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Abstract

The global upsurge of interest in corruption has led to the proliferation of anti-corruption instruments in international law. Such legal responses to corruption may be usefully divided into three interrelated planes of action: the promulgation of formal international legal instruments by organisations such as the UN and OECD; the work of national bureaucratic agencies cooperating across borders to enforce national anti-corruption laws; and the work of wholly non-governmental organisations such as Transparency International. The difficult task of regulating transnational actors, particularly corporations, requires an understanding of how these planes interact, and which elements would best be strengthened to further the fight against corruption. Furthermore, such regulation must carefully balance questions of efficacy against those of legitimacy. The purpose of this paper is to assess modern regulatory literature, particularly regarding corporate behaviour, and draw from it lessons for the development of the international anti-corruption legal regime.

TRANSNATIONAL CORRUPTION
Regulation across Borders

Patrick X Delaney

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submitted to the Faculty of Law, Australian National University*

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INTRODUCTION

On the 3rd of February 1975, the chairman of United Brands Corporation, Eli M Black, threw himself from the 22nd story of a New York skyscraper. The subsequent investigation revealed that he had recently approved a \$2.5 million payment to senior officials of the Honduran Government to secure the repeal of a tax on bananas.¹ This scandal was only one of many that were uncovered in post-Watergate investigations. Revelations of widespread corruption by Lockheed led to Kakuei Tanaka, the Japanese Prime Minister, resigning and being convicted of accepting ¥500 million in bribes.² In terms of corporate behaviour, little appears to have changed since the 1970s. In 2003, for example, former executives of Elf, the leading French oil company, were convicted of systemic corruption in their dealings with African leaders.³ Even now, South African courts are hearing allegations of bribery of top government officials by Thomson-CSF, a French arms and technology company.⁴ The ultimate cost of these bribes is borne by the citizens of developing nations.

In recent years, public pressure has galvanised the international community into action against transnational corruption. The result has been the creation of a series of international conventions on the subject, most of which require states to prohibit their companies from bribing foreign officials. The work of international lawyers, however, should not cease upon the signature of a convention. The task of regulating

¹ Alejandro Posadas, 'Combating Corruption Under International Law' (2000) 10 *Duke Journal of Comparative and International Law* 345, 349.

² *Ibid* 364–5. Prince Bernhard, husband of Queen Juliana of the Netherlands, was also implicated in the Lockheed scandal.

³ 'Elfs and Dwarfs', *The Economist*, 13 November 2003
<http://www.economist.com/displaystory.cfm?story_id=S%27%298%24%2DQ17%25%23P%21%28%0A> at 25 May 2005.

⁴ Fred Bridgland, 'S African Deputy's Bribe Link', *The Weekend Australian* (Sydney), 4–5 June 2005, 17.

transnational corporations should not be limited to the formulation of new laws. A more expansive and thorough approach is needed.

Legal pluralists suggest that law must be conceived of in new ways, including non-hierarchical, non-state manifestations of law.⁵ In international law, these manifestations are sometimes termed ‘soft’ law, as opposed to ‘hard’ law, which is sourced directly from the authority of the state.⁶ Scholars of corruption have promoted such soft law mechanisms under the titles of a ‘multi-layered strategy’⁷ or a ‘portfolio approach’,⁸ but the essential point remains the same—innovative, non-traditional legal approaches are necessary to deal with global problems such as corruption.

In this context, it is necessary to look beyond the state to discover effective regulatory techniques. Non-state methods of regulation, particularly those involving dialogue that includes corporations and international civil society, can be a powerful means to encourage compliance with regulatory goals. These methods are particularly beneficial in an international system where no supranational sovereign exists, and the effectiveness of intergovernmental cooperation remains limited. Transnational corruption is a salient example of these difficulties, and also a regulatory problem seriously in need of innovative solutions.

⁵ Gunther Tuebner, “‘Global Bukowina’: Legal Pluralism in the World Society’ in Gunther Tuebner (ed) *Global Law without a State* (1997) 3.

⁶ For a full description of this distinction, see Dinah Shelton, ‘Law, Non-Law and the Problem of ‘Soft Law’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 1.

⁷ Brian C Harms, ‘Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption’ (2000) 33 *Cornell International Law Journal* 159.

⁸ Thomas W Dunfee, and David Hess, ‘Getting from Salbu to the ‘Tipping Point’: The Role of Corporate Action Within a portfolio of Anti-Corruption Strategies’ (2001) 21 *Northwestern Journal of International Law and Business* 471.

Chapter one considers the nature of transnational corruption. It demonstrates the harmful consequences of corruption, its causes, and the manner in which the process of globalisation has exacerbated such problems. It concludes that the international community has the capacity to address a significant segment of corruption – the actions of transnational corporations based in the developed world. Thereafter, this paper considers the responses to corruption. For analytical purposes, these responses can be divided into three ‘regulatory planes’; intertwined but nonetheless amenable to separate analysis.

The first plane, addressed in chapter two, involves the formal international legal responses to transnational corruption. These responses are embodied by formal conventions which require signatory states to prohibit the bribery of foreign officials by their companies. Though some scholars have attacked these conventions as culturally imperialist,⁹ this paper suggests that such criticisms are unfounded, and that the anti-corruption conventions are legitimate.

As the responsibility to enforce such prohibitions is devolved to government agencies, a second plane of informal bureaucratic cooperation is produced. The transnational cooperation between regulatory agencies dispels the myth of the unitary state, and embodies many elements of what Anne-Marie Slaughter dubs a ‘transgovernmental network’.¹⁰ It is in the attempt to enforce the anti-corruption conventions that they are revealed as ineffective. Chapter three notes that, by virtue of the size, resources, and geographically dispersed nature of transnational corporations, government bodies are unlikely to be able control their activities through threat of legal sanctions alone.

⁹ Steven R Salbu, ‘The Foreign Corrupt Practices Act as a Threat to Global Harmony’, (1999) 20 *Michigan Journal of International Law* 419.

The third and final plane, stemming from and reinforcing the earlier two, is the cooperative work of a number of wholly non-governmental organisations, ranging from Transparency International and the International Chamber of Commerce, to corporations themselves. This plane forms part of Braithwaite and Drahos' conception of a 'regulatory web', composed of diverse global actors.¹¹ Chapter four examines the operation of regulatory webs, and assesses the manner in which such webs may be harnessed to achieve regulatory goals. It examines enforced self-regulation as one potential means of uniting disparate forms of regulation, and bridging the gap between domestic state action and global non-state action. It suggests that through the combined efforts of government, corporations and non-government organisations, corruption may be more adequately addressed.

Overall, this paper seeks to unite two divided strands of literature—that addressing modern international regulatory forms,¹² and that dealing solely with corruption.¹³ Each provides a lesson for the other, and allows for a more innovative response to a difficult problem of global governance. It is simultaneously a descriptive and a normative enterprise; examining existing forms of regulation, and discussing how those forms might best be employed against corruption. Bringing this analysis to bear on transnational corruption allows for better informed and more comprehensive methods of regulation.

¹⁰ Anne-Marie Slaughter, *A New World Order* (2004).

¹¹ John Braithwaite and Peter Drahos, *Global Business Regulation* (2000) 550–63.

¹² *Ibid*; Ian Ayres and John Braithwaite, *Responsive Regulation* (1992).

¹³ See, for example, Steven R Salbu, 'Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?' (1999) 24 *Yale Journal of International Law* 223, and Philip M Nichols, 'Regulating Transnational Bribery in Times of Globalization and Fragmentation' (1999) 24 *Yale Journal of International Law* 257.

I. THE PROBLEM OF TRANSNATIONAL CORRUPTION

Introduction

Transnational corruption is increasingly recognised to be a formidable global problem. The serious social and economic effects of corruption reinforce the need for effective regulation. Understanding the causes of corruption, in turn, allows for better tailored responses from the international community. In this context, it is important to note the challenges arising from the disjuncture between an international legal framework which privileges state boundaries, and a commercial structure which increasingly ignores them. By recognising these characteristics of corruption, a more nuanced response is possible.

A. Defining 'Transnational Corruption'

It is unsurprising that a term as amorphous as corruption is difficult to subject to a simple definition. Nevertheless, a useful starting point is the classic definition by political scientist Joseph Nye who defined corruption as 'behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gain; or violates rules against the exercise of certain types of private-regarding influence.'¹⁴ Through reference to rules, this and other definitions of its type incorporate a legal approach.¹⁵ Most definitions of corruption are supported by a public-private distinction, in which the abuse of governmental roles is distinguished from private interaction. Hence, the focus is often

¹⁴ Joseph S Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 *American Political Science Review* 417, 419.

¹⁵ Shihata provides a legal definition in which corruption is the 'deviation (for private gains) from binding rules, the arbitrary exercise of discretionary powers and illegitimate use of public resources': Ibrahim F I Shihata, 'Corruption – A General Review with an Emphasis on the Role of the World Bank' (1997) 15 *Dickinson Journal of International Law* 451, 455–6.

on the actions of government officials.¹⁶ In Nikolay Ouzounov's words, 'the predominant view is that corruption involves a transaction where a government official abuses a position of trust for personal gain.'¹⁷

Transnational corruption, on the other hand, is a phenomenon significantly more limited in its scope. Purely domestic transactions, governed wholly by domestic law, are excluded.¹⁸ Explicitly included are organisations that operate across multiple jurisdictions and engage in business activities. Therefore, the study of transnational corruption deals in particular with transnational corporations ('TNCs'), and their interactions with foreign officials. Nye's definition nevertheless provides the general framework in which these interactions can be understood as corrupt.

While corruption is not limited to bribery,¹⁹ it is the dominant form of transnational corruption.²⁰ Concern about bribery forms a central element of most multilateral instruments addressing corruption. For example, the *UN Convention Against Corruption*, the most recent and highly-subscribed convention on the subject, requires parties to criminalise the bribery of foreign public officials.²¹ Similar requirements

¹⁶ This is consistent with the definitions provided in the major anti-corruption convention, discussed below.

¹⁷ Nikolay A Ouzounov, 'Facing the Challenge: Corruption, State Capture and the Role of Multinational Business' (2004) 37 *John Marshall Law Review* 1181, 1186.

¹⁸ This may include, for example, police corruption or bribery of government officials by domestic companies. While important, these forms of corruption are not the focus of this paper.

¹⁹ State capture, for example, has been identified as a form of corruption which may not necessarily involve the offering or solicitation of bribes: Ouzounov, above n 17.

²⁰ Government procurement projects in the developing world, for example, are often tainted with bribery, be it offered or solicited: Zucker Boswell, Nancy 'Building Effective Anticorruption Regimes' in Stuart Marc Weiser, 'Dealing with Corruption: Effectiveness of Existing Regimes on Doing Business' (1997) 91 *American Society of International Law Proceedings* 99, 107.

²¹ *United Nations Convention Against Corruption*, opened for signature 9 December 2003, UN Doc A/58/422 (not yet in force). As at 5 June 2005, the convention has 125 signatories, and 25 parties, and requires in art 16 that parties establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international

can be found in the OECD Convention on the subject,²² and in equivalent regional instruments.²³ These instruments require states to implement laws with extraterritorial effect, applying criminal sanctions to domestic companies and individuals operating in foreign countries. In large part, these conventions encourage parties to replicate the approach of the *US Foreign Corrupt Practices Act* ('FCPA'), a law that has prohibited the bribery of foreign officials by US corporations since the 1970s.²⁴ While many of these conventions also recommend other mechanisms to combat corruption, it is the requirement to criminalise the bribery of foreign officials that forms the basis of an emerging international legal regime. Hence, while other forms of transnational corruption should not be ignored, this paper will focus on bribery as its primary form.²⁵ Consequently, the terms bribery and corruption will be used interchangeably.

B. *The Consequences of Corruption*

The most common method of assessing corruption is by reference to its consequences.²⁶ These consequences are particularly severe for the citizens of corrupt nations. Three particular consequences are consistently noted; diminished economic

business'. Status available at

<<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty18.asp>>.

²² *Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, opened for signature 17 December 1997, 37 International Legal Materials 1 (entered into force 15 February 1999).

²³ *Organization of American States Inter-American Convention Against Corruption*, opened for signature 29 March 1996, 35 International Legal Materials 724 (entered into force 6 March 1997); *Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union*, adopted 26 May 1997, OJ C195; *African Union Convention on Preventing and Combating Corruption*, opened for signature 11 July 2003, 43 International Legal Materials 5 (not yet in force).

²⁴ *Foreign Corrupt Practices Act of 1977*, Pub L No 95–213, 91 Stat 1494 (1977), as amended by the *Foreign Corrupt Practices Act Amendments of 1988*, Pub L No 100–418, 102 Stat 1415 (1988) and the *International Anti-Bribery and Fair Competition Act of 1998*, Pub L No 105–366, 112 Stat 3302 (1998) (bringing the *Foreign Corrupt Practices Act* into line with the OECD Convention).

²⁵ For a similar approach, see Ouzounov, above n 17, 1184.

