders is feasible and already happening. However, such stakeholders are limited to employees and creditors. The prospect of including general stakeholders such as the ‘nation/society’ more directly in corporate governance models seems stretched. Who would qualify for such stakeholding? What impacts would this have on the business as a whole?

The following subsections will identify and address (1) the use of shareholder derivative suits and (2) the role of institutional investors as examples of the limited role corporate governance currently plays in ensuring responsible behaviour regarding international corruption.

International corruption and the use of shareholder derivative suits

Shareholder derivative suits fall under the umbrella of corporate governance. In this section, shareholder derivative suits will be cited as an example of the impact corporate governance may have on broad CSR issues. As noted in the previous section, traditionally, corporate governance is ill suited for addressing broad CSR matters. However, through the use of derivative actions, corporate governance is able to address the traditional corporate governance notions of shareholder and director management whilst aiding the anti-corruption and CSR campaign. The use of shareholder derivative actions in the US to hold directors responsible for breach of fiduciary duty dealing with fraud or corrupt payments, illegal wrongdoing and waste of corporate assets will be

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31 J. Sabapathy, ‘In the dark all cats are grey: corporate responsibility and legal responsibility’ in Tully (ed.), Research Handbook on Corporate Legal Responsibility.
32 Ibid., p. 479.
33 Davies, Gower and Davies’ Principles of Modern Company Law.
examined. The development of statutory rules in the UK for derivative suits which may impact on broad CSR issues will also be examined.

Discussions in this section will also be relevant for Chapter 5, which focused on civil law remedies, namely the enforceability of international contracts tainted by illegality and the development of private rights of action for damages for victims of corruption as civil remedies. This is because shareholder derivative suits are also civil measures useful in the fight against corruption. The measures discussed in Chapter 5 were viewed from the perspective of contract and torts laws. The measures discussed here will be viewed from the perspective of corporate governance.

*Derivative suits in the US*

Derivative suits allow shareholders to assert a corporate claim when directors fail to do so. The right is a corporate right and recovery goes to the corporation. In the US there have been cases where shareholders have sued their directors for breach of fiduciary duty or waste of corporate assets. For shareholders to pursue a derivative suit, they need to either make a demand on the board of directors or show that demand is excused where such demand would be futile.

The cases discussed here are mainly those dealing with questionable payments made by corporations. In such cases, although the aim of the payments was to further the corporation’s interest, shareholders were able to sue, alleging corporate waste or breach of fiduciary duty. However, the success or otherwise of such derivative suits in the US is frequently hampered by the application in the courts of three rules, namely the business judgment rule, the net loss rule and the no duty to disclose rule. The effects of these rules on decisions of the courts involving derivative suits are considered. The goal is to assist in determining the likelihood or otherwise of success in future cases, and establish the prospect for frequent use of derivative actions in the fight against corruption.

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34 Comment, ‘*Zapata Corp. v. Maldonado*: restricting the power of special litigation committees to terminate derivative suits’ (1982) 68 Va. L. Rev. 1197, 1199.

35 See Note, ‘*Demands on directors and shareholders as a prerequisite to a derivative suit*’ (1960) 73 Harv. L Rev. 746, 748. See also Mark Underberg, ‘The business judgment rule in derivative suits against directors’ (1980) 65 Cornell L Rev. 600, 601.
Business judgment rule  First, the impact of the business judgment rule on three cases will be addressed. In these cases the derivative suits were dismissed as a result of the application of the business judgment rule. The business judgment rule vests responsibility for decision making in the corporation’s board of directors and prevents shareholders from disrupting the board’s decision through derivative actions where the board determines such actions are not in the interest of the corporation. Exception to the application of the rule applies where the decision barring derivative action is made in bad faith, or fraudulently, or where the directors themselves are subject to personal liability in the action.36

In Abbey v. Control Data Corporation,37 a shareholder brought a derivative action to compel seven senior officers and directors of Control Data Corporation (CDC) to repay monies owing to CDC due to civil and criminal penalties brought about as a result of the corporation’s guilty plea to criminal charges. The charges stemmed from illegal payments the corporation had made to certain foreign entities. The shareholder claimed the defendant had violated federal securities law and common law fiduciary principles of corporate waste and mismanagement. In response to the suit, the CDC board created a Special Litigation Committee (SLC) to investigate the charges. The SLC was made up of outside directors not involved in the suit or with no prior knowledge of the illegal payments. The SLC investigation concluded that the suit was not in the best interests of the corporation for a number of reasons, including the fact the defendants had not been directly involved in the payment and had not profited from the acts; and that at the time the payments were made, such payments were a customary business practice.

When the case came before the District Court of New York, the court terminated the derivative action based on the business judgment rule. The shareholder tried to argue that where the defendants are

36 See Abbey v. Control Data Corporation, 603 F.2d 724 (8th Cir. 1979) Cert. denied, 444 US 1017, Auerbach v. Bennet, 419 NYS 2d 920 (1979). See also Gall v. Exxon, 418 F.Supp. 508 (SDNY 1976). Gall concerned shareholder claims that directors’ approval of payments to Italian political parties were a waste of corporate assets and failure to disclose payments violated federal securities laws. The board established a Special Litigation Committee to look into the matter; the committee determined that the suit would not be in the best interest of the corporation.

37 Abbey v. Control Data Corporation.
charged with criminal conduct or violations of federal securities laws, the business judgment rule should not apply. The District Court rejected this and held that where an autonomous board determines reasonably and in good faith that the derivative action is not in the corporation’s best interest, the courts should uphold the board’s decision. Accordingly, the business judgment rule applied. The Court of Appeal affirmed the decision of the District Court and a certiorari to the Supreme Court was denied.

