PROMOTING CORPORATE SOCIAL RESPONSIBILITY THROUGH INTERNATIONAL MANDATORY CODE OF ETHICS: A CASE STUDY OF MULTINATIONAL CORPORATIONS IN SELECTED DEVELOPED AND DEVELOPING COUNTRIES

by

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ABSTRACT

Multinational companies (MNCs) often act unethically in their dealings and there are no mechanisms in place to hold them accountable for their unethical practices. Currently, there are various international instruments that regulate the ethical activities of MNCs for example, the Organization for Economic Corporation and Development Guidelines for Multinational Enterprises, the 1999 UN Global compact, the UN Guiding Principles and the ISO 14000 series. These instruments often referred to as codes of conducts except the UN Guiding Principles, have no enforcement mechanisms in place and only serve as a guideline for MNCs. As a result, most MNCs get away with unethical practices and do not participate in CSR activities.

This thesis proposes an international mandatory code of ethics (IMCE) that will govern the ethical practices of MNCs and impose liability on MNCs for unethical practices. This thesis argues that once MNCs are mandated to be ethical, they will be more conscious and participate more in CSR activities. It uses Nigeria, United States of America (USA) and the United Kingdom (UK) as a case study to determine if the IMCE can be implemented in other countries. The findings are that the IMCE can be implemented in various countries and that MNCs can be mandated to act ethically and comply with CSR initiatives once they are given international recognition as legal persons.

Chapter one discusses the importance of the MNCs being actively involved in CSR activities, the inadequacies of various international instruments; and finally discusses the differences and challenges of regulating CSR.

Chapter two discusses the sustainability of the IMCE by looking at one critical factor that will be needed before MNCs can be held accountable for their unethical practices such as recognition of MNCs under international law. This chapter is concluded with a discussion on the aspects that will make MNCs sustainable such as uniformity, strong institutional systems and overcoming jurisdictional challenge.

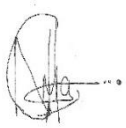
Chapter three looks at the provisions that will be contained in the IMCE. Chapter four discusses the application of the IMCE in Nigeria, USA and the UK and argues that if they can be applied in these countries, they can be applied in all countries. Chapter five is the conclusion and contains recommendation for future research.

Keywords: Corporate social responsibility, ethics, unethical, corporate, multinational corporations, corporate governance, state sovereignty, enforcement, domestication, implementing.

DECLARATION

I, Ada Ama-Njoku, declare that this thesis is my own unaided work except as indicated in the references, text and acknowledgements. It is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

Signed at Johannesburg, on the 15th day of April 2019.



Ada Ama-Njoku

ABBREVIATION

ANSI	American National Standards Institute
ATCA	Alien Tort Claims Act
BSI	British Standards Institution
CG	Corporate Governance
CSE	Corporate Social Ethics
CSO	Corporate Social Organizations
CSR	Corporate Social Responsibilities
DNA	Deoxyribonucleic Acid
ECHR	European Convention on Human Rights
FDI	Foreign Direct Investment
FIDH	International Federation for Human Rights
GDP	Gross Domestic Product
GRI	Global Reporting Initiative
HRW	Human Rights Watch
ICs	International Courts
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Disputes
ILO	International Labour Organization
IMCE	International Mandatory Code of Ethics
IMCERB	International Mandatory Regulatory Body
INR	Indian Rupee

IRF	International Regulatory Framework
MDIs	Multilateral Developmental Institutions
MNCs	Multinational Companies
MNEs	Multinational Enterprises
NCP	National Contact Points
NGOs	Non-governmental Organizations
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
PAIC	Pan African Investment Code
RAID	Rights and Accountability in Development
RF	Regulatory Framework
SON	Standards Organisation of Nigeria
SR	Social Responsibility
UK	United Kingdom
UN	United Nations
USA	United States of America
US	United States

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CHAPTER ONE

OVERVIEW OF THE STUDY

1. INTRODUCTION

Most companies are more concerned about generating profit than engaging in activities that benefit their society and the countries in which they operate in. However, studies have shown that companies thrive better when there is a balance in their day to day activities. This includes maintaining a balance in their ethical, environmental, social and personal values.[1] All these are components of Corporate Social Responsibilities (CSR) and a company's ability to carry them out can affect its employees, consumer behaviour, and the society at large.[2]

The concept of CSR has evolved over the years and has become the subject matter of discussion amongst academics and businesses.[3] The question is whether companies can assume responsibility beyond profit-seeking and maximizing its own financial well-being.[4] This question is answered in the discussion of the philosophical underpinnings of CSR, the CSR debate and the various models of CSR.

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[1] Z Mousavi, F Beiranvand & Z Moeinfar 'Corporate Social Responsibility' (2015) 5(1) *Indian Journal of Fundamental and Applied Life Sciences* 1, 1; See the following for other definitions of CSR: A Dahlsrud 'How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions' (2008) 15 *Corporate Social Responsibility and Environmental Management* 1, 7-11; A McWilliams, DS Siegel & PM Wright 'Corporate Social Responsibility: Strategic Implications' (2006) 43(1) *Journal of Management Studies* 1, 1; MS Schwartz & AB Carroll 'Corporate Social Responsibility: A Three-Domain Approach' (2003) 13(4) *Business Ethics Quarterly* 503, 503; European Commission 'Corporate Social Responsibility' <http://ec.europa.eu/growth/industry/corporate-social-responsibility/index_en.htm>; United Nations 'Corporate Social Responsibility and Developing Countries: What Scope for Government Action?' (2007) 1 *Sustainable Development Innovation Brief*s 1, 1.

[2] EH Creyer & WT Ross 'The Influence of Firm Behaviour on Purchase Intention: Do Consumers Really Care About Business Ethics?' (1997) 14(6) *Journal of Consumer Marketing* 421, 423; A Pomering & S Dolnicar 'Customers' Sensitivity to Different Measures of Corporate Social Responsibility in the Australian Banking Sector'(2006) *Faculty of Commerce Papers* 1,1 . B Hashimu & NA Ango 'Multinational Companies Corporate Social Responsibility Performance in Lagos State, Nigeria: A Quantitative Analysis' (2012) 5(1) *European Journal of Globalization and Development* 247, 248.

[3] A Mickels 'Effectively Enforcing Corporate Social Responsibility Norms in the European Union and the United States' (2009) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.522.9599&rep=rep1&type=pdf>.

[4] AB Carroll & KM Shabana 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) *International Journal of Management Reviews* 85,86; S Du, CB Bhattacharya & S Sen 'Maximizing Business Returns to Corporate Social Responsibility (CSR): The Role of CSR' *International Journal of Management Reviews (2010)* 8, 8-9; H Aguinis & A Glavas 'What We Know and Don't Know About Corporate Social Responsibility: A Review and Research Agenda' (2012) *Journal of Management* 932, 933-934.

1.1 Philosophical underpinning of CSR

The foundation of CSR is tied to ethics, politics, economics and social justice. The origin of CSR dates a far back as the 1920s[5] though companies were already involved in philanthropical activities before the 1920s. [6] The beginning of the idea of CSR was in the 1800s. This was the industrial evolution era where companies were more philanthropic in their activities. In the 1920s there was a shift from philanthropy to profit maximization.[7]

From the 1950s to the 1960s, there was a shift from the economic perspective of CSR to the conceptual basis.[8] The 1970s saw a rapid increase in the knowledge and participation of companies and individuals in CSR through environmental protection.[9] CSR has evolved over the years that it has become a subject matter of discussion in newspapers, textbooks and in media.[10]

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[5] TO Banki-Kalid & AH Ahmed 'Corporate Social Responsibility (CSR): A Conceptual & Theoretical Shift' (2017) 7(1) *International Journal of Academic Research in Accounting, Finance & Management Sciences* 203, 206.