²⁶ Most political ethics are tacitly, if not explicitly, consequentialist in nature, though some scholars consider every corrupt act an inherent wrong: Steven R Salbu, 'Transnational Bribery: The Big Questions' (2001) 21 *Northwestern Journal of International Law and Business* 435, 438–46. The most politically influential ethical alternative to consequentialism is found in rights discourse, which has also been invoked in the fight against corruption: Harms, above n 7, 189–90. For an interesting analysis of

development and growth, increased societal inequalities, and a discredited government and rule of law.²⁷

In a survey of 150 officials and members of civil society from over 60 developing nations, corruption was considered the single most severe impediment to development and growth.²⁸ The empirical evidence supports this perception. Corruption has been shown to deter foreign direct investment, acting in much the same manner as a tax on investment.²⁹ In addition, government spending becomes distorted through the misallocation of funds towards inefficient and overpriced contractors, increasing the overall cost of public procurement.³⁰ Excessive spending on public projects consequently diverts funds away from other government expenditure.³¹ The misallocation of resources occurs not only on the government side, but also in the private sector. As Philip Nichols notes, '[a] corrupt system does not reward the producer of the best and cheapest product, but instead rewards the producer who pays the largest bribe; the rational producer, therefore, will shift resources away from

corruption and rights discourse see Balakrishnan Rajagopal, 'Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship' (1999) 14 *Connecticut Journal of International Law* 495.

²⁷ Ouzounov, above n 7, 1182: 'Commentators have almost universally acknowledged that high levels of corruption retard economic development and undermine public trust in businesses, institutions, and government'.

²⁸ Cheryl Gray and Daniel Kaufmann, 'Corruption and Development' [March, 1998] *Finance and Development* 7, 7.

²⁹ Beata K Smarzynska and Shang-Jin Wei, 'Corruption and Composition of Foreign Direct Investment: Firm Level Evidence' (Working Paper No 7969, National Bureau of Economic Research, 2000); Paolo Mauro, 'The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis' in Kimberly Ann Elliot (ed), *Corruption and the Global Economy* (1997) 83.

³⁰ Paolo Mauro, 'Why Worry About Corruption?' (Economic Issues Vol 6, International Monetary Fund, 1997); Shihata, above n 15, 463.

³¹ Vito Tanzi, and Hamid Davoodi, 'Roads to Nowhere: How Corruption in Public Investment Hurts Growth' (Economic Issues Vol 12, International Monetary Fund, 1999). This pattern of spending frustrates the redistributive role of the state.

quality and toward the bribe payment.³² The inevitable outcome of these problems is the inhibition of development and growth.³³

The social and political consequences of corruption are equally severe. Corruption undermines the legitimacy of government,³⁴ and often results in widespread distrust of political authorities.³⁵ Citizens have legitimate reason to be suspicious given serious corruption has been isolated as a cause, not solely a consequence, of undemocratic governments.³⁶ In fact, Windsor and Getz suggest that '[t]he immediate effects of corruption include the destruction of democratic institutions'.³⁷ Moreover, social equality is eroded by persistent corruption. The poor are further disadvantaged, as efficient infrastructure is forgone to line the pockets of government officials.³⁸

The rule of law is also threatened by corruption. As Krygier notes, the rule of law is dependent not only on formal rules, but also on cultural and institutional supports.³⁹ Those supports are eroded through a culture of corruption, as institutions become tainted and the trust of citizens diminishes. Ibrahim Shihata suggests, therefore, that where corruption is rife, 'the rule of law ... is substituted for by the rule of whoever

³² Philip M Nichols, 'The Myth of Anti-Bribery Laws as Transnational Intrusion' (2000) 33 *Cornell International Law Journal* 627, 631.

³³ Mauro, above n 30; Susan Rose-Ackerman, 'The Political Economy of Corruption' in Kimberly Ann Elliot (ed), *Corruption and the Global Economy* (1997); Susan Rose-Ackerman, 'The Political Economy of Corruption – Causes and Consequences' (Viewpoint Note No 74, World Bank, 1996); Tanzi and Davoodi, above n 31; Duane Windsor and Kathleen A Getz, 'Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values' (2000) 33 *Cornell Journal of International Law* 731, 758–60.

³⁴ Nichols, above n 32, 632–3.

³⁵ Harms, above n 7, 166.

³⁶ Michael Johnston, 'Public Officials, Private Interests and Sustainable Democracy: When Politics and Corruption Meet' in Kimberly Ann Elliot (ed.) *Corruption and the Global Economy* (1997) 61; Windsor and Getz, above n 33, 756–7.

³⁷ Windsor and Getz, above n 33, 757.

³⁸ Rose-Ackerman (1997) above n 33, 44–5.

³⁹ Martin Krygier, 'Ethical Positivism and the Liberalism of Fear' (1999) 24 *Australian Journal of Legal Philosophy* 65, 71.

has the influence or the ability and willingness to pay.⁴⁰ The evidence suggests that transnational corruption is continuing to occur on a massive scale, perpetuating these problems, and many others.⁴¹

C. *The Causes of Corruption*

Legal and economic theorists have suggested a number of causes of corruption.

Notable among the various causes are economic policies and institutional structures.

However, addressing these causes directly through international intervention is often problematic. As a result, this essay focuses on the international regulation of business, rather than addressing domestic government policy.

Some theorists suggest that economies that are not liberalised foster corruption.⁴²

Brian Harms, for example, suggests that where government intervention in the economy is high, the scope for corruption increases.⁴³ However, it seems that privatisation and deregulation alone are no remedy.⁴⁴ Corruption is also rife in tendering and contracting processes, a necessary corollary of privatisation schemes.⁴⁵

⁴⁰ Shihata, above n 15, 456, 461–2. See also, Harms, above n 7, 166. Notably, *The Economist* suggests that this is presently the case in sub-Saharan Africa: ‘The Rule of Big Men or the Rule of Law?’, *The Economist*, 15 January 2004, <http://www.economist.com/displaystory.cfm?story_id=2328610> at 29 May 2005.

⁴¹ The World Bank estimates that five percent of exports to developing countries (\$50 to \$80 billion per year) goes to corrupt officials: Wayne Hamra, ‘Bribery in International Business Transactions and the OECD Convention’ (2000) 35(4) *Business Economics* 33. Former US Under Secretary of State for Economic, Business and Agricultural Affairs, Stuart Eizenstat, stated ‘[t]he U.S. government is aware of allegations of bribery in the last year affecting international contracts worth almost \$30 billion by foreign firms, which are not bound by anti-bribery laws in their home jurisdictions’: Stuart Eizenstat, ‘Promoting the Rule of Law and Anti-Corruption in a Globalized Economy’ (1998) Vol 3(5) *Economic Perspectives – USIA Electronic Journal* <<http://usinfo.state.gov/journals/ites/1198/ijee/eizen.htm>> at 21 April 2005. Windsor and Getz estimate the loss of foreign investment in developing nations at US\$50 billion: Windsor and Getz, above n 33, 759.

⁴² See, for example, Harms, above n 7, 164–5. Ibrahim Shihata notes that liberalisation is a common element of anti-corruption policies: Shihata, above n 15, 464–5.

⁴³ Harms, above n 7, 164–5. These types of economies are known as command economies, as opposed to laissez-faire economies.

⁴⁴ Ayres and Braithwaite note that with privatisation often comes with significant re-regulation: Ayres and Braithwaite, above n 12, 11.

⁴⁵ Rose-Ackerman (1997), above n 33, 36. Rose-Ackerman cites examples of corruption tendering processes in Argentina and Thailand.

It is in these corrupt tendering processes that TNCs are often implicated.⁴⁶ As a result, Ibrahim Shihata suggests that ‘[i]n the absence of strong and effective institutions, economic liberalization may become counter-productive.’⁴⁷

It is the absence of these strong and effective institutions that is the focus of other scholars of corruption. Institutional deficiencies range from excessive public service discretion with insufficient accountability,⁴⁸ to low public sector salaries and a ‘patrimonial ethos’.⁴⁹ However, the nature and composition of these institutions is often beyond the purview of the international community. States are often reluctant to accept intervention in domestic institutions, viewing the impact on their sovereignty as too great a cost.⁵⁰ Moreover, intervention of such a nature is fraught with difficulties, and has a chequered international record.⁵¹

As a result of the difficulties of intervention, the focus of this paper is on the supply-side of corruption.⁵² Demand-side corruption, on the one hand, occurs through solicitation. In the case of transnational corruption this may come in the form of a government official insisting on a bribe before he will award a contract.⁵³ Supply-side

⁴⁶ Zucker Boswell, above n 20. Two examples of corruption in public procurement, prosecuted under the FCPA, include the sale of garbage incinerators by Tanner Management to Argentina, and the sale of jets to Israel by General Electric: Christopher Corr and Judd Lawler, ‘Damned If You Do and Damned If You Don’t? The OECD Convention and the Globalization of Anti-Bribery Measures’ (1999) 32 *Vanderbilt Journal of Transnational Law* 1249, 1276, 1280–1.

⁴⁷ Shihata, above n 15, 465.

⁴⁸ Harms, above n 7, 164–5.

⁴⁹ Salbu, above n 26, 468–9.

⁵⁰ Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *International Organization* 421, 436.

⁵¹ The Structural Adjustment Policies of the IMF in the 70s and 80s were generally ineffective, and often poorly received by the nations which undertook them: Joseph Stiglitz, *Globalization and its Discontents* (2002) 16.

⁵² Harms, above n 7, 168–70. Notably, essentially the same distinction is often described as ‘active’ and ‘passive’ corruption: Posadas, above n 1, 393–4. This paper does not deny the potential for legitimate demand-side initiatives to respond to corruption. Rather, it suggests that a comprehensive strategy must address the supply-side of corruption.

⁵³ Goodyear Corporation, for example, was informed that it would not receive Iraqi government contracts if it paid a specified amount to Iraqi officials: Corr and Lawler, above n 46, 1286–7.

corruption, on the other hand, occurs through proposition. For example, a company may offer to pay a bribe in order to secure an advantage over its competitors.⁵⁴ The two are, of course, interrelated. Ibrahim Shihata, for example, notes ‘[f]oreign businesses, especially in developing countries, often contribute to the spread of corruption by assuming that pay-offs and connections are inevitable facts of doing business—an attitude which often turns out to be a self-fulfilling prophecy.’⁵⁵ In a similar vein, the former Malaysian Prime Minister Mahathir Mohamed accused developed nations of causing corruption in the developing world through their business practices.⁵⁶ TNCs may, therefore, be culpable for the ‘export’ of corruption to other nations.⁵⁷ Hence, addressing the supply-side of corruption is not only a good in and of itself; it may have beneficial consequences for domestic political structures.

D. *Globalisation and the International System*

In the introduction to *A New World Order* Anne-Marie Slaughter elucidates what she describes as the ‘globalisation dilemma’.⁵⁸ She suggests that globalisation has brought about a raft of problems that can only be addressed on a global scale, and yet liberal principles and the international system resist the attempt to locate power above the state. This analysis is echoed in much of the scholarly work on corruption.⁵⁹ Philip

⁵⁴ Harris Corporation, for example, was investigated for allegedly bribing a member of the Colombian legislature in order to secure telecommunications contracts: *ibid*, 1281–2.

⁵⁵ Shihata, above n 15, 462.

⁵⁶ David Hess and Thomas Dunfee, ‘Fighting Corruption: A Principled Approach: The C² Principles’ (2000) 33 *Cornell International Law Journal* 593, 598.

⁵⁷ *Ibid*.

⁵⁸ Slaughter, above n 10, 8–10.

⁵⁹ See, for example, Aman, Alfred C, ‘The limits of Globalization and the Future of Administrative Law: From Government to Governance’ (2001) 8 *Indiana Journal of Global Legal Studies* 379, 380; Lawrence Tshuma, ‘Hierarchies and Government Versus Networks and Governance: Competing Regulatory Paradigms in Global Economic Regulation’ (2000) 9 *Social and Legal Studies* 115, 121; Thorsten Benner, Wolfgang H Reinicke and Jan Martin Witte, ‘Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability’ (2004) 39(2) *Government and Opposition* 191, 194; Timothy L Fort and James J Noone, ‘Gifts, Bribes, and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercica’ (2000) 33 *Cornell International Law Journal* 525, 538; Nichols, above n 32, 627–9; Sol Picciotto, ‘Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism’ (1996-7) 17 *Northwestern Journal of International Law and Business* 1014, 1014–6.

Nichols, for example, focuses on the increasing gap between transnational activities occurring with little regard to political boundaries, and law generated by national bodies whose authority ceases at the border.⁶⁰ This gap has considerable implications, particularly for the problem of transnational corruption.

With formal legal authority in the international system vested primarily in states, cooperation between those states is a necessary precursor to any formal international legal regime. In the case of corruption, state discussions took 20 years to crystallise into multilateral agreements.⁶¹ This regulatory lag between the identification of the problem and formal international legal responses has led to a greater emphasis on informal processes of regulation. Hence, Braithwaite and Drahos note a trend towards self-regulation to deal with these types of complex and fast-moving problems.⁶² Yet, states are still the primary unit of analysis in international relations, and their influence cannot be underestimated. That influence may, however, no longer take traditional forms. Slaughter, for example, focuses on the manner in which the various arms of a 'disaggregated state' interact across borders, forming 'transgovernmental networks'.⁶³ Hence, the fight against corruption is occurring in many different ways, on many different levels.

Conclusion

Corruption represents a significant problem confronting the international community.