Similarly in the UK, a litigation decision is like any other decision a board of directors might take and should be left to the normal decision-making process of directors.38 However, just as there are exceptions to that rule in the US, in the UK it is clear that the board of directors may not be able to take decisions which are in the best interest of the company. This would be the case where such directors are involved in wrongdoing and the wrongdoers make up the majority of the board or are able to influence a majority of the board.39 In the US, it is common for boards of directors to appoint SLCs to look into whether it is in the best interest of the company to sue for wrongdoing. In the UK, the use of committees is not so well known, although there is the reported case of John Shaw & Sons (Salford) Ltd v. Shaw,40 where the company’s articles allocated the litigation decision to a committee of the board from which the wrongdoers were excluded.41

In Auerbach v. Bennet,42 a shareholder filed a derivative shareholder action against directors of a company, General Telephone & Electronics Corporation (GTE), and the company’s auditors. The shareholder alleged the board of directors were liable to the corporation for breach of their duties to the corporation and should be made accountable for the payments made in those transactions. The case arose because the management of GTE directed internal preliminary investigations into the possibility that questionable payments had been made to public officials or political parties in foreign countries. The investigations revealed that the corporation or its subsidiaries had made payments constituting bribes and kickbacks totalling more than $11 million.

38 Davies, Gower and Davies’ Principles of Modern Company Law, para. 17–2.
39 Ibid.
40 [1935] 2 KB 113.
41 Davies, Gower and Davies’ Principles of Modern Company Law, para. 17–2.
As a result of the derivative action and the possibility of others, the GTE board of directors created an SLC to determine the position GTE should take in litigation involving present and similar shareholder derivative claims. The SLC found there would be no proper interest served if the claim against the directors and the auditors continued. They found the auditors conducted their work in accordance with accepted auditing standards and in good faith. They also found the directors had not violated their duty, had not gained personally and the claim was without merit.

Before the New York Court of Appeal, the important question was whether the business judgment rule applied to shield the decision of the SLC from judicial scrutiny. The SLC was made up of three persons who had joined the board after the transactions were made. The derivative suit was brought against four directors out of a fifteen-member board. It did not appear that any of the directors participated in the illegal transactions, and the other directors had no knowledge of the transactions. The court held that the substantive aspects of a decision by a committee of disinterested directors appointed by the corporation’s board of directors are beyond judicial inquiry under the business judgment rule. However, the court can inquire as to the disinterested independence of the members of that committee and as to the appropriateness and sufficiency of the investigative procedures chosen and pursued by the committee. In this case, the Court of Appeal did not find anything wrong with the method and procedures of the SLC and concluded that the determination of the SLC foreclosed further judicial inquiry.

The cases are useful for analysing the impact shareholder derivative actions can have on CSR, particularly the anti-corruption standard, because they show that shareholders have the right to bring such derivative actions where directors have been involved in bribes. However, the cases also show the difficulties such actions may face. The business judgment rule and the use of independent committees by boards of directors impacts on derivative actions and where properly applied may be used to halt such actions.\textsuperscript{43} Commentators have

\textsuperscript{43} George Dent, ‘The power of directors to terminate shareholder litigation: the death of the derivative suit?’ (1980) 75 Nw. UL Rev. 96. For a more recent discussion on problems shareholder litigation faces with regard to special litigation committees, see Eric Moutz, ‘\textit{Janssen v. Best & Flanagan: at long last, the beginning of the end for the Auerbach approach in Minnesota?’} (2003) 30 Wm. Mitchell L Rev. 489.
opined that the application of the business judgment rule must face increased scrutiny to halt the regrettable trend towards judicial abdication and managerial immunity. There is a need for derivative suits to remain an effective tool for shareholder attempts to redress corporate wrongs.

In the light of Zapata Corp. v. Maldonado, the business judgment rule may not have the final say in determining whether a derivative suit should proceed or not. Zapata introduced the application by the court of its own independent business judgment. The Zapata case is different from the cases of Abbey Control Data Corporation and Auerbach because it did not concern breaches of corporate waste for bribery payments. However, it is similar to those cases because it involved the application of the business judgment rule, derivative suit and decisions of a committee. Commentators have stated that the Delaware Supreme Court’s decision in Zapata preserves the derivative suit as an effective means of redressing breaches of fiduciary duty by corporate management.

In Zapata, a shareholder brought a derivative suit against ten directors and officers of Zapata Corp. alleging breaches of fiduciary duties. The board of directors created an investigation committee made up of two new board members appointed after the alleged acts to look into the case and other cases. The investigation committee concluded that the suits against the corporation should be dismissed. Zapata Corp. moved for dismissal or summary judgment. The Chancery Court refused to grant summary judgment on the grounds that the business judgment rule is not a grant of authority to dismiss derivative actions and shareholders have individual rights to maintain derivative actions in certain cases. Zapata Corp. thus brought this interlocutory appeal before the Supreme Court of Delaware, which rejected the grounds on which the Chancery Court denied summary judgment.

45 Ibid. 46 430 A.2d 779.
46 Leah Tompkins, “Corporations – the court’s independent business judgment will be applied to a decision of a committee of disinterested directors to dismiss a derivative suit alleging a breach of fiduciary duty by a majority of the corporations’ directors” (1982) 27 Vill. L. Rev. 1308, 1324. See also Comment, “Zapata Corp. v. Maldonado”, 1198.
48 430 A.2d 779, 785.
However, with regards to the role the business judgment rule should play in dismissing derivative suits brought by shareholders, the Supreme Court was of the view that mere inquiries into independence, good faith and reasonable investigation were not a sufficient safeguard against potential abuse.\textsuperscript{49} The court devised a two-step test which should be applied in cases where motions are filed for dismissal of derivative suits where an independent committee has carried out an objective and thorough investigation.