[6] For example, in 1919 there was an uprising by Americans against the decision of Ford Company following a Supreme Court ruling to distribute all its profits to its shareholders rather than serving society. See B Hood in TO Banki-Kalid & AH Ahmed 'Corporate Social Responsibility (CSR): A Conceptual & Theoretical Shift'(2017) 7(1) *International Journal of Academic Research in Accounting, Finance & Management Sciences* 203, 206

[7] A Glazer 'The profit-maximizing non-profit' *Oxford Economic Papers* 68(2) 301, 307; SK Gupta 'The Purpose of Business: Profit Maximization versus Corporate Citizens' <https://www.usi.edu/media/3654807/Purpose-of-Business.pdf 1-2>; CD Hategan, N Sirghi, & H Vasile-Petru et al. 'Doing Well or Doing Good: The Relationship between Corporate Social Responsibility and Profit in Romanian Companies' <file:///C:/Users/Ada/Downloads/sustainability-10-01041.pdf >; BD Motilewa, EKR Worlu, & G Mayowa et al. 'Creating Shared Value: A Paradigm Shift from Corporate Social Responsibility to Creating Shared Value' (2016) 10(8) *International Journal of Economics and Management Engineering* 2687, 2688.

[8] A Kaul & J Luo 'The Economic Case For CSR: The Competitive Advantage Of For-Profit Firms in The Market for Social Goods' <https://corporate-sustainability.org/wp-content/uploads/The-Economic-Case-for-CSR.pdf>; SN Bhaduri & E Selarka 'Corporate Governance and Corporate Social Responsibility of Indian Companies' *CSR, Sustainability, Ethics & Governance* 11-33 at 14-15; I András & M Rajcsányi-Molnár 'The Evolution of CSR and its Reception in Post-Socialist Environments: The Case of Hungary' (2015) 4 (1) *Journal of Environmental Sustainability* 1,3-5.

[9] PL Cochran 'The evolution of corporate social responsibility Business Horizons' (2007) 50 449,449-451; AB. Carroll 'Corporate social responsibility: The Center piece of competing and complementary frameworks' (2015) 44 *Organizational Dynamics* 87,88; J Footea, N Gaffney & JR Evansa 'Corporate social responsibility: Implications for performance excellence' (2010) 21(8) *Total Quality Management*' 799, 799; J Szlavik, NC Sigene Sustainability and Business Behaviour: The Role Of Corporate Social Responsibility' (2005) 13(2) *Pálvölgyiperiodica Polytechnica Ser Soc Man Sci* 93, 94.

[10] M Painter-Morland & G Deslandes 'Reconceptualizing CSR in the Media Industry as Relational Accountability' (2017) 143 *Journal of Business Ethics* 665,666.

1.1.1 The 1800s

From the mid-1800s, small and upcoming businesses were concerned about employees[11] but there was no difference between individual philanthropy and business philanthropy.[12] The nature of the philanthropic work of most companies at the time had no label attached to it.[13] It included activities such as donating to orphans or educational institutions.[14]

These philanthropic activities were not viewed positively. Some considered it as companies giving away stakeholders' assets without their approval while others applied restriction to it for instances where it benefited the company.[15]

1.1.2 The 1920s to 1950s

This was the profit maximization era where most companies' primary objective was profit making.[16] Companies were profit-oriented and therefore every philanthropic activity was done in a way that could increase their profit.[17] This led to many questions on whether these

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[11] AB Carroll 'A History of Corporate Social Responsibility: Concepts and Practices' <https://www.researchgate.net/publication/282746355_A_History_of_Corporate_Social_Responsibility_Concepts_and_Practices/download>; BW Husted 'Corporate Social Responsibility Practice from 1800–1914: Past Initiatives and Current Debates' (2014) 25(1) *Business Ethics Quarterly* 125, 127; G Grigore 'Ethical And Philanthropic Responsibilities in Practice' (2010) 10(3) *Economics* 167, 168.

[12]MR Islam, MD Salim & TT Choudhury et al. 'Corporate Social Responsibility (CSR) and Challenges of Environmental and Social Reporting in Bangladesh' (2013) 5(23) *European Journal of Business and Management* 170, 175.

[13] M Mihaljevic & Ivana Tokic, 'Ethics and Philanthropy in the Field of Corporate Social Responsibility Pyramid' <https://bib.irb.hr/datoteka/782829.Ethics_and_philanthropy_in_the_field_of_corporate_social_responsibility_pyramid.pdf >.; TJ Dalsant 'Corporate Social Responsibility and Philanthropy in the European Outdoor Industry: an Investigation of Different Outdoor Brands and their Perceptions' <https://www.bsi-sport.de/fileadmin/user_upload/CSR/Thomas_Johannes_Dalsant_-_Corporate_Social_Responsibility_and_Philanthropy_in_the_European_Outdoor_Industry.pdf>; G von Schnurbein & S Stühlinger 'Revisiting the Relationship of CSR and Corporate Philanthropy by Using Alignment Theory' (2015) 6 *CEPS Working Paper* Series 1, 3.

[14] PC Godfrey 'The Relationship between Corporate Philanthropy and Shareholder Wealth: A Risk Management Perspective' (2005) 30(4) *Academy of Management Review* 777, 778.

[15] JPN Caracol 'Corporate Social Responsibility and its Importance in Company Strategy' <https://repositorio.iscte-iul.pt/bitstream/10071/4042/1/Tese_JoaoCaracol_11145_Responsabilidade_Social_FINAL.pdf>; FS Madrakhimova 'Evolution of the Concept and Definition of Corporate Social Responsibility (2013) 8(2) *Global Conference on Business and Finance Proceedings* 113,113-114; NN Eberstadt 'What History Tells us about Corporate Responsibilities' (1973) *Business and Society Review/Innovation* 76, 78.

[16] MD Tareq, B Hossain & C Siwar et al. 'Historical Development of Corporate Social Responsibility- A Review on Early Studies' (2014) 15 *Historical Research Letter* 14, 14; O Ihlen 'Ye olde CSR: The historic roots of corporate social responsibility in Norway' (2015) 127(1) *Journal of Business Ethics* 109,116; CAH Wells 'The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century' (2002) 51 *Kansas Law Review* 111, 119.

[17] H Wong & R Wong 'Corporate Social Responsibility Practices in Listed Companies' (2015) 7(1) *Journal of Management Research* 139, 140; S Brammer, G Jackson, & D Matten 'Corporate Social Responsibility and institutional theory: New perspectives on private governance' (2012) 1(10) *Socio-Economic Review* 3, 11.

philanthropic activities of companies were economical or moral.[18] The debate focused on whether an organization should engage in activities for public welfare.[19] This exposed the companies and the society became aware of illegal business practices. In this era most people and businesses referred to CSR as 'social responsibility' (SR).[20]Companies donated large number of things to charities throughout this period up to the 1950s.[21]

1.1.3 The 1950s-1970s

Between 1950 and 1960, companies were being remodelled.[22] During this period, there was a shift from economic ideology of the organization's activities to expansion of the conceptual basis of corporate responsibility.

This period was when societies debated on the organization's policy of engaging socially with its surrounding environment. Thus, there was a need to regulate relationships between companies and their shareholders.[23] In the 1950s there were calls to maximise shareholder value. This included making decisions and pursuing policies that would favour the society.[24]