Its negative effects are pronounced, and its causes are difficult to counteract.

⁶⁰ Nichols, above n 32, 628. Shihata also notes this problem, suggesting that '[w]ith the greater liberalization of trade and investment, the gradual globalization of the market place and overwhelming advances in technology, corruption is becoming not only a common domestic problem but an international problem as well': Shihata, above n 15, 484.

⁶¹ The FCPA was passed in 1977, and the OECD convention (the first major, non-regional convention) was not signed until 1997.

⁶² Braithwaite and Drahos, above n 11, 479–81.

⁶³ Slaughter, above n 10, 1–23.

Nevertheless, one important and pragmatic means of attacking the cycle of corruption is by addressing its supply. However, responses to corruption are complicated by an international system that seeks state solutions to global problems. It is such state actions, embodied in anti-corruption conventions, that forms the subject of the following chapter.

II. FORMAL INTERNATIONAL LEGAL INSTRUMENTS CONCERNING CORRUPTION

Introduction

The first plane of analysis—formal international legal instruments—is in many senses the least controversial. International conventions are among the most common and well recognised forms of interstate cooperation. Nevertheless, the various multilateral instruments dealing with corruption, both on a global and regional level, have a number of features that make them distinct from other conventions. Of particular note is the fact that a number of these conventions mandate national laws with extraterritorial effect—the laws apply to TNCs operating outside the physical jurisdiction of the state. Because such laws have an effect outside of the state which creates them, they have been the subject of heated academic debate. In particular, the legitimacy of such laws in the face of national cultural distinctions has been questioned. However, these questions are far from insurmountable, and this chapter suggests that, at least in this instance, the laws, and the conventions from which they are drawn, are legitimate.

For any international obligation to be effective, it must first be implemented by signatory states. Two factors militate against full implementation of the conventions; the influence of corporations on government economic policy, and the obstacles to controlling state behaviour through reputation. While it is, as yet, too early to empirically determine the operation of all anti-corruption conventions,⁶⁴ there are good reasons to suspect state implementation will not be comprehensive.

⁶⁴ This is particularly the case given the UN Convention is yet to come into force. See below n 82 and associated text.

A. *Global and Regional Conventions*

The anti-corruption conventions are a significant achievement given the burdens of international cooperation. Despite the need to collectively regulate any transboundary problem,⁶⁵ the self-interested drive to engage in regulatory competition operates as a force in the opposing direction.⁶⁶ States are often ‘forced to compete in offering favourable regulatory regimes’, and one such advantage on offer is permissive laws on corrupt activities abroad.⁶⁷ Hence, European nations resisted attempts to establish international conventions against bribery, viewing such conventions as damaging the interests of their TNCs.⁶⁸ Only a series of corruption crises which stimulated public concern and increased US lobbying ultimately led to multilateral initiatives. In terms of scope and effect, the leading conventions on corruption are the *UN Convention Against Corruption* (‘UN Convention’) and the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (‘OECD Convention’).⁶⁹ However, it is instructive to first turn to their precursor, the *US Foreign Corrupt Practices Act* (‘FCPA’).⁷⁰

The FCPA formed the benchmark for future multilateral initiatives, and predated most of them by 20 years.⁷¹ Instituted in 1977 in the wake of Watergate hearings and a Securities and Exchange Commission investigation that revealed massive corruption by US companies at home and abroad,⁷² the FCPA outlawed the bribery of foreign

⁶⁵ Shihata, above n 15, 469; Tshuma, above n 59, 117.

⁶⁶ Aman, above n 59, 397.

⁶⁷ Tshuma, above n 59, 128.

⁶⁸ Andrea Goldbarg, ‘The Foreign Corrupt Practices Act and Structural Corruption’ (2000) 18 *Boston University International Law Journal* 273, 278; Windsor and Getz, above n 33, 743, 767–8.

⁶⁹ *UN Convention Against Corruption*, above n 21; *OECD Convention*, above n 22.

⁷⁰ *US Foreign Corrupt Practices Act*, above n 24.

⁷¹ Goldbarg, above n 68, 276: ‘For almost twenty years, the United States was the sole country criminalizing the actions of its nationals, not only within its borders, but also in the international arena’.

⁷² Posadas, above n 1, 348–59.

officials by US nationals and companies.⁷³ The foundation of the legislative jurisdiction over companies operating outside of the state was nationality—the right to create laws applicable to nationals, wherever their actions might take place.⁷⁴ The 1988 amendments to the FCPA provided some latitude for US business—they allowed for a defence where payments were expressly legal in the receiving country, as well as including an exemption for ‘routine government actions’.⁷⁵ The international response to the passage of the FCPA in 1977 was studied inaction. In fact, 14 European nations continued to recognise foreign bribes as tax deductible in some form.⁷⁶

At the behest of US businesses who perceived the FCPA as a competitive disadvantage,⁷⁷ and in order to secure a corruption-free global economy,⁷⁸ the US began lobbying for multilateral instruments that mirrored the FCPA. The earliest wide-ranging instrument that did so was the OECD Convention.⁷⁹ Targeted, as it was, at the developed nations in which most TNCs are based, the OECD convention spread an FCPA-style prohibition on foreign bribery across most of the relevant actors.⁸⁰ Some years later, in late 2003, the first truly global initiative followed—the *UN*

⁷³ *US Foreign Corrupt Practices Act*, above n 24, §§ 78dd-1(a)(1)–78dd-1(a)(2). The Act refers to acts in furtherance of ‘an offer, payment, promise to pay or authorisation of the payment of any money, or offer, gift, promise to give or authorization of the giving of anything of value’.

⁷⁴ Posadas, above n 1, 389–90.

⁷⁵ *Foreign Corrupt Practices Act*, above n 24, §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-1(b), 78dd-2(b). Another affirmative defence allowed where expenses have been incurred in legitimate promotional activities (§§ 78dd-1(c)(2), 78dd-2(c)(2)).

⁷⁶ Windsor and Getz, above n 33, 743. See also, Goldbarg, above n 68, 278.

⁷⁷ Abbott and Snidal, above n 50, 435; Goldbarg, above n 68, 278; Posadas, above n 1, 376; Windsor and Getz, above n 33, 761.

⁷⁸ Windsor and Getz, above n 33, 770–1: ‘[t]he United States recognized that its own interests would be served if corruption suppression were multilateral. However, the United States also apparently was committed to a corruption-free global economy as a moral good’.

⁷⁹ For discussion of the details of the OECD convention see, especially, Corr and Lawler, above n 46, 1303–10. See also Posadas, above n 1, 380; Nichols, above n 32, 636; Harms, above n 7, 176–7; Windsor and Getz, above n 33, 732.

⁸⁰ *OECD Convention*, above n 22, art 1.1; Windsor and Getz, above n 33, 767–8; Nichols, above n 32, 638–9. The OECD Convention has 34 signatories – the 29 members of the OECD, and 5 non-member signatories.

Convention Against Corruption. With 123 signatories, it is the most highly subscribed of all the anti-corruption treaties.⁸¹ As a relatively recent convention, it does not yet have enough ratifications to come into force.⁸² It is, however, likely to become so in the coming year, further spreading the prohibition on foreign bribery.⁸³

Alongside the increase in multilateral conventions has been an increase in regional conventions. The Organisation of American States, the European Union and the African Union all have treaties on similar subject matter.⁸⁴ While varying somewhat in scope and application, they generally replicate the FCPA prohibition of bribery of foreign officials.⁸⁵ These conventions contribute to the interlocking network of laws which, operating collectively, apply to the vast bulk of TNCs.

B. Corruption, Culture and Compulsion

Laws with extraterritorial effect, while not uncommon in domestic legislation, are rarely sponsored by international conventions. By their very nature, extraterritorially effective laws will have an effect in other jurisdictions, and this effect has been viewed by some scholars as an unwarranted intrusion into the culture and affairs of other nations. Steven Salbu, in particular, has forcefully argued against the spread of prohibitions on bribery of foreign officials on this basis.⁸⁶ Salbu's arguments are

⁸¹ Status available at

<<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty18.asp>>.

⁸² The UN Convention, as at 5 June 2005 has 25 ratifications. It requires, per art 68 of the Convention, 30 ratifications to come into force. Status available at

<<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty18.asp>>.

⁸³ *UN Convention Against Corruption*, above n 21, art 16.

⁸⁴ *Organization of American States Inter-American Convention Against Corruption*, above n 23; *Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union*, above n 23; *African Union Convention on Preventing and Combating Corruption*, above n 23.

⁸⁵ Windsor and Getz, above n 33, 733. *Inter-American Convention Against Corruption*, above n 23, art 5; *African Union Convention on Preventing and Combating Corruption*, above n 23, arts 4–5. See generally, W Paatii Ofofu-Amaah, Raj Soopramanien and Kishor Uprety, *Combating Corruption* (1999) 70–8.

⁸⁶ Salbu, above n 9; Salbu, above n 13; Salbu, above n 26.

twofold. First, the conventions ignore cultural differences and are unjustifiably intrusive into the affairs of other nations. Secondly, if not actually intrusive, they are perceived as such, and developing nations resent their application. Close examination reveals that the conventions do not have the consequences Salbu suggests. Moreover, the conventions are independently justifiable on principle, to the extent that they do affect other nations.

It is clear that there is a distinction in many cultures between legitimate gift-giving practices and illegitimate corruption. Salbu notes, in particular, Asian and African traditions of gift-giving,⁸⁷ and anthropologists have observed ritualised gift-giving as social traditions of the indigenous inhabitants of New Zealand and other Pacific Islands.⁸⁸ However, the mere identification of such practices does not necessarily entail that a prohibition on transnational bribery would erode them. It is useful in this sense to note that TNCs are typically engaged in ‘grand’ corruption, rather than the kind of ‘petty’ corruption that might be confused with gift-giving.⁸⁹ In fact, Nikolay Ouzounov suggests that ‘grand bribery is the hallmark of major multinational corporations dealing at the highest governmental levels.’⁹⁰ It is difficult to paint major corruption in tendering for contracts as in any way implicated in culturally legitimate gift-giving practices.

⁸⁷ Salbu, above n 13, 232–9, 243–6.

⁸⁸ Fort and Noone, above n 59, 531–6. See also Alejandro Posadas, above n 1, 387 noting the Korean custom of ‘rice cake expenses’.

⁸⁹ Ouzounov, above n 17, 1186–9. Petty bribery tends to be small amounts, often to ensure that an official undertakes a duty they were already obliged to do. In terms of transnational corporations these may be equated to the ‘routine government actions’ referred to in the FCPA; see above n 75 and associated text. Grand bribery, on the other hand, is ‘often to gain a competitive advantage over other market participants in contract bidding’: Ouzounov, above n 17, 1188.

⁹⁰ *Ibid*, 1188. Note also Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (1999), 23: ‘corrupt payments to win major contracts and concessions are generally the preserve of large businesses and high-level officials’.

Moreover, to the extent that businesses seek to engage with local cultural practices, the major conventions allow for such customs. The FCPA, for example, allows payments which are legal in the receiving country, and has done so since 1988 while remaining concordant with international conventions.⁹¹ Moreover, as Nichols notes, it is overly pessimistic to suggest that judges are so ethnocentric that they could not distinguish between a legitimate gift and a bribe in the application of anti-bribery laws.⁹² In short, it seems highly unlikely that the application of such laws would impinge on the gift-giving practices of other cultures.

Salbu has suggested, in the alternative, that even if the anti-bribery laws do not in fact affect cultural practices, they are at least perceived as unnecessarily intrusive.⁹³ This contention is baseless, particularly given the history of the FCPA. As Philip Nichols notes, '[i]n those twenty years [of the FCPA], not one meaningful diplomatic rift can be attributed to the enforcement of the Act.'⁹⁴ Add to this the fact that the UN Convention is widely supported by developing countries and there seems little reason to suspect a backlash against such laws motivated by a charge of cultural imperialism.⁹⁵

The specifics of the conventions must be considered in combination with the legitimacy of intervening in the affairs of other nations. Whether out of respect for the

⁹¹ See above n 75 and associated text. The OECD Convention allows for 'small facilitation payments': Posadas, *combating corruption*, 387. There is seems little reason to believe that the UN Convention will operate any differently. The US, for example, has not indicated that it will further amend the FCPA.

⁹² Nichols, above n 13, 296–7.

⁹³ Salbu, above n 13, 231–2. See also Harms, above n 7, 185–7, and Kenneth U Surjadinata, 'Revisiting Corrupt Practices from the Market Perspective' (1998) 12 *Emory International Law Review* 1021, 1036: 'Developing states perceive extraterritorial application of value-based laws [like the FCPA] as a legally disguised attempt to impose western values'.

⁹⁴ Nichols, above n 32, 646. Note also that Kate Gillespie, in a 1987 study of Middle East government, found little negative response to the FCPA: Gillespie, Kate, 'Middle East Response to the US Foreign Corrupt Practices Act' (1987) 39(4) *California Management Review* 9, 28.