Step 1 inquires into the independence and good faith of the committee and bases of the supporting committee’s conclusions. If the court determines that the committee is not independent or has not shown reasonable bases, the court should deny the corporation’s motion. However, if the court is satisfied that the committee is independent and has shown reasonable bases for good faith findings and recommendations, the court will proceed to step 2. Step 2 requires the court to apply its own independent business judgment. The aim is to thwart instances where the corporation meets the criteria in step 1 but the result does not satisfy its spirit, or to prevent termination of shareholder grievance which needs further consideration in the company’s interest.\textsuperscript{50}

Another commentator has noted that perhaps the Zapata case overprotects the shareholder and questions whether the court’s two-step test adequately balances the competing interest of shareholders and corporations. It may be that the first step sufficiently balances the competing interests because it accounts for the corporation’s need to rid itself of detrimental litigation by demonstrating a reasonable basis and protects shareholder interest, as the court would not dismiss the suit unless it was convinced decisions were made on a sound basis.\textsuperscript{51}

While this argument is valid, in the light of decisions before Zapata, where courts were dismissing derivative suits because the business judgment rule applied and had been applied procedurally accurately, it may be easier to understand the basis for the two-step process. Overall it seems its goal is to achieve fairness, with a slant towards protecting shareholders who are the more vulnerable party in need of assistance in such instances. In any case, a subsequent decision by

\textsuperscript{49} Ibid., 787. \textsuperscript{50} Ibid., 788–9.
the Supreme Court of Delaware four years after Zapata has held that courts need not, but may, exercise their own business judgment. This decision brings Delaware’s view closer to Auerbach and other New York decisions, thereby justifying the arguments that the second step of Zapata is unnecessary.

In the UK, the power to initiate litigation is a managerial power. However, it may be that it is not only the board of directors which has a say in whether litigation would be in the best interest of the company. Davies has argued that common law appears to take the view that, even if the board does not wish to sue, it is open to the shareholders collectively by ordinary resolution to decide whether the company should initiate litigation. Davies notes that the abolition by the Companies Act 2006 of the rule in Foss v. Harbottle reduces the force of the argument that collective shareholders have the power to initiate litigation by ordinary resolution. It may therefore be that the decisions of the board whether or not to initiate litigation may take priority and the use of committees to show the decision of the board is not prejudiced may be on the rise, as in the US. Davies has suggested other possible solutions for determining who should decide if the company should initiate litigation. These include the use of non-executive directors or a subset of members of the board, a group of shareholders lying between individual and whole shareholders, and giving the right to commence a derivative action to someone outside the company altogether.

**Net loss rule** In situations where directors have breached fiduciary duty resulting in illegal acts, the business judgment rule does not shield directors from judicial scrutiny for breaching relevant statute. However, one commentator has noted that the net loss rule and the use of SLCs (which have already been discussed) provide the result of

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52 See Norwood Beveridge, ‘Does the corporate director have a duty always to obey the law?’ (1996) 45 Depaul L Rev. 729, 738, where Kaplan v. Wyatt, 499 A.2d 1184, 1192 (Del. 1985) is cited.

53 Ibid. Beveridge also makes the argument that Zapata step 2 is unnecessary.

54 Davies, Gower and Davies’ Principles of Modern Company Law, para 17–3.

55 [1843] 2 Hare 461, 67 ER 189.

56 Davies, Gower and Davies’ Principles of Modern Company Law, para. 17–4.

57 See ibid., para 17–5 for discussions on the usefulness or otherwise of each suggestion.

58 Miller v. American Tel & Tel. Co., 507 F.2d 759.
shielding directors.\textsuperscript{59} The net loss rule requires the corporation to have suffered loss before a shareholder derivative claim may be made.

In \textit{Miller v. American Tel & Tel Co.},\textsuperscript{60} which concerned a shareholder derivative action against the directors for breach of fiduciary duty in violating the federal statute that prohibits corporate campaign spending, the Court of Appeal held that since the shareholders had alleged actual damage to the corporation, they had a claim upon which relief could be granted.\textsuperscript{61} Thus in situations where the corporation has been involved in illegal acts which profit the corporation, if there has been no damage to the corporation, shareholders would face difficulty in bringing derivative claims.

There may even be situations where the corporation has suffered a loss but the shareholders may have difficulties bringing derivative suits. For example, where a corporation makes illegal payments and these payments lead to initial profits for the corporation. However, as a result of the discovery of these illegal payments, criminal convictions are imposed causing the shares of the corporation to tumble. Can shareholders recover for the damages to the corporation? It seems that even in such situations, application of the net loss rule may prevent recovery.