[18] Banki-Kalid & AH Ahmed (note 5 above) 206; G Jones 'Debating the Responsibility of Capitalism in Historical and Global Perspective' (2013) 14-004 *Working Paper* 1, 5.
[19] ES Asemah, RA Okpanachi & LON Edegoh 'Business Advantages of Corporate Social Responsibility Practice: A Critical Review'(2013) 18 *New Media and Mass Communication* 45, 45; J Galbreath 'The Benefits of Corporate Social Responsibility: An Empirical Study' <https://www.anzam.org/wp-content/uploads/pdf-manager/1279_GALBREATH_JEREMY-13.PDF>; RC Moura-Leite & RC Padgett 'Historical background of corporate social Responsibility' (2011) 7(4) *Social Responsibility Journal* 528, 533.
[20] Carroll (note 10 above).
[21] PE Murphy 'An Evolution: Corporate Social Responsiveness' (1978) 30(6) *University of Michigan Business Review* 19, 33.
[22] FS Madrakhimova 'History of Development of Corporate Social Responsibility' (2013) 4(6) *Journal of Business and Economics* 509,510; M Ismail 'Corporate Social Responsibility and its Role in Community Development: An International Perspective' (2009) 2(9) *The Journal of International Social Research* 199,202; C Bichta 'Corporate Social Responsibility a Role in Government Policy and Regulation?' (2003) *Research Report* 1,28.
[23] DP Lee 'A Review of the theories of Social Responsibility. Its Evolution and Road Ahead' (2008) 10 *International Journal of Management Reviews* 53, 60; R Marens 'The Hollowing Out of Corporate Social Responsibility: Abandoning a Tradition in an Age of Declining Hegemony' (2008) 39 *McGeorge Law Review* 851,872-873; A Johnston 'The Shrinking Scope of CSR in UK Corporate Law Johnston' (2017) 74(2) *Wash. & Lee L. Rev* 1001, 1020.
[24] HR Bowen 'Social Responsibility of the Businessman' (1953) in TO Banki-Kalid & AH Ahmed 'Corporate Social Responsibility (CSR): A Conceptual & Theoretical Shift' (2017) 7(1) *International Journal of Academic Research in Accounting, Finance & Management Sciences* 203, 207; WC Frederick 'The Growing Concern over Business Responsibility'(1960) 2 *California Management Review* 54, 58; J McGuire 'Business and Society' (1964) 5(3) *Technology and Culture* 478, 472.

From the 1960s there was an expanded study on research into CSR.[25] Some argued that corporate responsibility catered for the economic value of companies and for other interests.[26] While others argued that in balancing the interests of the companies with that of others, a firm is successful when it maintains a good relationship with their political environment.[27]

In the 1970s there was a rapid response by companies to environmental needs and issues, pressure from stakeholders and business crisis.[28] This was because of the various regulations that made the public aware of other corporate responsibilities such as business ethics, community engagement and disclosure practices.[29] The 1970s saw many demands being made of firms from stakeholders for direct or in-direct non-financial activities.[30]

In this era, there were attempts to formalize CSR[31] by defining it. The most prominent scholars in this period was Davis.[32] He defined social responsibility as: 'a businessman's decisions and actions taken at least partially beyond the firm's direct economic or technical interest'. In Davis's opinion, social responsibility ought to have been viewed with an executive framework.[33]

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[25] Frederick (note 23 above) 58; McGuire (note 23 above) 472; E Gheribi Corporate Social Responsibility in Foodservice Business in Poland on Selected Example (2017) 23 *European Journal of Service Management* 1, 14; L Yang & Z Guo 'Evolution of CSR Concept in the West and China' (2014) 3(2) *International Review of Management and Business Research* 819,820.

[26] K Davis 'Can Business Afford to Ignore Social Responsibilities?' (1960) 2 *California Management Review* 70, 72; LM Emilsson, M Classon & K Bredmar 'CSR and the quest for profitability – using Economic Value Added to trace profitability' (2012) 2(3) *International Journal of Economics and Management Sciences* 43, 44.

[27] T Parsons 'An Outline of the Social System' <http://www.csun.edu/~snk1966/Talcott%20Parsons%20-%20An%20Outline%20of%20the%20Social%20System.pdf>; A McWilliams & D Siegel 'Corporate Social Responsibility: A Theory of the Firm Perspective' (2001) 26 *The Academy of Management Review* 117, 119.

[28] DW Greening & B Gray 'Testing a Model of Organizational Response to Social and Political Issues' (1994) 37 *The Academy of Management Journal* 467, 484; AB Carroll 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) *Business and Society* 268, 287; WC Frederick *Corporate Social Responsibility: Deep Roots, Flourishing Growth, Promising Future* (2009) *98,102;* C Moore 'Corporate Social Responsibility and Creating Shared Value: What's the Difference?' <https://www.sharedvalue.org/sites/default/files/resource-files/CFR-047%20Corporate%20Social%20Responsibility%20White%20Paper_FINAL.pdf>.

[29] Carroll (note 27 above) 270; D Crowther & G Aras Corporate Social Responsibility <https://www.mdos.si/wp-content/uploads/2018/04/defining-corporate-social-responsibility.pdf>; P Considine 'Corporate Social Responsibility: The Intersection of Facts, Beliefs and Values' (2015) *A thesis submitted in partial fulfilment of the requirements of the University of Lincoln for the degree of Doctor of Philosophy* <http://irep.ntu.ac.uk/id/eprint/27127/1/4497_Considine.pdf >.

[30] E Garriga & D Mele 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) 53, *Journal of Business Ethics* 51,63; Carroll (note 10 above) 3; DC Gligor 'CSR Benefits and Costs in a Strategic Approach <http://feaa.ucv.ro/annals/v1_2015/8%20-%20ICOnEC_2015_Munteanu_Gligor.pdf>.

[31] Carroll (note 10 above) 9; I Slavova 'Strategic Perspective of Corporate Social Responsibility' <https://www.unwe.bg/uploads/Alternatives/A09-03.2013.pdf>; P Considine (note 28 above) 99.

[32] Davis (note 25 above).

[33] Ibid. RC Maura-Leite & RC Padgette 'Historical background of Corporate Social Responsibility' (2011) 7(4) *Social Responsibility Journal* 528,533.

According to Frederick social responsibility is the advancement of social and economic resources to the public to meet various social needs and not just the needs of private persons and firms.[34]

Bowen viewed CSR as the reinforcement of social and economic goals.[35] Bowen was considered the "father of CSR" by Carroll.[36]

Philanthropy, employee improvements and customer relations were some of the concepts that businesses were now practicing towards the end of the 1960s.[37] Companies then began to focus on very delicate issues such as urban decay, racial discrimination and pollution problems from 1968 to1973.[38]

In the 1950s and 1960s, CSR research focused on medium sized institutions that were involved in activities that promoted CSR.[39]

1.1.4 Post 1970s

In this era the concept of social responsibilities expanded to include environmental protection within its interest leading to what is known now as environmental sustainability. There has been a shift in focus for CSR from the 1920s from profit maximization being the exclusive objective of business organizations to social and environmental practices being integrated within companies' operations.

Johnson also criticised various definition of CSR and acknowledged that a business is CSR compliant when the interest of various stakeholders is protected such as the interests of the employees, suppliers and the community.[40]

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[34] Frederick (note 23 above) 60; WC Frederick 'From CSR1 to CSR2: The Maturing of Business and Society Thought' (1978) *Working paper* 279,284; WC Frederick 'Moving to CSR4: What to Pack for the Trip' (1998) 37(1) *Business & Society* 40, 53.

[35] Ibid.

[36] Carroll (note 10 above) 8.

[37] M Heald 'The Social Responsibilities of Business: Company and Community 1900-1960.' (1970) 45(1) *The Business History Review* 126,126; Y Feng, HH Chen & J Tang 'The Impacts of Social Responsibility and Ownership Structure on Sustainable Financial Development of China's Energy Industry' (2018) *Open Access Journal* 1,3; LH Bildsøe Exploring Corporate Social Responsibility: A comparative Study of the CSR Communication of Starbucks and Nestlé <http://pure.au.dk/portal/files/85276945/SPECIALEAFLEVERING.pdf>.

[38] Carroll (note 10 above) 7.

[39] HR Bowen *Social Responsibilities of the Businessman* (2013) 138.

[40] HL Johnson *Business in Contemporary Society: Framework and Issues* (2005) 10; HA Aminu, MD Haron & A Azlan 'Corporate Social Responsibility: A Review on definitions, core characteristics and theoretical perspectives' (2015) 6(4) *Mediterranean Journal of Social Science* 83, 86; J Mäkinen & A Kourula 'Pluralism in Political Corporate Social Responsibility' (2012) 22(4) *Business Ethics Quarterly* 649, 660.