⁹⁵ *UN Convention Against Corruption*, above n 21.

principle of sovereignty, or purely out of caution, intervention demands a higher threshold of justification than ordinary international policies. In the case of transnational bribery, it is important to note that the extent of intervention is limited. The subjects of regulation are TNCs, not the citizens of foreign nations, even when such citizens solicit bribes. Obviously, this regulation will have an influence on the manner in which business–government relations occur in other nations,⁹⁶ but that regulation is not direct—only TNCs of the legislating state’s nationality are compelled to change their behaviour. Nationality is an uncontroversial foundation for extraterritorial laws, and Nichols suggests that such regulation is ‘unremarkable in both a legal and ethical sense’.⁹⁷ Moreover, now that a large number of countries have signed the UN Convention, they have explicitly demonstrated a willingness to be subject to such laws.

Additionally, the norm prohibiting corruption is universal enough, and serious enough, to warrant the broad application of anti-bribery laws. Bribery is a crime in every country of the world, is condemned by major religious bodies, and is condemned by those who suffer from it.⁹⁸ Given that it is largely Western companies that engage in transnational bribery, Western nations have an obligation to regulate their actions. As Dr Frene Ginwalla, Speaker of the South African Parliament, eloquently stated, ‘attributing corruption to [African] cultures is both arrogant and racist, as well as convenient and self-serving. It says more about the culture of [the West], than our own.’⁹⁹

⁹⁶ Salbu, above n 13, 253.

⁹⁷ Nichols, above n 32, 650. See also Posadas, above n 1, 389–90.

⁹⁸ Nichols, above n 13, 277–8; Nichols, above n 32, 629.

⁹⁹ Reported in Nichols, above n 13, 274.

C. States and Implementation

Many international conventions are primarily designed to circumscribe the actions of states.¹⁰⁰ In contrast, the anti-corruption conventions require states to promulgate laws for the purpose of regulating the behaviour of third parties—transnational corporations. Implementation is therefore a question of degree—of the extent to which the state has altered the behaviour of TNCs¹⁰¹—rather than a simple question of whether the relevant prohibition has been instituted into law. The relationship between states and corporations significantly influences the degree to which states commit themselves to implementation.

Regulatory competition, by providing an incentive for lax implementation, frustrates the goals of the conventions.¹⁰² As Koenig-Archibugi suggests, '[r]egulatory competition impairs the accountability relationship between governments and TNCs, since it induces the principal to relax its demands on the agent and to abstain from punishment for fear that the agent will move to the jurisdiction of another principal.'¹⁰³ Even where there is little fear that corporations will move offshore, the state may yield to the demands of business for economic benefits. This appears to have been the motivation behind the UK Export Credits Guarantee Department's revocation of its policy requiring disclosure of secret commission agents—a mechanism commonly used to conceal bribery.¹⁰⁴ Corporations, therefore, have

¹⁰⁰ For example, *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) focuses on state military and security policy and the *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) focuses on state trade policy.

¹⁰¹ Windsor and Getz, above n 33, 765.

¹⁰² For a fuller explanation of regulatory competition, see Aman, above n 59, 397; Tshuma, above n 59, 128.

¹⁰³ Mathias Koenig-Archibugi, 'Transnational Corporations and Public Accountability' (2004) 39(2) *Government and Opposition* 234, 242.

¹⁰⁴ David Leigh and Rob Evans, 'Minister, How Far You've Come', *The Guardian*, 25 January 2005 <<http://politics.guardian.co.uk/comment/story/0,9115,1397961,00.html>> at 13 February 2005.

political influence due to their economic importance, and often exercise that influence to weaken state policies disadvantageous to them.

Moreover, the means of ensuring that states comply with international conventions are weakened where third party regulation is involved. One of the lessons of institutional theory in international relations literature is that reputation is a key motivating factor in compliance with international obligations.¹⁰⁵ Where a state fails to meet an international obligation, its resulting poor reputation can deny it the benefits of cooperation in the future.¹⁰⁶ Furthermore, as Keohane notes, the element of prestige among one's global peers is rarely far from the minds of executive politicians.¹⁰⁷ Yet even the moderate compliance push of reputation is limited by the separation between corporation and state. It is difficult to hold a state responsible, even reputationally, for an action undertaken by a corporation,¹⁰⁸ even if that action was loosely facilitated by under-enforcement on the part of the state.

Conclusion

Though globalisation continues to transform the international legal and political landscape, states remain central elements of any regime. State-centred instruments, such as the UN Convention and the OECD Convention, have dominated the fight against corruption in recent years. Suggestions that such instruments are illegitimate due to cultural diversity do not stand up to critical analysis. However, while the conventions are legitimate, serious questions remain about their effectiveness. It is as

¹⁰⁵ Robert O Keohane, 'Governance in Partially Globalized World: Presidential Address, American Political Science Association, 2000' (2001) 95 *The American Political Science Review* 1, 7; Abbott and Snidal, above n 50, 427.

¹⁰⁶ Abbott and Snidal, above n 50, 427.

¹⁰⁷ Keohane, above n 105, 8.

¹⁰⁸ The ongoing debate about state responsibility for the actions of individuals within its borders demonstrates the persistent disagreement over what can be attributed to the state. See, for some

yet too early to determine whether the nascent legal regime will be adequately implemented by states, though there is at least some reason to believe that it will not be. Of even greater concern is whether or not the arms of government vested with the responsibility to enforce extraterritorial laws are capable of doing so, and that question forms the basis of the following chapter.

disputed principles, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/CN.4/L.602/Rev.1 (26 July 2001).

III. THE TRANSGOVERNMENTAL NETWORK AGAINST CORRUPTION

Introduction

The multilateral anti-corruption conventions impose on parties an obligation to prohibit the bribery of foreign officials. That responsibility inevitably devolves to a bureaucratic agency enforcing the law on behalf of the state. Moreover, given the extraterritorial nature of the laws, their enforcement requires cooperation with similar bureaucratic agencies in other nations. The result can be characterised in terms of what Anne-Marie Slaughter labels a 'transgovernmental network'.¹⁰⁹ It is through such a network that the actual enforcement of anti-bribery laws occurs.

The idea of a transgovernmental anti-corruption network, however, is not without practical and theoretical problems. This chapter contends that the anti-corruption network is unlikely to ever be sufficiently effective to control corporate behaviour without additional supporting measures. While networks may encourage transnational cooperation, they cannot overcome all the challenges of the international system. Moreover, the very concept of a network, as envisaged by Slaughter, raises serious issues of legitimacy. Indeed, the case study of corruption may provide lessons for the analysis and creation of future networks.

A. *Transgovernmental Networks*

Anne-Marie Slaughter suggests that the response to the globalisation dilemma is, and should be, the generation of transgovernmental networks.¹¹⁰ Slaughter defines such a network as 'a pattern of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate

¹⁰⁹ Slaughter, above n 10.

the “domestic” from the “international” sphere.’¹¹¹ In her taxonomy of networks, Slaughter identifies horizontal enforcement networks as a particular type,¹¹² and it is into this category that the anti-corruption network most neatly falls. This kind of network typically arises ‘due to the inability of government officials in one country to enforce that country’s laws.’¹¹³

According to Slaughter, the driving force behind the development of transgovernmental networks is the ‘disaggregation’ of the state.¹¹⁴ By this term, Slaughter refers to the fact that the state can no longer be considered unitary—an actor which operates coherently as a single entity. Instead, she suggests that agencies within the state must be considered relatively independent actors, capable of acting across national borders without recourse to formal interstate relations.¹¹⁵ It is these agencies that form the nodes in transgovernmental networks.

Kanishka Jayasuriya provides a complementary analysis, suggesting that the independence of government agencies has brought about a situation of ‘complex sovereignty’.¹¹⁶ He suggests that where national agencies address global issues, they take on an ‘international function’.¹¹⁷ Moreover, in taking on such a function, they naturally develop a greater degree of autonomy within the state.¹¹⁸ The increasing role of government agencies is consistent with other regulatory trends. For example,

¹¹⁰ Ibid.

¹¹¹ Ibid, 14.

¹¹² Ibid, 19, 55–8. The network is horizontal in that it operates between formally equal states, without recourse to any higher institutional authority.

¹¹³ Ibid, 19.

¹¹⁴ Ibid, 12–15.

¹¹⁵ Ibid.

¹¹⁶ Kanishka Jayasuriya, ‘Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance’ (1999) 6 *Indiana Journal of Global Legal Studies* 425.

¹¹⁷ Ibid, 446–7.

¹¹⁸ Ibid, 438.

Imelda Maher suggests that the move towards transgovernmental networks is ‘a mirroring of the trend towards the regulatory state with increased delegation of regulatory authority to specialist agencies.’¹¹⁹ As a result, the international sphere can be conceptualised in terms of interactions between government agencies, rather than only interactions between states.

Slaughter foresees that such networks could come to pass as the result of international agreements,¹²⁰ as in the case of the anti-corruption network.¹²¹ Keohane and Nye suggest that conventions, by suggesting an issue is resolved, can depoliticise issues such that ‘particular questions can be settled at lower levels of government.’¹²² In the case of corruption, the responsibility for enforcement necessarily shifts to bureaucratic agencies. Certainly, the leading anti-corruption conventions make provision for the sharing of information and cooperation between government officials.¹²³ The UN Convention devotes an entire chapter of the treaty to the question of international cooperation yet, as discussed below, the likelihood of effective cooperation is slim, due largely to the nature of transnational corruption.

B. The Effectiveness of the Anti-Corruption Network

Transnational corruption is formidably difficult to police, and even an emerging network of government agencies is unlikely to be able to effectively control corporate behaviour. This is by virtue of the very nature of transnational corruption—it is secret, undertaken by well-resourced corporations, and occurs across national boundaries. As

¹¹⁹ Imelda Maher, ‘Competition Law in the International Domain: Networks as a New Form of Governance’ (2002) 29 *Journal of Law and Society* 111, 114.

¹²⁰ Slaughter, above n 10, 46–8.

¹²¹ Posadas notes that even the regional anti-corruption conventions gave rise to networks, suggesting the Inter-American Convention Against Corruption had ‘the effect of creating an “Inter-American network” for international legal cooperation in fighting corruption’: Posadas, above n 1, 394.

¹²² Robert O Keohane and Joseph S Nye, ‘Transgovernmental Relations and International Organizations’ (1974) 27(1) *World Politics* 39, 59.

Caiden notes, '[a]s difficult as it is to uncover corruption in the public sector, duplicating such performance in the private sector is decidedly more difficult.'¹²⁴

A number of scholars suggest that one of the defining characteristics of bribery is its secrecy.¹²⁵ Certainly, TNCs, conscious of the illegality of corruption, bring their significant resources to bear to conceal their acts. As a result, bribes often move through many hands in many countries before reaching their final destination.¹²⁶

Goodyear International Corporation, for example, channelled funds to a Goodyear executive, then through a Greek marketing company, before the bribe was ultimately paid to an Iraqi official.¹²⁷ As Braithwaite notes, '[b]ecause of the inherent and contrived complexity associated with the biggest abuses of organizational power, probabilities of detection and conviction fall.'¹²⁸ The history of the FCPA, largely because of such complexity, is chequered with a significant number of cases where prosecutors were unable to provide sufficient evidence to sustain a prosecution.¹²⁹

While empirical data on the incidence of bribery and corruption is difficult to gather, due to its secrecy and illegality,¹³⁰ the available evidence indicates the FCPA has not been very successful in altering US business practices.¹³¹ Studies undertaken for the World Bank indicate that US businesses continue to engage in bribery in transition

¹²³ Posadas, above n 1, 392; Windsor and Getz, above n 33, 763; *OECD Convention*, above n 22, art 9; *UN Convention Against Corruption*, above n 21, arts 43–50.

¹²⁴ Gerald E Caiden, 'Ten Major Flaws in Combating Corruption' (2004) 10 *Southwestern Journal of Law and Trade in the Americas* 269, 278.

¹²⁵ Fort and Noone, above n 59, 536–7. See also Windsor and Getz, above n 33, 750–1.

¹²⁶ For a description of a number of cases brought under the FCPA, see Corr and Lawler, above n 46, 1273–95.

¹²⁷ *Ibid.*, 1286–7.

¹²⁸ John Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' (1997) 47 *University of Toronto Law Review* 305, 325.

¹²⁹ Corr and Lawler, above n 46, 1273–95.

¹³⁰ Windsor and Getz, above n 33, 750–1.

¹³¹ Ouzounov, above n 17, 1193; Steven Salbu, 'Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act' (1997) 54 *Washington and Lee Law Review* 229, 231.

economies.¹³² Moreover, as Posadas notes, despite having criminalised foreign bribery for over 25 years, the US continues to rank relatively poorly on Transparency International's Bribe Payers Index.¹³³ Moreover, the fact that US business lobbied to spread the prohibition of foreign bribery abroad suggests only that US corporations perceived a disadvantage, not that they had altered their behaviour.¹³⁴ It appears, therefore, that the FCPA has been unable to control US business.