To illustrate the point, if shareholders are claiming the directors breached their fiduciary obligation to maximise share price, the net loss rule requires shareholders to show that the loss in share price resulting from the illegal acts outweighs the gain in share price resulting from the increased sales or profit the illegal act produced. Only if the illegal acts results in ‘net loss’ can the director be held to have breached fiduciary obligation to maximise share price.\textsuperscript{62} The American Law Institute has proposed three modifications to the net loss rule, which some commentators welcome and others do not.\textsuperscript{63}

Shareholders may also have problems proving the breach of statute was the proximate cause for the injurious claim. In \textit{Lewis ex rel.}\textsuperscript{59}

\textsuperscript{59} Beveridge, ‘Does the corporate director have a duty always to obey the law?’, 733.
\textsuperscript{60} 507 F.2d 759.  \textsuperscript{61} Miller v. American Tel & Tel. Co., 507 F.2d 759.
\textsuperscript{63} See Beveridge, ‘Does the corporate director have a duty always to obey the law?’. Cf. Rapp, ‘On the liability of corporate directors to holders of securities for illegal corporate acts’.
American Express Co. v. Robinson (In re American Express Co. Shareholder Litigation), the shareholders brought a derivative action against certain directors and officers of American Express claiming defendants violated section 14(a) of the Securities Act 1934 and section 1962(c) and (d) of the RICO as well as other fiduciary obligations under state law. The shareholders alleged that as a result of illegal activities, the corporation was injured in its business and property, the corporation suffered loss and was exposed to potential liability. The district court held with the Court of Appeal affirming that the RICO illegal act was not the proximate cause of the injuries the shareholders asserted. The appellants were not the targets of the RICO violations or competitor. The violations were intended to benefit the corporation.

Citing the Supreme Court decision in Holmes v. Securities Investor Protection Corporation, which said proximate cause would have a direct relation between the injury asserted and the injurious conduct alleged, the court reasoned that this precludes recovery by the plaintiff who complains of harm flowing merely from misfortunes visited upon a third person by the defendant’s act. The Court of Appeal also referred to its earlier decision in Hecht v. Commerce Clearing House, Inc., where it had described the proximate cause limitation as restricting liability to cases in which the RICO pattern or acts ‘are a substantial factor in the sequence of responsible causation and ... the injury is reasonably foreseeable or anticipated as a natural consequence’. Like Hecht, the Court of Appeal said that the injury to the shareholders was not reasonably foreseeable, the illegal acts were not directed at them and they were not the corporation’s competitor.

64 39 F.3d 395 (2d Cir. 1994).
65 In the appeal, the shareholders abandoned the Securities Act claim and focused on the RICO claim. The review here will be concerned with the RICO claim. See 18 USCS section 1962. Section 1962(c) states: ‘It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.’ Section 1962(d) states ‘It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.’
70 Above n. 66 at 400.
No duty to disclose rule\textsuperscript{71} Still on the subject of illegal corporate practices such as payment of bribes, shareholders may face difficulty when suing under the federal securities law.\textsuperscript{72} Courts have held that unlawful conduct by itself is not material per se.\textsuperscript{73} The Securities Exchange Commission (SEC) requires corporations to disclose material information as well as information the concealment of which will make the information released misleading. However, it seems the touchstone for materiality is financial materiality. Thus companies would be required to disclose issues pertaining to earnings and loss, stability of earnings, risks attendant to future profitability, amongst other material facts which would be dependent on a particular case.\textsuperscript{74}

The SEC has pointed out that improper payments have an important bearing on the quality of a corporation’s earning and that such payments are pertinent to evaluating management’s stewardship over corporate assets.\textsuperscript{75} However, the SEC has not made these facts important issues in determining materiality. Rather, the SEC weighs in each case the benefits of disclosure against its assessment of the extent of investors’ interest, cost and utility of particular disclosure.\textsuperscript{76}

Where the cases involve proxy solicitation and shareholders suing for failure to disclose a material fact or giving misleading facts, the material fact which was not disclosed must affect the investors in their dealing with the corporation’s shares. In \textit{Abbey v. Control Data Corporation}, the shareholders claimed the directors violated sections 13(a) and 14(a) of the Securities and Exchange Act, which prohibit corporations from including false and misleading statements in proxy solicitation. The false or misleading statements were the failure to disclose the illegal foreign payments. The court went into the reason for the securities law and said the federal securities laws were

\textsuperscript{71} The no duty to disclose rule related to breaches of federal securities law.
\textsuperscript{73} \textit{Ibid.}, 788. Roiter points to the exception where the SEC requires companies to report any formal criminal charge of illegal domestic campaign contributions.
\textsuperscript{74} \textit{Ibid.}, 790ff., where he discusses financial materiality.
\textsuperscript{76} McManis, ‘Questionable payments abroad’, 227.
designed to protect investors engaged in the purchase and sale of securities by implementing a policy of full disclosure.\textsuperscript{77} The court held that the remedy for claiming breach of corporate waste or mismanagement lay in state laws, and plaintiffs should not try to use the federal securities laws to claim remedies where the apparent non-disclosure had little if any impact on the plaintiff’s dealing with the corporation’s shares.\textsuperscript{78}

There has been debate as to whether disclosure should deter management self-dealing and conflicts of interest or whether it should be broader, deterring illegal or unethical corporate conduct that does not necessarily impair, and may even in some cases advance, corporate profitability.\textsuperscript{79} In \textit{Roeder v. Alpha Industries},\textsuperscript{80} the Court of Appeal for the First Circuit rejected a claim that corporate directors have a duty to disclose illegal acts. The court ruled that bribery was not material under rule 10b-5 until indictment was likely. As a result, the company had no duty to disclose the illegal acts. As it is, disclosure which is not material is not mandatory. There is no general duty to disclose that a corporation is involved in illegal conduct unless governmental proceedings are pending or known to be contemplated.\textsuperscript{81}

Rapp has touched on the tension between state courts, which apply the net loss rule, and federal courts, which apply the no duty to disclose rule, in deciding whether shareholders can recover for losses to share prices; he has highlighted the fact that this tension has led to very few cases which have held directors liable to shareholders for illegal acts.\textsuperscript{82} Rapp is concerned with the tension as it affects shareholders who buy shares after the market takes into account positive results, but before disclosure is required if it is found out that the corporation has engaged in illegal conduct. Here, the concern is with the impact the established rules have on the rights of shareholders to sue directors for illegal acts which suggest a breach of their fiduciary duty.