In the 1970s the focus was on how to build long term relationship between firms and their communities.[41] This period was termed the social power of stakeholders in addition to their powers of accountability.[42] There has been an expansion in the CSR theories which now includes interaction and connection between business and society as well as an emphasis on the inherent responsibilities of relations.[43] There was an addition of new ideas related to CSR practices which included enlightened self-interest.[44] There was further an inclusion of environmental protection within its interests and responsibilities.[45]

After 1978 the board games had changed as companies were now more serious and focused on important administrative and structural activities that addressed CSR issues such as changing their board of directors, employing disclosure techniques and looking at corporate ethics issues.[46]

In the 1990s companies were accepted into communities and surrounding environment when there was corporate citizenship and stakeholder management.[47] There was also much consideration of social consciousness, stakeholder rights, accountabilities and community involvement.[48]

The concept of Corporate Social Performance emerged in the 1970s. Business Ethics Stakeholder Management emerged in the 1980s, Corporate Citizenship Sustainability was from the 1990s to 2000s and the future of CSR became clear from 2015.

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[41] Lee (note 22 above) 62; B Sharma 'Discovering the Asian Form of Corporate Social Responsibility' <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1044&context=lien_research>; KK Tilakasir 'Corporate Social Responsibility and Company Performance: Evidence from Sri Lanka' (2012) *Thesis submitted in fulfilment of the requirement of the degree of Doctor of Philosophy* <http://vuir.vu.edu.au/21488/1/Korathotage_Kamal_Tilakasiri.pdf> .

[42] Banki-Kalid & Ahmed (note 5 above) 208.

[43] Frederick (note 33 above); DL Swanson 'Toward an Integrative Theory of Business and Society: A Research Strategy for Corporate Social Performance' (1999) 24 *The Academy of Management Review* 506-516; Garriga & Mele (note 29 above).

[44] Enlightened self-interest is a philosophy in ethics which states that persons act to further the interests of others. Carroll (note 27 above). The social contract is defined as the multitude of implicit and expectations that society has about how an organization should conduct its operations.

[45] R Gray, O Dave & M Keith 'Corporate Social Reporting: Emerging Trends in Accountability and the Social Contract' (1988) *Accounting, Auditing and Accountability Journal* 1, 14; EM Epstein 'The Corporate Social Policy Process: Beyond Business Ethics, Corporate Social Responsibility, and Corporate Social Responsiveness' (1987) 29 *California Management Review* 99, 102.

[46] Carroll (note 10 above).

[47] Garriga & Mele (note 29 above).

[48] Epstein (note 44 above); R Gray, R Kouhy & S Lavers 'Corporate Social and Environmental Reporting: A Review of the Literature and a Longitudinal Study of UK Disclosure' (1995a) 8 *Accounting, Auditing and Accountability Journal* 47, 65; D Hackston & M Milne 'Some Determinants of Social and Environmental Disclosures in New Zealand Companies'(1996) *9 Accounting, Auditing and Accountability Journal* 77, 92.

Ideas such as sustainable development and reporting system Global Reporting Initiative (GRI)emerged and were promoted in the 2000s.[49]

It is evident that there was a shift and growth of the concept of CSR in the above three decades: there was a shift in research from macro-social effects of CSR to organizational- level analysis.[50] Initially, the attention where CSR was concerned was on shareholders of the various companies but there was a shift of attention to the society and its actors.[51]

CSR has now grown to the extent that societies, governments, and corporations and non-governmental organisations,[52] international organizations like the United Nations (UN), the Word Bank, the Organisation for Economic Co-operation and Development (OECD); and the International Labour Organization (ILO) now promote it on various level.

This is evident from the report in the magazine of the Fortune 500 companies in 1977 and 1990 which reflected how the behaviours of U.S. companies changed within the period.[53] In the beginning, less than 50% of the companies accepted CSR[54] but by the end, almost 90% of the fortune 500 companies had CSR listed as one of their goals.[55]

1.2 The CSR Debate

CSR is now widespread and discussed nowadays that anyone reading a newspaper, a business magazine or financial news cannot help wondering on companies' (disclosed and hidden) goals in terms of protection and welfare for the environment and the community in which they are

[49] Ibid.
[50] A Geva 'Three Models of Corporate Social Responsibility Interrelationships between Theory, Research and Practice' (2008) 131(1) *Business and Society Review* 1, 5.
[51] L Becchetti, R Ciciretti & I Hasan 'Corporate social responsibility and shareholder's value: an empirical analysis' <http://www.csringreece.gr/files/research/CSR-1289990979.pdf>; D Millon 'Shareholder Social Responsibility' (2013) 39(911) *Seattle University Law Review* 911,923.
[52] RC Maura-Leite & RC Padgette 'Historical background of corporate social responsibility' (2011) *Social Responsibility Journal* 528, 533; R Steurer. The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe (2010) 43(1) *Policy Sciences* 49, 56; The World Bank 'CSR Implementation Guide Non-legislative Options for the Polish Government' <http://siteresources.worldbank.org/EXTDEVCOMSUSDEVT/Resources/CSRImplementationGuideNovember2006.pdf >.
[53] Fortune 500 Magazine 'Fortune 500'<http://archive.fortune.com/magazines/fortune/fortune500_archive/full/1977/>.
[54] Maura-Leite & Padgette (note 51 above) 534.
[55] Madrakhimova (note 21 above) 510.

operating.[56] CSR has been proclaimed in recent years as a key tool that helps companies to meet environmental pressures as well as to improve its competitiveness as a result.[57]

It is seen a switch from making a lot of profit for the company shareholders [58] to ensuring that the interest of the society is maintained and protected.[59]

However, this was not always the case. There was a time when CSR was seen as a necessity by companies to 'ward off government regulation.'[60] This is based on the hypothesis that government intervention will be minimum where companies regulate themselves, implement well-ordered values and subsequently fulfil societal expectations.[61]

The idea of CSR has not always been welcomed by scholars. There has always been a divide amongst scholars on the concept of CSR. Some viewed it as being profit oriented while others saw it from an ethical perspective. Two theories are used to illustrate the CSR debate: monetary and ethical theories.

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[56] N Farcane & Bureana E 'History of Corporate Social Responsibility Concept' (2015) 17(2) *Annales Universitatis Apulensis Series Oeconomica* 31, 31.

[57] JB Martinez, ML Fernandez & PMR Fernandez 'Corporate Social Responsibility: Evolution through Institutional and Stakeholder Perspectives' (2016) 25 *European Journal Management and Business Economics* 8, 8. B Ackers 'Ethical considerations of corporate social responsibility: A South African perspective' (2015) 46(1) *South African Journal of Business Management* 11, 13.

[58] M Friedman 'The Social Responsibility of Business is to increase its profits' <http://umich.edu/~thecore/doc/Friedman.pdf>.

[59] J Elkington 'Cannibals with Forks: The triple Bottom Line of 21st Century Business' <http://appli6.hec.fr/amo/Public/Files/Docs/148_en.pdf>.

[60] K Davis 'Can Business Afford to Ignore Social Responsibilities?' (1973) 2 *Carlifonia Management Review* 66 in AB Carroll & KM Shabana 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) 12(1) *International Journal of Management Reviews* 84, 89; JS Armstrong & C Kesten 'Green Effects of Corporate Social Responsibility and Irresponsibility Policies' (2013) 66 *Journal of Business Research* 1922, 1923-1925; D McInnes 'Can Self-Regulation Succeed?' (1996) 103(2) *Canadian Banker* 30, 32; J Diller 'A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives.' (1999) 138(2) *International Labour Review* 99, 12 in K Bondy, D Matten & J Moon 'The Adoption of Voluntary Codes of Conduct in MNCs: A Three-Country Comparative Study' 109(4) *Business and Society Review* 449, 450; D Brereton & WMP Truss 'Codes of Conduct Policy Framework'<*http//:www.selfregulation.gov.au/publications/CodesOfConduct-PolicyFramework/Conduct_PolicyFramework.pdf* >; S Aaronson & J Reeves 'The European Response to Public Demands for Global Corporate Responsibility' (2002) <*http//:www.bitc.org.uk/docs/NPA_Global_CSR_survey.pdf*>.