Transgovernmental networks may encourage transboundary cooperation, but they cannot erase borders altogether. The limits of state power are conspicuous in attempts to address corruption. Where the relevant circumstances occur in multiple jurisdictions, with differing laws regarding accounting provisions and bank secrecy,¹³⁵ maintaining an effective investigation continues to be difficult even in a cooperative network. Thus even where the US had full assistance from other nations in the investigation of FCPA violations, convictions were nonetheless difficult to secure.¹³⁶ Furthermore, many of the relevant acts occur in developing nations, where complicit officials and weak institutions can frustrate effective investigation.¹³⁷

¹³² Hellman, Joel S, Jones, Geraint and Kaufmann, Daniel, 'Far from Home: Do Foreign Investors Import Higher Standards of Governance in Transition Economies?' (Policy Research Working Paper, The World Bank, 2002). See also Joel S Hellman, Geraint Jones and Daniel Kaufmann, 'Are Foreign Investors and Multinationals Engaging in Corrupt Practices in Transition Economies?' (2000) 11 *Transition: The Newsletter About Reforming Economies* 4.

¹³³ Posadas, above n 1, 412.

¹³⁴ Some scholars, nonetheless, suggest that business lobbying is indicative that the FCPA has had at least some effect: Corr and Lawler, above n 46. This argument is also canvassed, though not specifically endorsed by Windsor and Getz, and Posadas: Windsor and Getz, above n 33, 760; Posadas, above n 1, 358–9. Clearly, US businesses which engage in bribery in violation of the FCPA assumed some risk, which would be motivation for spreading that same risk to competitors. It does not, however, demonstrate that US businesses stopped engaging in corruption.

¹³⁵ The UN Convention makes provision for cooperation irrespective of bank secrecy laws: *UN Convention Against Corruption*, above n 21, arts 40, 46(8). However, these provisions are non-specific, and given that nations such as Switzerland have long protested any attempt to erode their bank secrecy laws, differences will inevitably continue.

¹³⁶ Corr and Lawler, above n 46, 1273–95.

¹³⁷ Koenig-Archibugi, above n 103, 240; Ouzounov, above n 17.

These investigative difficulties are exacerbated by the size and power of transnational corporations. The corporate collapses of recent years demonstrate how difficult it is to enforce legislation against powerful corporations in purely domestic situations, let alone across national borders, and regulators persistently suffer from information asymmetries. Monitoring large and complex corporations is difficult, and concealment of suspect payments relatively easy.¹³⁸ In fact, as Corr and Lawler note, '[v]iolations of the FCPA are generally brought to the attention of authorities by whistleblowers or disgruntled former employees.'¹³⁹ The heavy reliance on whistleblowing suggests the failure of investigative regulatory techniques. This suspicion is reinforced by the fact that, despite a World Bank survey indicating that approximately 40 percent of companies pay bribes, there have been less than 50 convictions under the FCPA since 1990.¹⁴⁰ These figures suggest that the great majority of bribes go undiscovered and unpunished.

If one accepts that corporations are profit-seeking rational actors, one would expect they would weigh the benefits of bribery against its costs. Rose-Ackerman, following this logic, suggests that '[t]he expected cost of bribery is the probability of being caught times the probability of being convicted times the punishment levied.'¹⁴¹ Thus far, the international legal regime has focussed on the punishment levied; ensuring that states recognise foreign bribery as a crime. Yet when the benefits of bribery are so great,¹⁴² and the likelihood of detection and conviction so low,¹⁴³ rational

¹³⁸ Braithwaite, above n 128, 325.

¹³⁹ Corr and Lawler, above n 46, 1275.

¹⁴⁰ The survey is reported in Windsor and Getz, above n 33, 752. For a breakdown of convictions and pleas under the FCPA since 1990, see Danforth Newcomb and Stephen Fishbein, 'The Foreign Corrupt Practices Act: Recent Trends and Patterns' (Client Publication, Shearman and Sterling LLP, 2004) <http://www.shearman.com/documents/LT_fall2004.pdf> at 2 June 2005.

¹⁴¹ Rose-Ackerman (1997), above n 33, 40.

¹⁴² The revenues associated with bribery appear to be twenty to a hundred times the amount of the payment: Posadas, above n 1, 355. Posadas draws his information from the 1970s US Congressional

corporations will continue to bribe even where the potential punishments are severe. Moreover, even when such punishments are considerable, the resources of TNCs are such that they are able to absorb legal costs and adverse judgements as part of their operating costs.¹⁴⁴ While cooperation through a network will most likely improve enforcement mechanisms, it is unlikely to do so sufficiently to alter corporate behaviour.

Enforcement of extraterritorial anti-corruption laws, even through the mechanism of a transgovernmental enforcement network, faces systemic difficulties. Relying solely on the threat of sanctions is unlikely to influence a 'rational actor' corporation, as the likelihood of detection is low. Corporations and their constituents, however, are not purely rational actors. They are capable of socialisation through norm-creation. It is through a focus on this mechanism that corporate behaviour is most likely to be altered. These 'soft law' mechanisms will be considered in the following chapter.

C. Legitimacy and Networks

Networks, including the anti-corruption network, are confronted not only by questions of effectiveness, but also by questions of legitimacy. This distinction is sometimes phrased in terms of 'input legitimacy' (the accountability of the actors and process), as against 'output legitimacy' (the consequences).¹⁴⁵ Much of the literature on networks has privileged consequences alone, narrowing governance to a purely

hearings on corruption, but there seems little reason to think that such ratios would have changed. See also Windsor and Getz, above n 33, 757.

¹⁴³ Since 1990, even in the small number of cases where the Department of Justice has brought charges for breach of the FCPA, only 8 percent have resulted in convictions, and 54 percent in pleas: Newcomb and Fishbein, above n 140.

¹⁴⁴ *Contra* Corr and Lawler, above n 46, 1324. Corr and Lawler suggest the weighty consequences of a convicted breach of the FCPA is enough to deter companies, as is the cost of defending a case.

¹⁴⁵ Benner et al, above n 59, 204.

functional question and ignoring input legitimacy.¹⁴⁶ Anne-Marie Slaughter, the leading proponent of transgovernmental networks, is not unaware of such difficulties.¹⁴⁷ Nonetheless, the solutions she proposes are insufficient to remedy the underlying legitimacy problems with transgovernmental networks.¹⁴⁸

Robert Keohane suggests there are three procedural criteria for acceptable global governance systems: accountability, participation and persuasion.¹⁴⁹ Slaughter perceives a benefit of transgovernmental networks to be that the bureaucrats involved remain accountable to legislatures and, indirectly, citizens.¹⁵⁰ Following that same logic, Lawrence Tshuma suggests ‘the transgovernmental approach has the virtue of ensuring accountability of national regulators to the electorate.’¹⁵¹ However, as many commentators have noted, the accountability of regulators is far from assured by virtue of being part of government. In the words of Imelda Maher, ‘any democratic accountability is indirect at best.’¹⁵²

Regulators are only democratically sanctioned through a chain of accountability, first to the legislature, and through the legislature to the citizenry. As with any such indirect process, long chains of responsibility dilute democratic influence. As Keohane suggests, ‘[c]hains of delegation are long, and some of their links are hidden behind a veil of secrecy.’¹⁵³ Moreover, regulators acting internationally operate at an

¹⁴⁶ For discussion, see *ibid*, 207.

¹⁴⁷ Slaughter, above n 10, 216–60.

¹⁴⁸ Kenneth Anderson, ‘Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks (Review of Anne-Marie Slaughter, *A New World Order*)’ (2005) 118 *Harvard Law Review* 1255, 1301–10.

¹⁴⁹ Keohane, above n 105, 3.

¹⁵⁰ Anderson, above n 148, 1311: ‘*A New World Order* was written partly in response to critics ... who attacked forms of global governance that transferred power to unaccountable NGOs and private groups’.

¹⁵¹ Tshuma, above n 59, 128.

¹⁵² Maher, above n 119, 135.

¹⁵³ Keohane, above n 105, 9.

even further remove from citizens than those acting only within the state.¹⁵⁴

Regulators acting internationally are often semi-autonomous, and working in fields characterised by technical complexity, and hence it is difficult for citizens to remain fully informed about regulatory decisions and more difficult still to hold the regulators directly accountable.¹⁵⁵ These two mechanisms—the flow of information and the capacity to sanction the relevant actors—are two crucial aspects of accountability.¹⁵⁶ Without them, the claim to democratic accountability is dubious at best.¹⁵⁷

Not only are the links between citizens and regulators problematic in transgovernmental networks, so too are the links between the legislature and the regulators. The very nature of transgovernmental networks is that they anticipate independent linkages between bureaucrats, and an associated community-building element. This has led White to conclude, in the field of financial regulation, that ‘a community of central bankers and regulators has emerged whose shared values may give them more in common than they may have with various parts of their national government.’¹⁵⁸ Similarly, Anderson suggests that regulators in a transgovernmental network have a tendency to drift away from accountability through the state over time.¹⁵⁹ Given an already burgeoning regulatory state, ‘[f]or top leaders this leads to the further problem of losing control over their own sprawling and governmentally

¹⁵⁴ Richard B Stewart, ‘Administrative Law in the Twenty-First Century’ (2003) 78 *New York University Law Review* 437, 459.

¹⁵⁵ Picciotto, above n 59, 1049–50.

¹⁵⁶ Koenig-Archibugi, above n 103, 237–8.

¹⁵⁷ These problems are not unique to transnational networks, and may be manifested in many agencies in a regulatory state. They are, however, particularly pronounced in transgovernmental networks.

¹⁵⁸ White, William R, ‘International Agreements in the Area of Banking and Finance: Accomplishments and Outstanding Issues’ (Working Paper No. 38, Bank for International Settlements, Monetary and Economic Department, 1996), 20.

¹⁵⁹ Anderson, above n 148, 1301–10.

active bureaucracies.’¹⁶⁰ Though regulators may, in principle, be restricted by a chain of accountability, the effective functioning of that chain is questionable.

In examining Keohane’s second procedural requirement, participation, networks raise further issues. Benner et al identify a dual participatory gap in the operation of networks; first, in the gap between those marginalised and those empowered by the international system, and second, in the gap between those within the networks and those (such as legislatures and NGOs) excluded from the networks.¹⁶¹ This is not a point lost on Slaughter. Indeed, in relation to the competition policy network, she has warned of the dangers of the politics of insulation, where networks are restricted to the powerful, and policy imposition, where powerful nations attempt to impose their models of governance on weaker nations.¹⁶² In *A New World Order*, however, Slaughter nevertheless goes on to suggest that the exercise of power is ineradicable, and that networks are at least as equitable as other international institutions.¹⁶³ She is clearly correct in noting that power exists as a subtext of all relations between states. Yet, examining the manner in which such power is exercised is nonetheless an important endeavour, and one which raises contentious issues.

It is the manner in which power is exercised that is the thrust of Keohane’s third procedural requirement—persuasion. Following Foucault, one could suggest that any social relations, be it between nations or individuals, is characterised by power.¹⁶⁴

¹⁶⁰ Keohane and Nye, above n 122, 61.

¹⁶¹ Benner et al, above n 59, 195.

¹⁶² Slaughter, Anne-Marie, ‘Governing the Global Economy through Government Networks’ in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 180. See also Slaughter, above n 10, 227–30; Anne-Marie Slaughter, ‘The Accountability of Government Networks’ 8 *Indiana Journal of Global Legal Studies* 347 (2001).

¹⁶³ Slaughter, above n 10, 227–30.

¹⁶⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, 1979 ed) [trans of: *Surveiller Et Punir: Naissance De La Prison*].

However, some acts of power are widely considered legitimate. Keohane, for example, suggests ‘voluntary cooperation based on honest communication and rational persuasion provides the strongest guarantee of a legitimate process’,¹⁶⁵ even though persuasion is, in the broad sense, an exercise of power. Given the participatory gaps identified above, one can question the extent to which the power exercised in networks is legitimate. For example, a network may function to circumvent official state consent, rather than acting as a vehicle for rational persuasion.¹⁶⁶ Networks, therefore, exhibit a potential for abuse and may be illegitimate conduits of power.

D. *Legitimacy and the Anti-Corruption Network*

The criticisms of networks elucidated above are general, and their application to the anti-corruption network remains to be demonstrated. Some of the general criticisms of networks are mitigated by the existence of many formal and highly-subscribed conventions on corruption. This certainly diminishes the secrecy and informality that a number of authors find least palatable about transgovernmental networks.¹⁶⁷ Yet, as Picciotto notes, most international agreements that sit behind transgovernmental networks are general in their terms.¹⁶⁸ The UN Convention, for example, while obliging signatories to prohibit foreign bribery, provides little detail on the nature of such a prohibition or the mechanisms for enforcement. The process of developing specific content to accompany general obligations occurs through the

¹⁶⁵ Keohane, above n 105, 10. Notably, this is consistent with the concept of ‘communicative rationality’ as expressed by Habermas: Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, 1996 ed) [trans of: Faktizität und Geltung].

¹⁶⁶ Slaughter notes that networks of regulators may operate to circumvent their own legislatures, though she suggests that this is for the purposes of speed and effectiveness: Slaughter, above n 10, 49.

¹⁶⁷ See, for example, Keohane, above n 105, 9; Picciotto, above n 59, 1047–50.

¹⁶⁸ Picciotto, above n 59, 1050.

transgovernmental network.¹⁶⁹ Hence, as Picciotto notes, '[l]aw may oil the wheels, but it does not alter the structure of the machinery.'¹⁷⁰

Given that regulatory officials will be making substantive decisions regarding corruption and bribery including, in marginal cases, what actually constitutes bribery, their democratic accountability remains an issue.¹⁷¹ In addition to the accountability issues noted above, another particular problem occurs in the case of anti-corruption regulators. A disjuncture exists between those who exercise the material power to regulate, and those who are subject to it. Regulators in the developed world, where most TNCs make their homes,¹⁷² engage in regulation with a tangible effect in the developing world, where much bribery occurs. If one views the citizens of the developing world as subjects of such regulation, as well as corporations, this does not simply stretch the chain of accountability between the regulators and their subjects, it may break it entirely.