\textsuperscript{77} \textit{Abbey v. Control Data Corporation}, 603 F.2d 724 at 731. \textsuperscript{78} Ibid.

\textsuperscript{79} Roiter, ‘Illegal corporate practices’, 786.

\textsuperscript{80} See \textit{Roeder v. Alpha Indus., Inc}, 814 F.2d22 (1st Cir. 1987). See also above n. 69 at 112.

\textsuperscript{81} See \textit{United States v. Matthews}, 787 F.2d 38, where the court of appeal for the 2nd cir. held that the SEC regulations did not require the appellant to disclose incharged criminal conduct in his proxy statement for election to the board of directors. See also above note 69.

\textsuperscript{82} Rapp ‘On the liability of corporate directors to holders of securities for illegal corporate acts’, 106–7.
On the whole, it can be seen that the application of the business judgment rule, net loss rule in state courts and no duty to disclose rule in federal courts greatly affects the successful use of derivative suits to ensure corporate management behave responsibly. Some of the difficulties shareholders face in bringing such suits has been highlighted. It is hoped that with this knowledge, shareholders would appreciate what needs to be done before they can be successful in such claims. The law has been applied as it relates to illegal foreign payments such as bribes, which is the CSR issue of main interest in this book.

Derivative suits in the UK
In English law, a derivative suit occurs when a shareholder (claimant) who cannot procure the company to bring the action itself, brings a claim on behalf of the company, which the company could, if willing to do so, have brought. The claimant joins the alleged wrongdoers and the company for whose benefit the derivative action was brought as defendants. A common feature of derivative actions, if successful, is for the courts to order payment of damages to the company, rather than to the claimant.\(^\text{83}\) Scarman LJ in Wallersteiner v. Moir (No. 2)\(^\text{84}\) stated that the stockholder derivative action is well recognised in the United States and that the grounds for bringing derivative actions in the US are wider than those in the UK.\(^\text{85}\)

A recent US derivative action suit which highlights this difference is City of Harper Woods Employees Retirement System v. Richard Olver et al.\(^\text{86}\) The case involved allegations of breach of fiduciary and corporate waste of assets committed by the individual defendants, directors of BAE Systems plc (BAE plc). BAE plc is a UK defence contractor headquartered in London. The plaintiffs alleged the directors of the company allowed the company to pay improper bribes to a Saudi Arabian prince in connection with the Al-Yamamah military

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\(^{83}\) See Halle v. Trax BW Ltd [2000] BCC 1020. The case involved an appeal against the refusal by lower court to make an order pursuant to Rules of the Supreme Court 1965, Ord 15r.12(a) (13), for the claimant to be afforded an indemnity as to the costs of the action out of the assets of the corporate defendant.

\(^{84}\) [1975] QB 373.


programme whereby the UK sold war planes to the kingdom of Saudi Arabia.

The case, although pursued in the US, concerned the application of the English law rule in *Foss v. Harbottle*. This was because the District of Columbia applies the law of the state of incorporation of the nominal defendant company, in this instance the law of the UK. The court dismissed the case because the rule in *Foss v. Harbottle* applied and the exceptions to the rule were inapplicable. The court took pains to examine the rule in *Foss v. Harbottle*, and concluded that while the case could succeed in the District of Columbia, it could not succeed in the UK.

One of the issues which came before the court in deciding the choice of law to follow was whether the UK laws and the District of Columbia laws were in substantial accord. The court said there was no substantial accord between the two laws regarding derivative lawsuits. The UK law, referring to *Foss v. Harbottle*, precludes shareholders from bringing derivative actions except in limited circumstances, while the District of Columbia law provides for a more liberal derivative remedy.

Prior to the enactment of the UK Companies Act 2006, shareholder derivative suits were governed by the rule in *Foss v. Harbottle*. Under this rule, a suit by a shareholder instead of a company can be brought in a limited number of situations, namely in the case of ultra vires or illegal actions or proposed actions by the company or of fraud or oppression on the minority by those who control the company.  

87 *Konamaneni and others v. Rolls-Royce Industrial Power (India) Ltd and others* was a case which raised for the first time in England the question of the operation in the international context of derivative claims and the exceptions to the rule in *Foss v. Harbottle*. The *Konamaneni* case involved allegations of bribery brought by minority shareholders of Spectrum Power Generation Ltd (SPGL), an Indian company, against two English companies. The shareholders alleged that the English companies paid SPGL’s Indian managing director bribes in order to secure contracts for the construction and maintenance of a power station in India.

87 Above n. 55. For more on the case of *Foss v. Harbottle* and the exceptions to the application of the rule, see *Prudential Assurance Co Ltd v. Newman Industries Ltd and Others (No. 2)* 1982 1 All ER 354.
88 [2002] 1 All ER 979.  
In order to commence the action in the UK and because the case concerned a foreign company, the claimants sought leave of the court to serve proceedings on SPGL outside the jurisdiction. Permission was granted and the defendants subsequently applied to set the order aside. The defendants argued that England had no jurisdiction to hear the claim. In order to be successful, the claimant also had to bring the case within one of the exceptions to the rule in *Foss v. Harbottle*. They therefore alleged that there was a fraud on the minority. Amongst other issues, the court had to consider whether England was the appropriate forum. The court held that the English courts have jurisdiction to hear derivative claims concerning foreign companies. However, it found the connection to India overwhelming. It also found that the shareholders had failed to satisfy the burden of showing England was the appropriate forum.