[61] K Davis (note 25 above) 66. United Nations Report of the World Commission on Environment and Development: Our common future (1987). (They noted that one way was to make MNCs socially responsible); P Gugler, & YJ Shi 'Corporate Social Responsibility for Developing Country Multinational Corporations: Lost War in Pertaining Global Competitiveness' (2009) 87 *Journal of Business Ethics* 3, 15. (from their study that addressed the CSR divide in developing countries further instructed that to bridge the CSR gap there is a need to improve CSR standard-setting participation).; ODJ Egbe & FAE Paki 'The Rhetoric of Corporate Social Responsibility (CSR) in the Niger Delta' (2011) 1(3) *The American International Journal of Contemporary Research* 123, 129. (noted that the environmental pollution experienced in the Nigerian oil sector can be traced to poor developmental policies).

a. Monetary theories

These theories view CSR being focused of making more profit for the company. Some examples of these theories include the economical approach which states that companies place stakeholders under consideration so that they can maximise profit under the standards in the country they operate.[62] This theory suggests that the corporation should have responsibility towards its stakeholder only if it would lead to creating wealth for the corporation.[63]

Friedman was one of the scholars that advocated for the monetary theory and opposed the idea of CSR on the grounds it is a financial burden to shareholders.[64] He argued that greedy executives of an organisation could use CSR as an excuse to mismanage the company funds for their personal gain.

Friedman[65] was supported by Beurden and Gosling[66] who argued that the corporation would increase its profit by taking responsibility. This framework describes a short-term maximization.

b. Ethical theories

There are two focus areas with ethical approach/theories: a. beyond the profit goal and the aim was to create a sustainable environment for all corporations to operate in and this means that the profit of one company today should not become a hindrance for the operation of another company tomorrow.[67] According to this theory, the future and security of the organisations are more important and companies have an important role to play in the creation and provision of a stable future for the generations to come.[68]

The evolution of CSR over the years has seen many companies' participation in philanthropic activity that benefit members of a company and the society at large. This has also helped companies act ethical in their operations because they are concerned about the impact of their activities to the community in which they operate. However, most Multinational companies

[62] Friedman (note 57) above.
[63] McWilliams & Siegel (note 26 above).
[64] M Friedman 'Friedman responds: a *Business and Society Review* interview' (1972b) 1 *Business and Society*, 1,14.
[65] Friedman (note 57 above) 32.
[66] P Beurden & T Go¨ssling 'The worth of values—a literature review on the relation between corporate social and financial performance' (2008) 82 *Journal of Business Ethics* 407, 411; Davis (note 59 above).
[67] L Chonko 'Ethical Theories' <http://www.dsef.org/wp-content/uploads/2012/07/EthicalTheories.pdf>.
[68] Madrakhimova (note 21 above) 509.

still act unethically in their operations particularly where they operate in a country where there is minimal rule of law or checks and balances.

The relationship between CSR and ethics is founded on the fact that: first, there is an ethical component in CSR in that a company that acts ethically will indirectly be fulfilling its corporate responsibilities. The focus will no longer be on profit generation but on how best to ensure that their dealings are society centred. Second, CSR and ethics are intertwined. It is impossible for a company that is unethical to fulfil its CSR obligations and neither is it possible for a company that fulfils its CSR obligations to be unethical in its operations unless off-course their aim is to build a good company reputation for profit purposes only.

Most MNCs bypass the ethical aspect in their operations because they have the economic power that most countries need for growth and development. They often bribe their way out from compliance in most developing countries. As a result, these MNCs do not perform and CSR obligations. Even where there are laws in place, laws that regulate ethical practices, they are often voluntary in nature and often in the form of codes. Their ability or lack thereof to deal with unethical practices has been subject to debates.

1.3 The Code of Ethics Debate

Some examples of the international codes of ethics that provide guidelines for MNCs include Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, 1999 United Nations Global Compact and the ISO 14000 series.[69] The main purpose of these codes of ethics is to restrict MNCs from acting in a socially undesirable manner.[70]

There are contrasting views on the significance of corporate code of ethics.[71] One school of thought points that it serves as a good guideline for companies and can increase business performance. Yet another view argues that it has no effect on the operations of business as the

[69] OECD 'The OECD Guidelines for Multinational Enterprises: Reference Instruments and Initiatives Relevant to the Updated Guidelines' <http://www.oecd.org/daf/inv/mne/ResourceDocumentWeb.pdf>.

[70] GR Weaver 'Corporate Codes of Ethics: Purpose, Process and Content Issues' (1993) 32(1) *Business and Society* 44, 47; M Schwartz 'The Nature of the Relationship between Corporate Codes of Ethics and Behaviour' (2001) 32(3) *Journal of Business Ethics* 247, 250; JS Adams, A Tashchian, & TH Shore 'Codes of Ethics as Signals for Ethical Behavior' (2001) 29(3) *Journal of Business Ethics* 199, 205.

[71] GR Weaver, LK Treviño & PL Cochran 'Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors' (1999) 42 (1) *The Academy of Management Journal* 41, 42; BJ Farrell, DM Cobbin & HM Farell 'Can Codes of Ethics Really Product Consistent Behaviours?' (2002) 17(6) *Journal of Mangerial Psychology* 470, 472; P Brandl & M Maguire 'Code of Ethics: A Premier on the Purpose, Development and Use' (2002) 25(4) *Journal for Quality and Participation* 120,124. (For other definitions of a code of ethics).

code is not enforceable. The proponents argue that a code of ethics should exist as a means of augmenting the ethical environment in the corporate sector.[72] Brenner and Molader argue that the mere existence of a code of ethics can raise the ethical level of business behaviour by clarifying what is required in terms of corporate conduct.[73] Gellerman as well as Murphy, Vallance, Sasseen and Townley propose that companies use codes of ethics as a benchmark when faced with ethical issues.[74] This view is supported by Wood, Svensson and Singh *et al* who argue that a code of ethics helps to remedy the negative impact (unethical corporate conduct) that globalization has had on business operations.[75]

It is further argued that it serves as a guideline for globalized markets by providing core principles that are universally applicable and promote good corporate governance.[76] Others attribute its significance to employee behaviour in that once an employee knows how to conduct themselves, their performance is also boosted.[77] However, though codes of ethics are

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[72] LL Axline 'The Bottom Line on Ethics' (1990) *Journal of Accountancy* 90, 95; RR Sims 'The Institutionalization of Organizational Ethics' (1991) 10(7) *Journal of Business Ethics* 498, 500; SJ Harrington 'What Corporate America is Teaching About Ethics' (1991) 5(1) *Academy of Management Executive* 24, 28; K Bondy & K Starkey 'The Dilemmas of Internationalization: Corporate Social Responsibility in the Multinational Corporation' (2014) 25(1) *British Journal of Management* 4,18-20; R van Tulder & A Kolk 'Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry' (2001) 32(2) *Journal of International Business Studies* 267, 268.

[73] SN Brenner & EA Molander 'Is the Ethics of Business Changing?' (1977) 55 *Harvard Business Review* 61 in BB Schegelmilch & JE Houston 'Corporate Codes of Ethics in Large UK Companies: An Empirical Investigation of Use, Content and Attitudes' 23(6) *Journal of Marketing* 10, 12. (This is based on their contribution in the literature that focus specifically on corporate codes of ethics); YK Lee, J Choi & BY Moon et al. 'Codes of Ethics, Corporate Philanthropy, and Employee Responses' (2014) 39 *International Journal of Hospitality Management* 97,104. (Argues that good ethics is good for business).

[74] SW Gellerman 'Managing Ethics from the Top Down' (1989) 30(2) *Sloan Management Review* 73,73; P Townley 'Business Ethics. An Oxymoron' (1992) *Canadian Business Review* 35, 37; PE Murphy 'Corporate Ethical Statements: Current Status and Future Prospects' (1995) 14(9) *Journal of Business; Ethics* 730, 732; YH Godiwalla (note 4 above) 1389; E Vallance 'Good at Work: The Ethics of Modern Business' (1993) 22, 27; J Sasseen ' Companies Clean Up' (1993) 48(8) *International Management* 31, 39; JC O'Brien 'The Urgent Need for a Consensus on Moral Values' (1992) 19(19) *International Journal of Social Economics* 171 in MS Schwatz 'Universal Moral Values for Corporate Codes of Ethics' (2005) 59 *Journal of Business Ethics* 31, 35.