Given, however, the growing consensus across the developing and developed world about the legitimacy of anti-corruption legislation,¹⁷³ it seems inappropriate to overemphasise the possibility of unaccountable regulators overusing their anti-corruption powers. Rather, the more pertinent concern is that such regulators may under-enforce the anti-corruption legislation.¹⁷⁴ This is particularly problematic given the capacity to regulate transnational corporation is, at best, limited. Vigorous

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ The definitions of bribery provided in the leadings conventions are not always definitive, leaving some scope for regulators to decide which cases to pursue. See for example, *UN Convention Against Corruption*, above n 21, art 16.

¹⁷² Windsor and Getz, above n 33, 765.

¹⁷³ See above n 95 and associated text.

¹⁷⁴ Corr and Lawler, above n 46, 1320: 'there are those who warn of the danger of over-legislation and under-enforcement'.

enforcement, therefore, may not be forthcoming from regulators who are at arms length from citizens who desire the limitation of corruption.

Conclusion

The key international anti-corruption conventions contemplate and, when effective, will cultivate a series of relations which are consistent with Slaughter's concept of a transgovernmental enforcement network. This network, however, is likely to be of dubious efficacy in the face of powerful TNCs operating across multiple jurisdictions. Hence, measures to complement the emerging transgovernmental network of anti-corruption regulators are necessary, and one such measure is considered in the following chapter.

The legitimacy of transgovernmental networks is also uncertain. Some authors have noted that it is important not to compare networks against an 'ideal-type national democracy' as 'networked governance does not pretend to organise a perfectly democratic process at the transnational level.'¹⁷⁵ Conversely, however, scholars should not close their eyes to the accountability flaws of transgovernmental networks. Recognition of such limitations encourages the development of new mechanisms by which to enhance democracy in international governance. Increased involvement of non-state actors can provide some additional legitimacy to an anti-corruption regime, and one means of including these actors is considered in the following chapter.

¹⁷⁵ Benner et al, above n 59, 206. See also Keohane, above n 105, 9: 'International institutions will probably never meet the standards of electoral accountability and participation that we expect of domestic democracies, so at best they will be low on the democratic scale. It is unfair to demand too much of them.' See also, Kathryn Sikkink, 'Restructuring World Politics: The Limits and Asymmetries of Soft Power' in Sanjeev Khagram, James V Riker and Kathryn Sikkink (eds), *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (2002), 315.

IV. SOFT LAW, NORMS AND CORPORATE BEHAVIOUR

Introduction

Transnational corruption, as with many other global problems, involves a plurality of relevant actors—states, officials, regulators, non-government organisations, civil society and, not least, transnational corporations. Yet despite the centrality of such non-state actors, much of the literature on corruption has neglected any close analysis of them. One notable exception is Braithwaite and Drahos' consideration of 'regulatory webs', constituted by a multiplicity of actors and often operating through dialogue and persuasion rather than coercion. These webs function through the use of soft power to shape corporate behaviour, particularly through the redefinition of interests and through reputational sanctions. These soft law mechanisms, often discussed by scholars in terms of state compliance with international law,¹⁷⁶ can likewise be applied to transnational corporations.

Whilst regulatory webs demonstrate the possibility of non-state global regulation, they are far from a panacea. The mechanisms used in regulatory webs are not universally applicable to corporations, and the webs themselves continue to suffer from problems of legitimacy. A comprehensive approach to the regulation of transnational corporations, therefore, should incorporate both state-based and non-state regulation in combination. One method which may be appropriate to such an enterprise is Braithwaite's notion of 'enforced self-regulation'.¹⁷⁷ More important,

¹⁷⁶ See for example, Peter M Haas, 'Choosing to Comply: Theorizing from International Relations and Comparative Politics' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 43.

¹⁷⁷ John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1981-2) 80 *Michigan Law Review* 1466.

however, than specific models is a recognition that soft, non-state mechanisms of regulation can have significant effects.

A. *Non-State Actors and 'Regulatory Webs'*

In *Global Business Regulation*, Braithwaite and Drahos consider the manner in which regulatory regimes are formed by the work of a variety of actors.¹⁷⁸ They explicitly reject Slaughter's model of transgovernmental networks.¹⁷⁹ Their counter-metaphor is that of 'regulatory webs', constituted by both states and non-state actors. Braithwaite and Drahos suggest, pithily, that '[s]omething as hard to achieve as the globalization of regulation seems to require a web of influences—many actors deploying many mechanisms.'¹⁸⁰ These actors include non-government organisations, civil society and even corporations themselves. The regulatory webs become a locus of soft power, influencing the behaviour of corporations without recourse to explicitly coercive hard power.

Braithwaite and Drahos' analysis builds upon an existing body of literature on the use of norms as a regulatory form. For example, Robert Ellickson, in his work *Order Without Law*, considers the role that law and norms play, alternately or in combination, in the regulation of individual behaviour.¹⁸¹ Drawing upon the value of norms in the domestic sphere, scholars such as Parker and Braithwaite have advocated dialogic mechanisms of corporate regulation that, through consultation between corporations and regulators, enhance the likelihood of compliance.¹⁸² These mechanisms operate through the redefinition of internal corporate interests, rather

¹⁷⁸ Braithwaite and Drahos, above n 11.

¹⁷⁹ Ibid, 479.

¹⁸⁰ Ibid, 31.

¹⁸¹ Robert Ellickson, *Order Without Law: How Neighbours Settle Disputes* (1991).

¹⁸² Christine Parker, *The Open Corporation* (2002); Braithwaite, above n 128.

than simply through the external applications of legal sanctions.¹⁸³ Concurrently with this analysis, international relations literature has considered the manner in which soft power influences the behaviour of states, redefining their interests and altering their behaviour.¹⁸⁴ In the absence of an international sovereign to exercise coercive power, it has become necessary to look to other means of controlling the behaviour of international actors. These means stand above and apart from the traditional powers of the state.

Braithwaite and Drahos have considered the use of ‘dialogic webs’ to generate compliance in the international sphere, where the powers of individual states remain limited.¹⁸⁵ These webs, operating through persuasion rather than coercion, can effectively globalise practice without recourse to state-promulgated rules. A number of dialogic mechanisms of this type are already in existence. The Global Reporting Initiative, for example, in consultation with civil society, encourages corporations to institute reporting processes for a number of activities, both economic and social.¹⁸⁶ Likewise, The Global Compact, a voluntary initiative in which businesses undertake to observe ten principles covering human rights, labour standards, the environment and corruption, has been described by its architect as a ‘social learning network’.¹⁸⁷ Determining the effectiveness of webs of this type, particularly with regards to corruption, requires an examination of how they operate. Four mechanisms assist the effective operation of dialogic webs; the manner in which epistemic communities redefine interests, the use of reputation as a restraint on behaviour, the creation of

¹⁸³ Braithwaite and Drahos, above n 11, 553–4.

¹⁸⁴ See especially, the literature on ‘social constructivism’, including Alexander Wendt, ‘Anarchy is what States Make of It: The Social Construction of Power Politics’ (1992) 46 *International Organization* 391.

¹⁸⁵ Braithwaite and Drahos, above n 11, 553–7.

¹⁸⁶ Benner et al, above n 59, 202–3. See also www.globalreporting.org.

intellectual resources valuable to corporations, and the manner in which habitual compliance can be incorporated into organisational routines.

A.i Epistemic Communities and Business Regulation

Peter Haas has identified what he terms ‘epistemic communities’—networks of individuals with shared beliefs and expertise on a given issue.¹⁸⁸ They include professionals from government, civil society and corporations themselves, united by a shared interest in the process of regulation. Epistemic communities, through their expertise, control the diffusion of ideas and knowledge which ‘can lead to new patterns of behaviour and prove to be an important determinant of international policy coordination.’¹⁸⁹ In particular, these communities influence the manner in which problems are perceived, and the scope of potential solutions envisioned by relevant actors.¹⁹⁰ Epistemic communities are particularly important for issue-definition.¹⁹¹ Only once problems are broadly identified and accepted can actors begin to formulate collective solutions and standards of behaviour. In the case of corporate corruption, this process involves the recognition of corruption as a problem and collective understandings of how to approach it.

Epistemic communities successfully communicate norms because they emphasise dialogue with corporations, which can foster internal norms of compliance.¹⁹² This represents a significant improvement on traditional coercive regulatory methods, which can give rise to ‘reactance’—uncooperative responses to forceful external

¹⁸⁷ John Gerard Ruggie, quoted in Koenig-Archibugi, above n 103, 255. See also <www.unglobalcompact.org>.

¹⁸⁸ Peter M Haas, ‘Epistemic Communities and International Policy Coordination’ (1992) 46 *International Organization* 1, 3.

¹⁸⁹ *Ibid.*, 2–3.

¹⁹⁰ Braithwaite and Drahos, above n 11, 553–4

¹⁹¹ *Ibid.*, 553.

¹⁹² *Ibid.*, 563.

pressure.¹⁹³ Therefore, as Braithwaite suggests, ‘using reasoning in preference to power-assertion tends to promote [compliance].’¹⁹⁴ For example, where management officials invest in the creation of standards, they demonstrate a greater likelihood of complying with them.¹⁹⁵ Corporate involvement in the creation of standards also increases the likelihood that those standards are tailored to the needs of corporations.¹⁹⁶ Consequently, one of the strengths of dialogic webs lies in their inclusion of corporate actors.

Internal compliance constituencies—those responsible for the implementation of corporate standards or codes—form an important element of any epistemic community. Parker, in reviewing empirical studies of self-regulatory schemes, has identified these constituencies as a key contributing factor to compliance among corporations.¹⁹⁷ In the case of corruption, the FCPA has already encouraged a body of such professionals.¹⁹⁸ Motorola, for example, has financial specialists checking for accounting discrepancies which could result from corruption.¹⁹⁹ Once established, internal compliance bodies are integrated into existing epistemic communities of compliance professionals. Hence, as Parker suggests, they become ‘conduit[s] of information, skills and concerns from external groups such as regulators, public interest groups, and communities of professional experts that significantly shapes the

¹⁹³ Braithwaite, above n 128, 314–24; Ayres and Braithwaite, above n 12, 49.

¹⁹⁴ Braithwaite, above n 128, 321–2.

¹⁹⁵ For a summary of the relevant studies see Braithwaite, above n 177, 1479; Ayres and Braithwaite, above n 12, 113. See also, Shelton, above n 6, 16.

¹⁹⁶ Ayres and Braithwaite, above n 12, 110.

¹⁹⁷ Parker, above n 182, 53–5.

¹⁹⁸ Fritz Heimann, ‘Combating International Corruption: The Role of the Business Community’ in Kimberly Ann Elliot (ed), *Corruption and the Global Economy* (1997) 147, 156: ‘For every Justice Department employee involved in enforcing the FCPA, there are scores of corporate lawyers and financial people working on compliance programs’. See also Parker, above n 182, 22; Braithwaite, above n 128, 346.

¹⁹⁹ ‘Doing Well by Doing Good’, *The Economist*, 20 April 2000

<http://www.economist.com/displaystory.cfm?story_id=304119> at 3 June 2005.

way in which the company handles legal compliance and social responsibility.’²⁰⁰

Consistent with this role, these groups tend to view their professional duty as ensuring compliance, rather than maximising profit.²⁰¹ Accordingly, such constituencies contribute to an internal impetus towards compliance.

An epistemic community focussing on corruption has existed for some years.²⁰² A number of international actors, including the International Chamber of Commerce (‘ICC’) and Transparency International, have begun to develop a body of expertise on corruption. In particular, this expertise is manifested in the model corporate codes which are promulgated by these organisations, discussed below. One measure of success of this epistemic community has been the resurgence of interest in corruption, and the growing number of voluntarily-signed corporate codes on corruption.²⁰³ The International Chamber of Commerce, in particular, has been active in setting standards expected of its members.²⁰⁴ Transparency International, in turn, has not only promulgated codes of behaviour, but has also attempted to use publicity to hold corporations reputationally accountable for breaches of expected standards of behaviour.²⁰⁵

²⁰⁰ Parker, above n 182, 58–9.

²⁰¹ Empirical studies of the pharmaceutical industry support this contention: Braithwaite, above n 177, 1479; Ayres and Braithwaite, above n 12, 125–6.

²⁰² A defining moment was the establishment of Transparency International in 1993. See www.transparency.org.

²⁰³ Kathryn Gordon and Maiko Miyake, ‘Business Approaches to Combating Bribery: A Study of Codes of Conduct’ (2001) 34 *Journal of Business Ethics* 161; Ronald Berenbiem, *Company Programs for Resisting Corrupt Practices: A Global Study* (2000).

²⁰⁴ International Chamber of Commerce, ‘Corporate Misconduct is Unacceptable, Say ICC Leaders’ (Press Release, 16 December 2002)

<http://www.iccwbo.org/home/news_archives/2002/stories/corp_govn_dec.asp> at 5 June 2005.