The case gives insight into how the fraud on minority exception operated under the rule in *Foss v. Harbottle*. The exception prevents a wrongdoing without redress where conduct amounts to a fraud and the wrongdoers are in control of the company. Fraud includes cases where wrongdoers are endeavouring directly or indirectly to appropriate for themselves money, property or advantages belonging to the company.\(^90\) With the enactment of the Companies Act 2006, the rule in *Foss v. Harbottle* which permitted minority shareholders to sue only in the limited situations stated above was abolished. Derivative actions in the UK involving directors are now only possible under statute.\(^91\)

Shareholders seeking to bring a derivative suit must issue a claim form and seek the permission of the court to take further steps in the litigation. Whereas the rule in *Foss v. Harbottle* decided whether an individual shareholder had standing to sue, the statutory claim decides whether it is in the interests of the company for the litigation to be brought and whether the litigation is desirable.\(^92\)

The use of shareholder derivative actions for CSR issues such as bribery allegations is possible by virtue of section 260 of the Companies Act 2006. Section 260(3) allows claims in respect of a cause of action

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\(^90\) Ibid., 987.

\(^91\) See part 11 of the Companies Act 2006.

\(^92\) Davies, *Gower and Davies' Principles of Modern Company Law*, para. 17–7. For more on the factors courts will consider in determining whether to give permission for the derivative claim, see Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford University Press, 2007), ch. 4.
arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. Indeed, in the US City of Harper Woods case, the parties agreed that had the conduct occurred after 1 October 2007, section 260 would have been applicable. It has been noted that the Companies Act 2006 will potentially allow a broader range of claims to be brought more easily than is presently the case at common law.\(^93\) However, it is yet to be seen if this will actually be the case. Moreover, it seems that the statutory footing for derivative actions is unlikely to yield an increase in the number of such claims.\(^94\)

**ROLE OF INSTITUTIONAL INVESTORS IN CURBING INTERNATIONAL CORRUPTION**

Environmental, social and governance (ESG) issues affect investment performance. It is therefore in the best interest of investors to ensure that the companies they invest in manage such issues well. Poor management of ESG issues has the potential to affect long-term company valuation.\(^95\) A 2010 survey showed that CEOs want sustainability integrated into the strategy and operations of a company. The call is for the investment community to support efforts towards sustainability by factoring performance on sustainability issues into valuation models.\(^96\)

In order for investors to support sustainability efforts carried out by companies, some have called for a focus on integrated reporting of CSR and financial results to produce an alignment between sustainability and economic performance. The need for companies to be more proactive in communicating progress on the sustainability issue is another suggestion which has been made.\(^97\)

According to Donald MacDonald, chair of the Principles for Responsible Investment Initiative (PRI):

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\(^93\) Reisberg, *Derivative Actions and Corporate Governance*. \(^94\) Ibid.


\(^97\) Ibid.
If a company has poor corporate governance or persists with bad environmental management then it can, and should, affect the long-term valuation of the company. The truth is that’s still a relatively new concept for many investors, but there are now leaders in mainstream markets that have developed the tools and models to integrate sustainability and who can push the global capital markets beyond the tipping point on sustainability.\footnote{98 See UNGC, ‘Global CEOs want investors to act to create sustainability tipping point’.
}

The Principles for Responsible Investment are a voluntary framework devised by the investment community to help investors incorporate ESG issues into decision making and ownership practices. As of April 2011, there are over 850 signatories to the PRI managing about US$25 trillion assets.\footnote{99 See PRI, ‘About us’, www.unpri.org/about/. See www.unpri.org/principles/.}

Signatories to the PRI commit to incorporating ESG issues into investment analysis and the decision-making process, ownership policies and practices; seek disclosure on ESG issues from investment companies; implement the principles; co-operatively enhance investor effectiveness in implementation; and report on progress and activities towards implementation.\footnote{100 See www.unpri.org/principles/.
}

A number of institutional investors have been active in considering ESG factors in their investment process. In relation to anti-corruption, the PRI and its anti-corruption working group have agreed to work closely with the UNGC to explore a joint platform for investor–company dialogue to improve understanding on corporate anti-corruption actions.\footnote{101 See UNGC, 7th Meeting of the Global Compact Working Group on the Tenth Principle against Corruption, 9–10 December 2010, www.unglobalcompact.org/docs/issues_doc/ Anti-Corruption/ACWG_7th_Meeting_Report.pdf.
}

Institutional investors are increasingly calling for robust anti-corruption measures. Anti-corruption scandals have serious financial implications.\footnote{102 For examples, see above Chapter 2 on MNCS and international corruption.
}

They are inconsistent with good corporate governance and have a negative impact on companies’ long-term growth.\footnote{103 See above n. 101.
}

In April 2010, a group of twenty investors, all signatories to the PRI, with collective asset management of US$1.7 trillion, sent a letter to twenty-one major companies in fourteen countries asking for improvements in disclosure of bribery and corruption risks and avoidance measures. The investors asked the companies to explain whether their anti-corruption management systems adhere to international reporting

Mechanisms for curbing international corruption
frameworks developed by the International Corporate Governance Network (ICGN) and UN Global Compact. The investors included APG, F&C Asset Management and Hermes, well-known leaders in the advancement of sustainability issues in the investment community. The investors noted that the absence of a robust anti-corruption programme or the failure to monitor anti-corruption management risks has the potential to create financial, operational and reputational risks.\(^{104}\)