[75]G Wood, G Svensson & J Singh et al. 'Implementing the Ethos of Corporate Codes of Ethics: Australia, Canada and Sweden Business Ethics' (2004) 13(4) *European Review* 390, 394. (Wood et al have argued that globalization has led to two impacts: negative in that it led to increased competition which may lead to the unethical corporate conduct; and positive in that it has facilitated the spread of corporate ethics programs hence they believe that a code of ethics is adjunct in developing ethical standards in organizations).

[76] R Berenbeim 'Global Ethics' (2000) 17(5) *Executive Excellence* 7 in G Wood, G Svensson & J Singh et al. 'Implementing the ethos of corporate Codes of Ethics in Australia, Canada and Sweden Business Ethics' (2004) 13(4) *European Review* 389, 390.

[77] RC Ford & WD Richardson 'Ethical Decision Making: A Review of the Empirical Literature' (1994) 13(3) *Journal of Business Ethics* 219, 223; GR Laczniak & EJ Inderrieden 'The Influence of Stated Organization Concern upon Ethical Decision Making' (1987) 11(4) *Journal of Business Ethics* 370, 383; WA Weeks & J Natel 'Corporate Codes of Ethics and Sales Force Behaviour: A Case Study' (1992) 11(10) *Journal of Business Ethics* 754, 756; A Jose & MS Thibodeaux 'Institutionalization of Ethics: The Perspective of Managers' (1999) 22 *Journal of Business Ethics* 136, 138 (Jose and Thibodeaux study on whether ethics is good for business revealed that the majority of managers perceived that being ethical is good for business particularly for the bottom line of organizations. The research asked the following questions: about ethics being good for the bottom line of the

so important, they have been criticized for being too 'platitudinous' or just 'mom and apple pie' statements partly because they do not have systems in place for dealing with violations.[78]

This thesis argues that there is need for an international mandatory code of ethics that will provide for sanctions for ethical violations. According to Ferrell and Gresham, the rationale for sanctions for violating a code of ethics is that it may influence behaviour and is likely to produce the highest level of compliance.[79]

In summary therefore, the lack of enforcement mechanisms for unethical practices through corporate code of ethics and the disparity in the corporate governance framework in different countries constitute the main reasons justifying the need for an international mandatory code of ethics for MNCs.

2. INTERNATIONAL REGULATORY FRAMEWORK (IRF) OF CORPORATE GOVERNANCE AND CORPORATE SOCIAL RESPONSIBILITY THROUGH CORPORATE CODES OF ETHICS

The International regulatory framework are those principles, rules, policies or laws (regulations) that have been adopted by different governments and made part of their national law or perhaps that they use as guidelines.[80] In most cases, these CG or CSR code of ethics are not legally binding but only serve as a guideline for different activities.

The essence of analysing the regulatory framework of CG and CSR through corporate code of ethics is because this thesis is proposing an IMCE and therefore there is need to ascertain the nature (weak or strong) of the regulatory system and whether the IMCE can function within

organizations, and the other asked about the necessity to compromise one's ethics in order to succeed in organizations); C Parker 'Meta-Regulation: Legal Accountability to Corporate Social Responsibility' in D McBarnet, A Voiculescu & T Campbell (eds) '*The New general Corporate Accountability: Corporate Social Responsibility & the Law* (2012*)* 218, 220; R Clavet, G de Castro & D Isabelle et al 'Governance, International Law & Corporate Social Responsibility' <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_193765.pdf>.

[78] PE Murphy 'Corporate Ethical Statements: Current Status and Future Prospects' (1995) *Journal of Business Ethics* 731, 735; JH Leigh & EP Murphy 'The Role of Formal Policies and Informal Culture on Ethical Decision Making by Marketing Managers' (1993) *Working Paper* 12, 15.

[79] OC Ferrell & LG Gresham 'A Contingency Framework Understanding Ethical Decision Making in Marketing Research Organizations' (1985) 49(3) *Journal of Marketing Research* 90.

[80] There is a long line of literature on private ordering in economics, political and social science, and law. On market discipline, see M Hellwig, 'Market Discipline, Information Processing, and Corporate Governance, in Corporate Governance in Context', in 'Comparative Corporate Governance: The State of the Art and International Regulation, Law' (2011) 170 *Working Paper* 1, 23. J Klaus 'Policy Framework For Investment User's Toolkit <http://www.oecd.org/investment/toolkit/policyareas/corporategovernance/44931152.pdf>; L Viegas 'Corporate Governance-related Regulatory Framework for non-listed Companies in Brazil' <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/37329861.pdf>.

such existing frameworks. If it cannot, it may mean that changes (this includes amendment of various laws or regulations where necessary) would first have to take place within the regulatory framework such as putting enforcement mechanisms in place before the enactment of the IMCE.

In this section, this thesis compares the international regulatory framework of CG and CSR through corporate codes of ethics. For the purposes of the arguments put forward here we focus on the following international corporate code of ethics only: Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, 1999 United Nations Global Compact, UN "Protect, Respect and Remedy" Framework and Guiding Principles and the ISO 14000 series.[81] This is because these are the most referenced and the most adopted international code of ethics amongst governments.

When discussing these instruments, this thesis focuses on the following aspects: when it was passed; how it was passed; where it was passed; who are the members; its provisions on ethical practices, CSR and CG; its purpose or aim; and its application to MNCs and whether it applies only to some MNCs or to all.

a. a. Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises

The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (hereinafter referred to as the OECD Guidelines) was implemented by the OECD.[82]

The OECD Guidelines were first adopted in 1976 and has been reviewed five times since then.[83] They are recommendations addressed by governments to multinational enterprises (parent companies and/or local entities) which form part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises.[84]

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[81] OECD 'The OECD Guidelines for Multinational Enterprises: Reference Instruments and Initiatives Relevant to the Updated *Guidelines'* <http://www.oecd.org/daf/inv/mne/ResourceDocumentWeb.pdf>.

[82] The OECD is a unique forum where the governments of several countries with market economies work with each other, as well as with non-member economies to promote economic growth, prosperity, and sustainable development. The OECD works with governments to understand what drives economic, social and environmental change. We measure productivity and global flows of trade and investment. We analyse and compare data to predict future trends. We set international standards on a wide range of things, from agriculture and tax to the safety of chemicals.

[83] The most recent update in 2011 took place with the active participation of business, labour, NGOs, non-adhering countries and international organisations.

[84] OECD 'About the OECD Guidelines for Multinational Enterprises' <http://mneguidelines.oecd.org/about.htm>.

The OECD Guidelines does not provide differential treatment MNCs and local businesses: the principles apply to both categories of companies in the same manner.[85] As such, the expectation is the same for both MNCs and local businesses.[86] Regardless of the capacities of these companies, their governments often encourage them to observe the principles under the guidelines.[87]

The principles under the OECD guidelines are voluntary but they serve as guidelines for companies on how to conduct their businesses in a responsible manner with the applicable laws[88] bringing the operation of these business at par with government policies.[89]

The governments that adhere to the OECD guidelines aim to ensure that businesses through their operations can contribute to economic, environmental and social progress and to minimise any problems which their actions may cause.[90]

The OECD guidelines is voluntary and not legally enforceable.[91] They contain recommendations on human rights, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition, and taxation.[92]These guidelines encourage Enterprises to participate in CSR activities by contributing to economic, social and environmental progress[93] with a view to achieving sustainable development; and respecting the human rights of those affected by their activities consistent with the host government's international obligations and commitments.[94]

They further encourage Enterprises to be ethical in their dealings by encouraging them to refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues; and to develop and apply effective self-regulatory practices and management