²⁰⁵ See, for one example, the Transparency International Press Release on Alcatel: Transparency International, ‘Recent High-Level Bribery Allegations Highlight Disregard for International Anti-Corruption Laws’ (Press Release, 29 October 2004)

<http://www.transparency.org/pressreleases_archive/2004/2004.10.29.alcatel.html> at 3 June 2005.

A.ii Reputation as a Restraint on Behaviour

Reputation acts as a restraint on corporate behaviour in situations of ‘complex interdependence’. Formulated initially by Keohane and Nye, complex interdependence describes the manner in which actors rely on each other for cooperation in a range of areas over significant periods of time.²⁰⁶ The interrelationships of these areas is such that to gain the benefits of one cooperative scheme, an actor may have to suffer the negative consequences of another. Conversely, where an actor, such as a corporation, defaults on one obligation it may suffer in other areas.²⁰⁷ Hence, corporations may take on obligations which do not appear to be in their direct interests, as part of a larger, beneficial cooperative whole. Often invoked as an explanation of state behaviour,²⁰⁸ Braithwaite and Drahos note that complex interdependence can be equally applied to transnational corporations.²⁰⁹ Much like states, corporations benefit from predictable and consistent business standards, and can submit to some disagreeable rules for the benefit of an ordered whole.

Reputation is valuable to corporations not only as a result of interdependence, but also as a result of public pressure. Where corporations fail to meet accepted standards, international bodies such as Transparency International can, and do, bring public pressure to bear against them.²¹⁰ For many companies, the public perception of fault is incentive enough to reform their policies, as their reputation is a valuable commodity in the marketplace. For example, Lockheed, in the wake of the 1970s bribery scandals completely reformed their compliance policies in order to restore the company’s

²⁰⁶ Robert O Keohane and Joseph S Nye, *Power and Interdependence* (1989).

²⁰⁷ Braithwaite and Drahos, above n 11, 553.

²⁰⁸ Keohane, above n 105, 7; Abbott and Snidal, above n 50, 427; Haas, above n 176, 63.

²⁰⁹ Braithwaite and Drahos, above n 11.

reputation.²¹¹ Other corporations, such as Shell and Nike, have found themselves injured by consumer backlashes in the wake of public scandals, and made efforts to reform their policies.²¹² Reputational consequences not only attach to the corporation as a whole, but also to corporate executives among their peers.²¹³ Meetings such as the World Economic Forum provide a vehicle for the praise or reprimand of executives by other executives.²¹⁴ Executives therefore, on their own behalf and on behalf of their corporation, make significant efforts to advertise their compliance with expected standards of behaviour.²¹⁵

Two qualifications should be noted to the effectiveness of reputation as an accountability mechanism. First, it is only effective insofar as corporations value their reputation.²¹⁶ While Nike, as a corporation heavily dependent on consumer sentiment, may be vulnerable to negative publicity, other corporations without such dependencies may not. Furthermore, corporations may respond with public relations exercises rather than genuine reform.²¹⁷ Continued oversight by organisations such as Transparency International provides some measure of protection against these

²¹⁰ Benner et al, above n 50, 200. See also Parker, above n 182, 56–7.

²¹¹ Braithwaite, above n 128, 334. Similar reform was undertaken by Baker Hughes subsequent to revelations that company had engaged in corruption: ‘The Short Arm of the Law’, *The Economist*, 28 February 2002 <http://www.economist.com/displaystory.cfm?story_id=1010969> at 3 June 2005.

²¹² ‘Doing Well by Doing Good’, above n 199; ‘The Worm That Never Dies’, *The Economist*, 28 February 2002 <http://www.economist.com/displaystory.cfm?story_id=1011076> at 3 June 2005.

²¹³ Corporate epistemic communities, in this sense, are analogous to the transnational communities of state officials discussed by Keohane: Keohane, above n 105, 7.

²¹⁴ See <www.weforum.org>.

²¹⁵ Note, for example, the statements of Lee Tashjian, head of communications at Fluor Corporation, on its corruption policy: World Economic Forum, *Tackling Corruption is Good for Business* <<http://www.weforum.org/site/homepublic.nsf/Content/Tackling+corruption+is+good+for+business>> at 3 June 2005.

²¹⁶ Benner et al, above n 50, 200.

²¹⁷ Koenig-Archibugi also notes that negative publicity ‘suffers from the fact that the people who are able to punish companies (eg consumers in rich countries) are frequently not the same people whose interests the codes are supposed to protect (eg workers and communities in developing countries)’: Koenig-Archibugi, above n 103, 257.

circumventions. While reputational accountability is not without its flaws, it does contribute another strand to the web of regulatory influences.²¹⁸

A.iii Intellectual Resources for Corporations

Dialogic webs produce not only behavioural norms, but also authoritative information. This information, in turn, has a value for corporations in the creation of their internal policies. Instead of investing heavily in their own compliance procedures, corporations are able to draw upon the resources provided by non-government organisations.²¹⁹ Hence, such organisations engage in a form of private capacity-building, making it easier for corporations to regulate themselves.²²⁰ The credible and authoritative information provided by non-government organisations is at a premium in a globalised world where there is an oversupply of information.²²¹ Hence, as Keohane and Nye note, '[i]nternational secretariats staffed with knowledgeable individuals, even without traditional sources of power, have the opportunity to place themselves at the center of crucial communications networks, and thereby acquire influence as brokers, facilitators, and suggestors of new approaches.'²²²

In the case of corruption, corporations have already demonstrated a willingness to draw upon such resources. The ICC Rules of Conduct, discussed below, have formed the blueprint for an array of corporate codes.²²³ Similarly, the Partnering Against Corruption Initiative launched by the World Economic Forum is based on a model

²¹⁸ Braithwaite and Drahos, above n 11, 555.

²¹⁹ Generally, firms have to invest in the acquisition of expertise: Gordon and Miyake, above n 203, 166.

²²⁰ For a discussion of capacity building in the context of compliance, see Braithwaite and Drahos, above n 11, 555.

²²¹ Robert O Keohane and Joseph S Nye, 'Power and Interdependence in the Information Age' (1998) 77 *Foreign Affairs* 81, 86; Keohane and Nye, transgovernmental relations, 52; Maher, above n 119, 118.

²²² Keohane and Nye, above n 105, 55.

²²³ Harms, above n 7, 175.

code developed by Transparency International.²²⁴ Worth examining are the three leading approaches to the self-regulation of transnational corruption; the International Chamber of Commerce Rules of Conduct,²²⁵ Hess and Dunfee's C² principles,²²⁶ and the Transparency International 'Integrity Pact' and 'Business Principles'.²²⁷

The International Chamber of Commerce Rules of Conduct ('Rules') have existed since 1977, and saw their latest incarnation in 1999.²²⁸ The Rules are designed to be 'of a general nature constituting what is considered good commercial practice in the matters to which they relate but without direct legal effect.'²²⁹ The Rules prohibit extortion and bribery for any purpose, call for independent and thorough auditing techniques, and establish a Standing Committee to promote their adoption. The Rules are designed to promote individual codes within companies,²³⁰ and the Standing Committee is charged with assisting companies in drawing up their own codes.²³¹

²²⁴ World Economic Forum, 'Partnering Against Corruption Initiative' <<http://www.weforum.org/site/homepublic.nsf/Content/Partnering+Against+Corruption>> at 3 June 2005.

²²⁵ International Chamber of Commerce, *Extortion and Bribery in Business Transactions*, (1999 edition) <http://www.iccwbo.org/home/statements_rules/rules/1999/briberydoc99.asp> at 5 June 2005.

²²⁶ David Hess and Thomas Dunfee, 'Fighting Corruption: A Principled Approach: The C² Principles' (2000) 33 *Cornell International Law Journal* 593.

²²⁷ Transparency International, *Integrity Pact and Public Contracting* <http://www.transparency.org/integrity_pact/index.html> at 5 June 2005; Transparency International, *Business Principles for Countering Bribery* (2002) <http://www.transparency.org/building_coalitions/private_sector/business_principles.html> at 5 June 2005.

²²⁸ An authoritative description of the history of the ICC Rules is provided by Francois Vincke, 'How Effective is the Business Community in Combating Corruption?' in Stuart Marc Weiser, 'Dealing with Corruption: Effectiveness of Existing Regimes on Doing Business' (1997) 91 *American Society of International Law Proceedings* 99. Vincke was the chair of the ICC Ad Hoc Committee on Extortion and Bribery in International Business Transactions, which sat from 1994 to 1996, and the subsequent standing committee. See also, Heimann, above n 198, 150–2; Salbu, above n 26, 456–8; Posadas, above n 1, 407–8; Shihata, above n 15, 474; Harms, above n 7, 175.

²²⁹ International Chamber of Commerce, *Extortion and Bribery in Business Transactions*, (1999 edition) Pt II, Introduction [2] <http://www.iccwbo.org/home/statements_rules/rules/1999/briberydoc99.asp> at 5 June 2005.

²³⁰ Shihata, above n 15, 474.

²³¹ Vincke, above n 228, 105.

Building off the ICC Rules and other corporate codes such as the Sullivan and McBride Principles, Hess and Dunfee have developed a twelve-point set of principles, labelled the C² Principles (Combating Corruption) ('Principles').²³² Hess and Dunfee suggest that the Principles aim to place an emphasis on policies, procedures and publication.²³³ Emphasis on policies is designed to prevent a superficial adoption of the Principles, and to inform employees of the stance of the company. Procedures are designed to attack specific corruption from a number of angles, including through accounting provisions and the transparency of payments to agents. Publication seeks to make transparent the firm's efforts against corruption, and to ensure that their performance is capable of being independently evaluated. Notably, the Principles make no effort to specifically define bribery. As Salbu suggests, 'whereas the ICC approach seems to aim for extreme simplicity, and therefore ease of application, the C² anticorruption Principles are more open-textured and theoretical'.²³⁴

Transparency International has not only developed codes for corporations generally, but also for specific procurement projects. Known as Integrity Pacts ('Pacts'), they require any bidders for a government contract to sign a tender document which provides undertakings not to engage in bribery, supported by a code of conduct and a compliance program.²³⁵ Where a company defaults on the undertaking, they open themselves to liability for damages and debarment from present and future tenders. The Pacts are designed to reintroduce expectations of honesty in tendering processes

²³² Hess and Dunfee, above n 226, 619–22. For discussion, see Salbu, above n 26, 458–61; Fort and Noone, above n 59, 541; Ouzounov, above n 17, 1199–200. For a discussion of the Sullivan and McBride Principles, see Christopher McCrudden, 'Human Rights Codes For Transnational Corporations: The Sullivan and MacBride Principles' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 418.

²³³ Hess and Dunfee, above n 226, 622–3.

²³⁴ Salbu, above n 26, 460. See also Ouzounov, above n 17, 1199.

²³⁵ See Transparency International, *Integrity Pact*, above n 227. See also Boswell, above n 20, 107; Godlbarg, above n 68, 286–7; Posadas, above n 1, 405–7; Harms, above n 7, 208.

tainted by expectations of bribery.²³⁶ Thus far, the Pacts have only been instituted in a limited number of projects, though a growing number of nations have expressed support for them.²³⁷

Notable, too, are the efforts of Transparency International in designing the Business Principles for Countering Bribery.²³⁸ These principles are explicitly designed to assist corporations in the development of internal compliance mechanisms, and were composed following the OECD Convention, in order to help ensure compliance with that convention. These principles, in particular, anticipate a consultative role for Transparency International in interacting with business. These efforts, and the others noted above, represent an undertaking by international civil society to engage with corporations to alter their behaviour.

A.iv Organisations, Employees and Routine

Corporate engagement with regulatory webs, be it through the adoption of corporate codes or simply through dialogue, operates on corporations from within, redefining interests and policies. In this way, regulatory webs are distinct from regulatory techniques that focus on external sanctions. Focussing on these internal regulatory procedures can help bring about a ‘culture of compliance’.²³⁹ In the words of Oran Young, ‘rules constitute an essential feature of bureaucracies and ... routinized compliance with rules is a deeply ingrained norm among bureaucrats.’²⁴⁰ This is also partly due to the fact that decision-making in a large organisation is a significant transaction cost, and so ‘organizations internalize rules so that the advantages and

²³⁶ Boswell, above n 20, 107.

²³⁷ Posadas, above n 1, 406.

²³⁸ Transparency International, *Business Principles*, above n 227.

²³⁹ H Lowell Brown, ‘Parent-Subsidiary Liability under the Foreign Corrupt Practices Act’ (1998) 50 *Baylor Law Review* 1.

disadvantages of compliance need not be recalculated each time they are invoked.²⁴¹

Where internal compliance rules form part of a bureaucratic regime, such as those of large corporations, they foster habits of compliance.²⁴²

Changes in policy, including measures such as corporate codes, also have a marked effect on the behaviour of employees. Communication of ethical commitments to employees opens them to discussion which, in turn, increases the likelihood that employees will utilise broader ethical standards.²⁴³ Samart Powpaka considered the effect of support for bribery on managerial decision-making, and found that reducing perceived support reduced the likelihood of bribery.²⁴⁴ Hence, even voluntary self-regulatory systems can have a pronounced effect on behaviour as part of a regulatory web.