The UNGC requires companies to communicate on their progress in implementing the principles. Principle 10, included in 2004, urges business to work against corruption in all its forms, including extortion and bribery, and develop policies and programmes to address corruption.\(^ {105}\) Reporting on the tenth principle is not as widespread as reporting on the other principles such as human rights, labour and environmental issues.\(^ {106}\) The UNGC set up a taskforce to look into reporting on the tenth principle, which developed guidance to help companies report more consistently on their anti-corruption efforts in non-financial or sustainability reports.\(^ {107}\) F&C Asset Management, mentioned in the previous paragraph, was an observer of the taskforce.\(^ {108}\)

In a letter to Jeremy Heywood, Downing Street permanent secretary, the ICGN warned that further delay in the implementation of the UK Bribery Act would be bad for business, investment and the reputation of the UK as a centre for investment.\(^ {109}\) The ICGN is a global membership organisation with over 500 leaders in corporate governance. It has a large number of institutional investors with collective asset management of over US$12 trillion.\(^ {110}\) The ICGN has produced a


\(^{110}\) See www.icgn.org/about/.
statement and guidance on anti-corruption practices establishing the importance of curbing bribery and corruption as part of the corporate governance agenda. The statement and guidance document provides a series of questions pertaining to company policies, procedures, transparency and voluntary initiatives to assist investors in their engagement with companies on the issue of anti-corruption.\footnote{See ICGN Statement and Guidance on Anti-Corruption Practices, www.icgn.org/best-practice/ .}

**Effect of Ruggie’s Framework**

John Ruggie presented his final report on the issue of issue of human rights and transnational corporations in 2008 after extensive research based on the mandate given to him when he was appointed as Special Representative to the Secretary-General.\footnote{See John Ruggie, ‘Protect, respect and remedy: a framework for business and human rights’, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2008. See also Chapter 1 above, notes 21 ff.} A group of nineteen investors with collective asset management of US$2 trillion expressed support for Ruggie’s work. The investors, all signatories to the PRI, noted that the work would be useful in analysing how companies address human rights risk. They also noted that Ruggie’s framework and guiding principles are a useful benchmark for performance in investor engagement with companies on the management of risks.\footnote{See ‘Investor statement in support of the work of Professor John Ruggie, UN Secretary-General’s Special Representative on Business & Human Rights’, February 2011, www.business-humanrights.org/media/documents/ruggie/investor-statement-supporting-ruggie-feb-2011.pdf. See also Investor Statement in Support of Guiding Principles on Business & Human Rights, May 2011, www.business-humanrights.org/media/documents/ruggie/investor-statement-re-guiding-principles-2011-may-20.pdf.}

Ruggie’s framework states that the corporate responsibility to respect others essentially means not to infringe on the rights of others, or to do no harm.\footnote{See Ruggie, ‘Protect, respect and remedy’, para. 24.} Companies respect this right by carrying out due diligence, which ensures compliance with national laws as well as managing the risk of human rights harm with a view to avoiding it.\footnote{Ibid., para. 25.} The scope of due diligence consists of three factors: country contexts and specific human rights challenges; human rights impacts of activities within country contexts; and contributions to avoiding...
abuse through relationships connected to activities.\textsuperscript{116} In carrying out due diligence, companies should consider the International Bill of Human Rights and the core conventions of the International Labour Organization; and include policies, impact assessments, integration and tracking performance.\textsuperscript{117}

**Conclusion**

CSR has increasingly been mentioned in the corporate governance discourse. However, a closer examination of corporate governance and its approach to external CSR issues suggests it is incapable in its present form of addressing such issues without reference to shareholders’ interests. The chapter examined the limited but important role which corporate governance plays in the anti-corruption campaign. The changes which are taking place in corporate governance circles to incorporate ESG issues into policies and practices for achieving long-term business value were discussed.

Through derivative actions, which are an aspect of corporate governance, shareholders attempt to direct and control company actions. The aspect of derivative actions discussed in this chapter shows the shareholders’ ability to shape the decisions of the corporation regarding ethical and social obligations to society; this is more prevalent in the US than in the UK. Derivative actions can therefore be seen as a means by which corporate governance addresses external CSR concerns. However, there is a need for increased application of derivative actions relevant for external CSR issues in many domestic jurisdictions. The application at present is mostly limited to the US and this is unlikely to impact effectively on CSR in the global context. The chapter also explored the rising significance of institutional investors in the engagement of companies to promote socially responsible behaviour, which in turn potentially leads to improved investment performance.

\textsuperscript{116} See *ibid.*, para. 57. See also ‘Business and human rights: towards operationalizing the “protect, respect and remedy” framework’, A/HRC/11/13, 22 April 2009, para. 50.

\textsuperscript{117} See ‘Business and human rights’, para. 58–63.
Corporate behaviour impacts both positively and negatively on states. CSR provides the opportunity to examine the regulatory frameworks—the soft and hard laws relevant for holding corporations accountable when abuses occur and promoting responsible behaviour. CSR focuses mainly on corporations and their relationships with multi-stakeholders, and is therefore best positioned to address the social and ethical issues corporations face in the pursuit of business.

In developing countries, MNCs have been the subject of much scrutiny. They have been implicated in human rights, environmental and labour abuses and corrupt practices. With the focus on the extractive industry in developing countries, Chapter 1 discussed US ATCA cases involving allegations of human rights abuses carried out by MNCs, and UK cases involving allegations of breach of duty of care by parent companies towards employees in foreign subsidiaries.