[85] Ibid.
[86] OECD (note 83 above).
[87] Ibid.
[88] OECD 'Preface to the OECD Guidelines for MNEs' <http://www.oecd.org/corporate/mne/1922428.pdf>.
[89] Ibid.
[90] OECD (note 87 above).
[91] Ibid.
[92] I Bantekas Corporate Social Responsibility in International Law <http://www.bu.edu/law/journals-archive/international/volume22n2/documents/309-348.pdf>.
[93] Part I.II of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises reads: 'Contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection.'
[94] Ibid.

systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.[95]

The OECD Guideline recommends that the businesses should not directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage; nor should enterprises be solicited or expected to render a bribe or other undue advantage.[96]

The OECD Guidelines also promote good CG by encouraging Enterprises to support and uphold good corporate governance principles and develop and apply good corporate governance practices.[97] On this aspect, it deals with the consumer interests and competitive practices. The guidelines provide that when dealing with consumers, enterprises should act in accordance with fair business, marketing and advertising practices and should take all reasonable steps to ensure the safety and quality of the goods or services they provide.[98] On the aspect of competition the OECD Guidelines state that Enterprises should, within the framework of applicable laws and regulations, conduct their activities in a competitive manner. In particular, enterprises should: refrain from entering into or carrying out anti-competitive agreements among competitors: a) to fix prices; b) to make rigged bids (collusive tenders); c) to establish output restrictions or quotas; or d) to share or divide markets by allocating customers, suppliers, territories or lines of commerce.[99]

Although these Guidelines make all these recommendations, they are said not to substitute or override domestic laws and regulations. They are of a non-legal character in respect to the international operation of these Enterprise.

b. ISO 14000 Series

The ISO 14000 series is a series of environmental management standards developed and published by the International Organization for Standardization (ISO) for organizations.[100] Its

[95] Part I.II of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (note 92 above).
[96] Ibid.
[97] Part I.II of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (note 92 above).
[98] Part I. VII of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.
[99] Part I.IX of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.
[100] ISO 14000 'family - Environmental management' <https://www.iso.org/about-us.html>.

story began in 1946 when delegates from 25 countries gathered in London to discuss the future of standardization. A year later, on 23 February 1947, ISO officially came into existence.[101]

The ISO 14000 standards provide a guideline or framework for organizations that need to systematize and improve their environmental management efforts.[102] Unlike the OECD guidelines, the members of the ISO 14000 series are the foremost standards organizations in their countries and there is only one member per country.[103] Each member represents ISO in its country.[104] Individuals or companies cannot become ISO members.[105] The organizations representing ISO in the three countries that form part of this thesis: Nigeria- SON; UK- BSI; USA –ANSI.[106]

The ISO 14000 family of standards are developed by ISO Technical Committee ISO/TC 207 and its various subcommittees. ISO 14001:2015 sets out the criteria for an environmental management system. It maps out a framework that a company or organization can follow to set up an effective environmental management system. It helps organizations improve their environmental performance through more efficient use of resources and reduction of waste, gaining a competitive advantage and the trust of stakeholders.[107] It can be used by any organization regardless of its activity or sector.

Using ISO 14001:2015 can provide assurance to company management and employees as well as external stakeholders that environmental impact is being measured and improved.

Users of the standard have reported that ISO 14001 helps to:[108]

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[101] Ibid.

[102] International Standard Organization 'Celebrates 70 years' <http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref2163>.

[103] International Standard Organization 'ISO: a global network of national standards bodies' <http://www.iso.org/iso/about/iso_members.htm>.

[104] International Standard Organization 'ISO Members' <http://www.iso.org/iso/about/iso_members.htm>.

[105] Ibid.

[106] There are three member categories. Each enjoys a different level of access and influence over the ISO system. This helps us to be inclusive while also recognizing the different needs and capacity of each national standards body. Full members (or member bodies) influence ISO standards development and strategy by participating and voting in ISO technical and policy meetings. Full members sell and adopt ISO International Standards nationally. Correspondent members observe the development of ISO standards and strategy by attending ISO technical and policy meetings as observers. Correspondent members can sell and adopt ISO International Standards nationally. Subscriber members keep up to date on ISO's work but cannot participate in it. They do not sell or adopt ISO International Standards nationally and it's supporting standards such as ISO 14006:2011; focus on environmental systems to achieve this. The other standards in the family focus on specific approaches such as audits, communications, labelling and life cycle analysis, as well as environmental challenges such as climate change.

[107] International Standard Organization 'ISO 140001: Key Benefit' <http://www.iso.org/iso/iso_14001_-_key_benefits.pdf>.

[108] Ibid.

i. Demonstrate compliance with current and future statutory and regulatory requirements;

ii. Improve company reputation and the confidence of stakeholders through strategic communication; and

iii. Encourage better environmental performance of suppliers by integrating them into the organization's business systems.

Accredited certification to ISO 14001 is not a requirement, and organizations can reap many of the benefits from using the standard without going through the accredited certification process.[109] However, third-party certification – where an independent certification body audits your practices against the requirements of the standard – is a way of signalling to your buyers, customers, suppliers and other stakeholders that you have implemented the standard properly.[110]

Although ISO develops and publishes standards, they do not perform certification. However, governments cannot compel companies to have their practices audited again the ISO Standards requirement.

c. 1999 United Nations Global Compact

The United Nations Global Compact (UN Global Compact) is a voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals.[111]

The UN Global Compact's Ten Principles just like the OECD Guidelines call on the board of directors of corporations to address critical dimensions of concern to stakeholders such as human rights, labour related issues, environmental concerns and corruption.[112] The Ten Principles are derived from the Universal Declaration of Human Rights; the International Labour Organization's Declaration on Fundamental Principles and Rights at Work; the Rio

[109] International Standard Organization (note 10 above).
[110] International Standard Organization (note 107 above).
[111] UN Global Compact 'About the UN Global Compact' <https://www.unglobalcompact.org/about>.
[112]International Finance Corporation: World Bank Group Corporate Governance The Foundation for Corporate Citizenship and Sustainable Businesses' <https://www.ifc.org/wps/wcm/connect/a2b5ef8048a7e2db96cfd76060ad5911/IFC_UNGC_brochure.pdf?MOD=AJPERES>; UN Global Compact 'The Ten Principles of the UN Global Compact' <https://www.unglobalcompact.org/what-is-gc/mission/principles>; AL Dempsey *Evolutions in Corporate Governance: Towards an Ethical Framework for Business Conduct* 167.

Declaration on Environment and Development; and the United Nations Convention Against Corruption.[113]

With respect to CSR, the Global Compact requires companies to publicly endorse its principles and 'pledge to work with the UN in partnership projects, either at the policy or at the operational levels.'[114]

In addressing the environment, the UN Global Compact states that businesses should support a precautionary approach to environmental challenges by developing a code of conduct or practice for its operations and products that confirms commitment to care for health and the environment and to develop a company guideline on the consistent application of the approach throughout the company.[115]

In addressing Corruption, the UN Global Compact states that businesses should work against corruption in all its forms (including extortion and bribery) by introducing anti-corruption policies and programmes within their organizations and their business operations.[116]

d. The UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework

These principles were developed by John Gerard Ruggie and their aim is to provide convincing standards that apply globally to help prevent and address the risk of adverse human rights impacts linked to business activity.[117]

These guidelines commenced in 2008 with a framework on business and human rights based on three pillars:

i. The state duty to protect against human rights abuses by third parties, including business;
ii. The corporate responsibility to respect human rights; and
iii. Greater access to effective remedy both judicial and non- judicial.

[113] UN Global Compact (note 111 above).
[114] K Gordon 'The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison, in OECD' *Working Paper* <http://www.oecd.org/dataoecd/46/36/2075173.pdf> in I Bantekas Corporate Social Responsibility in International Law <http://www.bu.edu/law/journals-archive/international/volume22n2/documents/309-348.pdf>.
[115] Principle 7
[116] Principle 10
[117] UN Global Compact 'Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' <https://www.unglobalcompact.org/library/2>.