B. *The Limits of Soft Power*

Regulatory webs are a valuable means to regulate transnational corporations.

However, their influence should not be overstated. In the case of corruption, while an active web of influences exists, there are significant aspects of corporate practice which remain uncontrolled. It is notable, in an international climate where anti-corruption norms are described by one commentator as ‘morally unassailable’,²⁴⁵ that few corporations exhibit any indications of having internalised such norms.²⁴⁶ A gap clearly exists between the norm and the behaviour. Michael Reisman, identifies a

²⁴⁰ Oran Young, *Compliance and Public Authority: A Theory with International Implications* (1979) 39.

²⁴¹ Abbot and Snidal, above n 50, 429.

²⁴² Braithwaite and Drahos, above n 11, 554–5.

²⁴³ See Parker, above n 182, 34, citing F Bird, *The Muted Conscience: Moral Silence and the Practice of Ethics in Business* (1996).

²⁴⁴ Samart Powpaka, ‘Factors Affecting Manager’s Decision to Bribe: An Empirical Investigation’ (2002) 40 *Journal of Business Ethics* 227, 242.

²⁴⁵ Bill Shaw, ‘The Foreign Corrupt Practices Act and Progeny: Morally Unassailable’, (2000) 33 *Cornell International Law Journal* 689.

²⁴⁶ A World Bank survey indicates that approximately 40 percent of companies pay bribes: Windsor and Getz, above n 33, 752.

divide in corruption between ‘mythical norms’, the overarching set of moral norms, and ‘operative codes’, which determine actual behaviour in given circumstances.²⁴⁷ In the place of anti-corruption norms, companies generally emphasise operative codes of profit-making.²⁴⁸ While companies are prepared to make token gestures, many seem reluctant to undertake serious reform.²⁴⁹

Many observers are, therefore, cynical about the prospects for self-regulatory mechanisms, even in the context of a web of regulatory influences. Koenig-Archibugi, for example, has suggested such codes ignore the concerns of those not party to their drafting, and that self-certification alone is usually insufficient to ensure compliance where lax enforcement would be beneficial to the firm.²⁵⁰ Moreover, as noted above, reputation is not a universally effective means of controlling corporate behaviour – corporations may not care about their reputation, or engage in public relations exercises in place of genuine reform. Regulatory webs, therefore, may be a useful, but ultimately insufficient means of controlling corporate behaviour.

C. Private Actors and Accountability

Regulatory webs, like transgovernmental networks, also face problems of legitimacy. As Alfred Aman has noted, ‘[p]ublic law values such as transparency, participation, and fairness remain relevant, even though private actors now carry out various tasks that can appropriately be called governmental.’²⁵¹ An assessment of regulatory webs must be made on these values.

²⁴⁷ Michael W Reisman, *Folded Lies, Bribery, Crusades and Reforms* (1979). Luis Moreno Ocampo, former President of Transparency International for Latin America and the Caribbean, has similarly noted that many informal systems that allow corruption in coexistence with the prohibitive norms: cited in Goldbarg, above n 68, 281. See also Amartya Sen, *Development as Freedom* (1999) 267, 275–9.

²⁴⁸ Goldbarg, above n 68, 284.

²⁴⁹ ‘The Short Arm of the Law’, above n 211.

²⁵⁰ Koenig-Archibugi, above n 103, 251–6.

²⁵¹ Aman, above n 59, 382.

Without dispute, a number of the criticisms levelled at transgovernmental networks in the previous chapter are applicable to an anti-corruption regulatory web as well. It remains the case that citizens lack a means of direct input into the creation of regulatory webs, just as they lacked direct input into the substance of transgovernmental networks.²⁵² Nevertheless, the inclusion of corporations and, indirectly, non-government organisations represents an improvement over purely governmental networks. While Slaughter justifiably responded to the lack of government in international governance,²⁵³ the reintroduction of the state need not exclude non-state actors. In fact, the inclusion of global interest networks can enhance accountability,²⁵⁴ so long as the state remains involved in the process. So, too, is it important to engage corporations in the process of regulation, as they are its most direct subjects.

The existence of dialogue in the webs is a distinct advantage. The engagement between government, corporations and civil society provides for much greater mutual accountability. Keohane, for one, suggests that '[c]riticism, heard and responded to in a public space, can help generate accountability'.²⁵⁵ Similarly, an emphasis on dialogue is a central element of Habermas' conception of democracy.²⁵⁶ Regulatory webs are far better vehicles for such criticism and dialogue, than government action alone.

²⁵² As Benner et al note, 'two traditional mechanisms of accountability are not applicable in networks: electoral accountability and hierarchical accountability': above n 50, 198.

²⁵³ See above n 150 and associated text.

²⁵⁴ Alfred C Aman, 'Privatization and Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law' (2001) 28 *Fordham Urban Law Journal* 1477, 1505–6.

²⁵⁵ Keohane, above n 105, 9.

²⁵⁶ Habermas, above n 165.

Nevertheless, while regulatory webs may constitute an improvement on the legitimacy of transgovernmental networks, they cannot pretend to meet traditional standards of accountability. A 'democratic deficit' obtains in all forms of global governance, and presents a continuing challenge to international lawyers and policy-makers.²⁵⁷ Continued attention to such problems is essential, even if solutions are not immediately forthcoming.

D. Combining State and Non-State Regulation

For reasons of functionality and legitimacy, regulation of transnational corruption should attempt to unite the activities occurring on a number of planes. As Braithwaite and Drahos note, the state is still one of the primary actors in regulatory webs, and their influence should not be underestimated. This paper, therefore, commends an approach which links all three planes of analysis – international conventions, supported by networked regulatory agencies, combined with regulatory webs. One means by which the three planes may be linked is through enforced self-regulation.

Braithwaite distinguishes enforced self-regulation, which involves state to business negotiation, from co-regulation, which involves state negotiation with an entire industry sector.²⁵⁸ His model involves compelling individual firms to draft a set of rules tailored to the specific circumstances facing the firm, and subject to certain minimum standards. Those rules are then sent to the government for approval and publication, and thereafter compliance groups internal to the company take on the role of enforcement. The role of government is then only to audit the internal compliance groups to ensure they have done their work satisfactorily, and to impose sanctions

²⁵⁷ Aman, above n 59, 383.

²⁵⁸ Braithwaite, above n 177; Ayres and Braithwaite, above n 12, 102.

where there has been failure to meet the approved standards.²⁵⁹ The system seeks to gain the benefits of self-regulation, while still having the firm hand of government in the background to prevent regulatory abuses.²⁶⁰

This form of regulation would allow for a continued role by the state, but assigns a significant role to regulatory webs. By allowing corporations to choose their codes, they continue to be involved in dialogic webs which help define their interests and internalise commitments. Similarly, non-government organisations would continue to provide regulatory assistance in the development of these codes. However, by being vested with the force and legitimacy of law, these codes would have an increased 'compliance pull'.²⁶¹ Moreover, by reinforcing self-regulation with the threat of legal sanction companies are forced to take their responsibilities seriously.²⁶² These legal penalties prevent corporations from manufacturing 'paper' compliance solely for public relations purposes. Joseph Rees, in examining regulatory arrangements in both the nuclear and chemical industries, identified the background threat of legal sanctions as a central element of the successful self-regulatory schemes.²⁶³ Similarly, legal sanctions tend to strengthen the hand of those inside the corporation who

²⁵⁹ For a full account of enforced self-regulation see Braithwaite, above n 177; Ayres and Braithwaite, above n 12, 106–9.

²⁶⁰ Koenig-Archibugi notes that a number of scholars consider such programs a 'third way' between the poles of command and control regulation and unalloyed self-regulation: Koenig-Archibugi, above n 103, 254.

²⁶¹ A number of scholars suggest that law itself, by virtue of its generally accepted legitimacy, encourages compliance. See Shelton, above n 6, 8; Abbott and Snidal, above n 50, 428.

²⁶² This has been suggested to be the case with norms generally: Ellickson, above n 181.

²⁶³ Joseph Rees, 'The Development of Communitarian Regulation in the Chemical Industry' (1997) 19 *Law and Policy* 477; Joseph Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (1994). Weiss, too, suggests, 'the literature on informal social norms points to the importance of having sanctions available as a credible threat in the background in order to encourage compliance with informal social norms': Edith Brown Weiss, 'Understanding Compliance with Soft Law' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 535, 544.

promote compliance,²⁶⁴ and reinforce compliance norms in the web as a whole.²⁶⁵

Background legal threats, therefore, can supplement and reinforce the regulatory web.

In combination with threats, rewards can be provided for effective internal compliance schemes. For example, US sentencing guidelines for corporations provide for a reduction of penalties where companies have strong compliance programs, and empirical evidence suggests that this motivated a significant number of corporations to enhance or create internal compliance mechanisms.²⁶⁶ For most TNCs, enforced self-regulation would be a minimal financial burden. Since most bribery compliance programs focus on good accounting practice, ‘implementation programmes in bribery might well have stronger, more direct synergies with existing control processes.’²⁶⁷ Moreover, since TNCs tend to be large and well-resourced, they are also more capable of establishing internal compliance programs against corruption.²⁶⁸ Monitoring of such programs can occur through two mechanisms – by civil society and consumers for companies concerned about their reputation, and by regulators for those companies not susceptible to reputational accountability.²⁶⁹

This, however, is only one potential means of uniting the three planes of regulation.

Further research is necessary to determine whether enforced self-regulation is entirely feasible as a complete regulatory strategy. Other regulatory strategies which harness

²⁶⁴ Heimann, above n 198, 156.

²⁶⁵ Sunstein, for instance, has considered the manner in which law may, by ‘making a statement’, strengthen some norms and weaken others: Cass Sunstein, ‘On the Expressive Function of Law’ (1996) 144 *University of Pennsylvania Law Review* 2021, 2034–5. See also Cass Sunstein, ‘Social Norms and Social Roles’ (1996) 96 *Columbia Law Review* 903.

²⁶⁶ Parker, above n 182, 20; Heimann, above n 198, 157.

²⁶⁷ Gordon and Miyake, above n 203, 169.

²⁶⁸ Parker, above n 182, 56–7.

²⁶⁹ Braithwaite suggests ‘when trust is tried and found to be misplaced, there is a need to escalate to deterrence as a regulatory strategy’: Braithwaite, above n 128, 333.

the power of regulatory webs, and can simultaneously gain the benefits of a state-backed program, will also represent an improvement on existing regulation.

Conclusion

Webs are increasingly influential in the regulation of global business. By uniting individually weak strands of soft law vested in non-state actors, the web as a whole can influence corporate behaviour. Hence, a comprehensive approach to the regulation of foreign bribery should focus on a multiplicity of actors and methods, instead of remaining conceptually wedded to the state. Enforced self-regulation is one mechanism which may be able to traverse the gap between state and non-state regulation. While this form of international regulation, like others, is not without problems of legitimacy and accountability, it does represent an improvement through the inclusion relevant actors such as corporations and non-government organisations. It does so, however, while still maintaining the control and involvement of government. As a result, it represents an improvement in both functionality and legitimacy compared to alternate proposals.

CONCLUSION

Transnational corruption is one of many regulatory challenges posed by globalisation. Its consequences, however, are particularly severe. It inhibits growth, compromises political institutions, and obstructs the rule of law. Moreover, it does so primarily in the developing world, where all three commodities are in short supply. It is imperative, therefore, that regulators utilise every resource available to combat transnational corruption.

In spite of this imperative, many scholars and policy makers continue to be blinded by their fidelity to the state. Anne-Marie Slaughter, for example, responds to global problems by advocating a renaissance of the state, albeit in the modified form of transgovernmental networks. Yet wholly state-based regulation, even in cooperative networks, cannot fully control transnational corporations. Regulators confront recurring problems with investigations beyond their borders, and struggle to reign in corporations of increasing size and complexity. Transnational corruption is a vivid illustration of these difficulties.

In the absence of effective state action, non-state actors have made efforts to fill the regulatory vacuum. Organisations such as the International Chamber of Commerce and Transparency International have played instrumental roles in setting standards and preventing corrupt behaviour. By fashioning soft law mechanisms, such as dialogue and reputation, into regulatory webs, these organisations have gone some way to controlling corporate behaviour. While these mechanisms are no panacea, they are valuable regulatory resources and should be recognised as such.

This paper, therefore, advocates an approach which draws upon all the available resources, be they vested in states, corporations, or non-state actors. Only through a combination of approaches can intractable problems such as transnational corruption be addressed. Enforced self-regulation may be one means of uniting state and non-state approaches, though it, and other mechanisms, necessitate further investigation.

Future scholarship should also be attentive to the need for legitimacy, particularly through democratic accountability. Both transgovernmental networks and regulatory webs suffer, in varying degrees, from problems of legitimation. It is easy, in the quest for functional regulation, to neglect the importance of regulatory accountability. Yet popular control of regulation must remain an important element of any well-rounded governance policy.

The signature of the *UN Convention Against Corruption* marks an important step forward in the fight against corruption. It is not, however, an end point. By harnessing new, soft law mechanisms to regulate corporate behaviour, a more comprehensive and effective approach is possible. For transnational corruption, such an approach is long overdue.

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