The examination of these cases, typically litigated in ‘home states’ of corporations for activities which took place in ‘host states’, raises issues of state responsibility in international law. There are manifold reasons why states do not prosecute corporations for corporate abuses. In developing countries the reasons may include corruption, bad governance, lack of resources, fear of a race to the bottom or foreign pressure. This raises the question, when host states are ineffective in holding corporations responsible for violations of international law, how can corporations be held accountable?

Chapter 4 addressed this question in the context of the international crime of corruption. Hitherto, discussions have centred on international human rights. It seems that particularly with regard to developing countries, where corporations may not be held accountable for whatever reason, there is a valid argument for direct corporate
responsibility. Chapter 4 proposed a structured approach to such direct responsibility, identifying and addressing several problems a model of direct corporate responsibility may encounter. The discussions suggest that the state-centric structure of international law militates against the evolution of direct corporate responsibility in international law.

Nevertheless, hope is not lost because global governance encompasses the activities of states and non-state actors for addressing common global concerns. The social and ethical issues corporations face are examples of such global concerns. Chapter 3 considered how global governance is leading to improved corporate behaviour. It focused on the impact of international organisations such as the UNODC, World Bank, IMF and WTO in the fight against corruption. These actors have a major impact on developing countries. They are useful for providing the necessary consensus required in global governance; they are also able to strengthen and reform institutions and co-ordinate collaborative efforts. Initiatives such as StAR constitute a significant deterrent to corruption in developing countries. StAR helps developing countries recover stolen assets beneficial to their economy, while recognising the role of financial centres, MNCs and intermediaries in the theft.

Discussions on global governance also necessarily touch on the impact of the emerging global administrative law. Chapter 3 addressed the problem this concept poses for the multitude of actors in global governance. This led to a general consideration of ‘governance’, a term promoted in development circles. Chapter 3 discussed the implication of this concept and other western principles for developing countries.

**The relevance of CSR for anti-corruption campaigns in developing countries**

Corruption is said to undermine economic growth, increase poverty and impact adversely on nations. The focus is usually on political corruption, with a myriad of solutions provided to address the issue. There is a need for a fresh outlook on avenues for eliminating corruption, especially in developing countries. This book fulfils this goal through the lens of CSR. CSR has a role to play in the fight against corruption, particularly as it affects corporations. The vital roles states
and non-state actors are playing in addressing CSR issues and, for the purposes of this book, anti-corruption suggest CSR does indeed have relevance for anti-corruption campaigns in developing countries.

These actors are involved in multilateral initiatives which typically lead to the development of codes of conduct, guidelines and principles, best practice and standards, giving corporations direction on how to approach CSR issues. The international community has now taken a unified stance against corruption, including transnational bribery, which is being fought on multiple grounds. There are laws in place addressing the issue of corruption, which, in many instances, are the outcome of regional and international multilateral treaties. The United Nations Convention against Corruption is the latest in this spate of international laws seeking to address corruption on a global level. Individual states are also strengthening their corruption laws. The UK Bribery Act, which came into force on 1 July 2011, epitomises this. CSR involves voluntary and mandatory rules aimed at regulating corporate behaviour to ensure corporations are aware of the impact of their activities on multi-stakeholder interests and society.

**THE NEED FOR A MULTIPRONGED APPROACH**

Attempts to curb corruption typically focus on criminal law enforcement. As seen in Chapter 2, criminal law enforcement provides great scope for corporate liability, however, by itself it may not be adequate to curb corruption. Chapter 5 responds to the call for the use of non-criminal legal tools to complement criminal enforcement. Chapter 5 explores the potential for civil remedies to act as deterrents against international corruption. The role of arbitrators, the emergence of transnational public policy and the reliance on anti-bribery conventions in international commercial arbitration tribunals all point to international consensus that corruption is wrong and should be deterred.

In the introduction to the book, the point was made that the rationale for curbing corruption from the developed country point of view was to prevent barriers to trade. Since the adoption of the UNCAC, this has changed. The revamped rationale is discerning of the interests of both developed and developing countries. It recognises the need for competitiveness in international trade as well as the right atmosphere for development, economic growth and poverty
reduction. The approach of corporate governance and, in particular, the role of institutional investors who seek to incorporate ESG issues into business strategy suggest an understanding of this revamped rationale. Institutional investors are collaborating with UNGC, UNDP and other UN agencies to promote sustainability issues. In Chapter 6, derivative actions as a means of compelling responsible corporate behaviour were canvassed.

The approach corporate governance takes towards achieving the rationale for curbing corruption is different from, say, the approach of global governance. Global governance with its wide range of actors can approach corruption from several viewpoints. Corporate governance approaches it from a more limited point focused on long-term value maximisation. The trick is to create avenues for anti-corruption strategies to be been seen as part of the strategy and operations of the corporation. Likewise, international law needs to be conversant with the central role states play in international law and how this impacts on CSR. This suggests the need for a multipronged approach. Moreover, corruption involves many aspects and one size cannot fit all.

CONCLUSION

The book approached CSR as a set of binding and non-binding rules which corporations adhere to in order to be socially responsible. It identified different regulatory approaches, applicable for solving the problem of corruption as it relates to CSR. Hard laws and self-regulatory laws, notably soft-law initiatives, were examined. Until quite recently, corruption was a problem associated with CSR, but rarely addressed in conjunction with CSR. The UNGC, which added anti-corruption as its tenth principle, has done a lot to bring corruption and CSR into the limelight. The discussions in the book aim to strengthen and advance the anti-corruption/CSR discourse.


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EITI: eitransparency.org

ICC: www.iccwbo.org

ICC: www.iccwbo.org/policy/anticorruption

ICAC: www.icac.org

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