The framework was unanimously approved by the United Nations Human Rights Council.[118] The guiding principles were then endorsed by the UN Human Rights Council in June 2011. These guiding principles have been criticised extensively by various human rights organizations such as the Rights and Accountability in Development (RAID); Human Rights Watch (HRW); International Federation for Human Rights (FIDH); and Amnesty International.[119]

RAID stated that it is self-policing in that it allows companies to institute internal grievance mechanisms that are often inadequate.[120] They further argued that the whole mechanism established by the Guiding Principles aids companies implement human rights in their own way.[121]

The HRW argues because it is a non-binding regulation, it gives companies leeway to continue with abusing human rights in the best way possible.[122] The FIDH, an umbrella group representing 150 human rights groups around the world stated that the Guiding principles do not provide accountability mechanisms, rights to recourse for aggrieved parties and to prevent abuses committed by the companies overseas.[123]

Amnesty International criticised the Guiding Principles' failure to adequately address key corporate accountability issues and argues that companies should be mandated to follow a due diligence approach, 'effectively preventing and pushing extraterritorial human rights abuses, and explicitly recognising the right to a judicial remedy as a human right.'[124]

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[118] Ibid

[119] J Martens 'Corporate Influence on the Business and Human Rights Agenda of the United Nations' (2014) <https://www.gifa.org/wp-content/uploads/2014/06/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf>.

[120] Rights and Accountability in Development (RAID) 'Privatized Remedy and Human Rights: Privatized Remedy and Human Rights: Re-thinking thinking thinking Project Project Project-Level Grievance Mechanisms Grievance Mechanisms Grievance Mechanisms' <http://www.raid-uk.org/sites/default/files/grievance-mechanisms-briefing-bhr.pdf>.

[121] Ibid.

[122] Human Rights Watch (HRW) 'HRW vs. Ruggie How Valid is the Criticism of the UNGPs?' <http://www.batesmithlaw.com/blog/hrw-vs-ruggie-how-valid-is-the-criticism-of-the-ungps>.

[123] International Federation for Human Rights (FIDH) 'UN Human Rights Council Adopts Guiding Principles on Business Conduct, yet Victims Still Waiting for Effective Remedies' <http://www.fidh.org/UN-Human-Rights-Counciladopts-Guiding-Principles>.

[124] Amesty International 'Public Statement, United Nations: A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses' <http://www.amnesty.org/ar/library/asset/IOR40/009/2011/en/0ba488bd-8ba2-4b59-8d1f-eb75ad9f3b84/ior400092011en.pdf>.

e. Legally binding instrument to regulate, in International Human Rights Law, the activities of transnational corporations and other business enterprises

In June 2014, the UN Human Rights Council in Geneva adopted a resolution drafted by Ecuador and South Africa to establish an open-ended intergovernmental working group to draft an international legally binding instrument on Transnational Corporations and other Business Enterprises with respect to human rights.[125]

In terms of substance, the working paper proposes a number of possible elements for the treaty. These include:[126]

i. An obligation on States to introduce laws requiring businesses to respect human rights and to take measures to ban companies from bidding for public contracts if they fail to respect human rights;

ii. An obligation on States to introduce laws requiring businesses to conduct human rights due diligence to prevent human rights violations;

iii. An obligation on States to strengthen administrative and civil penalties for business-related human rights violations, including by providing for corporate criminal liability and prosecution of corporate officers; and

iv. The establishment of a specialist international court or other international tribunals to prosecute transnational corporations which, according to the working paper, are said to be able to exploit the limits of territorial jurisdiction in order to escape prosecution.

Since 2015, a United Nations working group has met annually to negotiate and draft a multilateral treaty that addresses human rights violations committed by businesses. The most recent of these annual meetings was held from October 15 to 19, 2018, at which a first draft of the treaty was debated.[127]

Freehills criticized the proposed treaty for the fact that it only applies to violations of human rights resulting from any business activity that has a transnational character.[128] He argues that the definition of a business activity of a transactional character is not clear.

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[125] V Fietta 'UN working Group issues draft binding international instrument on Business and Human Rights' <https://www.lexology.com/library/detail.aspx?g=59a976c5-0a4c-4d23-9a29-4815e58f32a2A>

[126] HS Freehills 'Negotiations for an international business and human rights treaty continue in Geneva' <https://www.lexology.com/library/detail.aspx?g=d9ee7159-aad5-4a26-a6e6-b71ffac344ce>

[127] Ibid.

[128] HS Freehills (note 124 above).

It has also been criticized for its application to all international human rights as opposed to being more specific on the type of human rights to which it will apply.[129]

2.1 Promoting Good CG and Participation in CSE (Corporate Social Ethics) activities using International Code of Ethics Instruments

The international code of ethics instruments discussed above are voluntary in nature in that they only serve as guidelines to MNCs and governments. They are not legally binding, and their implementation and observance solely depends on the voluntary commitment of the company.[130] They do not provide any mechanisms on ensuring that MNCs and governments comply with them.

Scholars have argued that voluntary codes of conduct for companies is a good step but it is not adequate as the only means of human rights protection against MNCs.[131] Some of the ways in which these instruments can be made effective is to implement internal and external mechanisms which could be used to monitor the procedures and sanction companies and individuals for violation of the code of conducts.

These international codes of ethics have so many hindrances that make it an inadequate tool of encouraging MNCs to participate in CSR initiatives in the UK, USA and Nigeria. Some of which include the fact the most developing countries are not members; they have a non-binding effect; inadequate structures and mechanisms.

2.2 The future of the IRF of CG and CSR

When one talks of the future of IRF of CG and CSR, we are looking at how much impact it will have in the future on making CG and CSR better. Currently, the lack of enforcement mechanisms and its inability to ensure that there are measures in place to ensure compliance by MNCs means that the IRF of CG and CSR will continue to have a minimal impact in the betterment of the society.

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[129] Ibid.

[130] CN Franciose 'A Critical Assessment of the United States Implementation of the OECD Guidelines for Multinational Enterprises' (2007) 30(1) *International and Comparative Law Review* 223, 226.

[131] M Weschka 'Human Rights and Multinational Enterprises: How Can Multinational Enterprises be held Responsible for Human Rights Violations Committed Abroad?' (2006) 66 *ZaöRV* 625, 637.

It is important that corporations operate in a sound regulatory and legal environment to attain strong economic outcomes. This will not be possible unless there is a structure put in place by the legislators for various companies based on the circumstances within which they operate.[132]

What we have currently with the international code of ethics is a bunch of guidelines that provides little or no monitoring or enforcement mechanisms. Therefore, members of this instruments do as they please and go about sounding their membership. It can be safely argued that there is no future for the current IRF of CG and CSR if we want to promote CSR.

2.3 International Regulatory Framework on Corporate Governance and Corporate Social Responsibility in the UK, USA and Nigeria

The unethical behaviours of businesses such as poor working conditions, low wages, enforced overtime, bribery, patent or copyright infringements, lying and deceit about product performance and safety; deliberate use of harmful substances; intentional environmental pollution, discrimination; and violation of promises has become a global concern.[133] These unethical practices are mostly perpetuated by MNCs.[134]

An MNC that acts in an ethical manner, protects the rights of the general public; protects employees from being subjected to unethical practices; and ensures that the company remains economically viable by complying with the value system of a society in which they operate.[135]

Currently, many MNCs have incorporated ethical behaviours into their practices by enacting codes of ethics which provides for the conduct of the MNCs and its employees.[136] However,

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[132] J Klaus 'Policy Framework for Investment User's Toolkit <http://www.oecd.org/investment/toolkit/policyareas/corporategovernance/44931152.pdf>.

[133] J Saee *Contemporary Corporate Strategy: Global Perspectives* (2007) 1, 76; AV Phatak, RS Bhagat and RJ Kashlaki '*International management: Managing in a diverse and Dynamic Global Environment'* 2 ed (2008) 230; G Svensson & G Wood 'The Dynamics of Business Ethics: A Function of Time and Culture – Cases and Models' (2003) 41(4) *Management Decision* 350, 353.

[134] I Ameer Evolution of Unethical Practices in the Sales Environment: A macro story of pharmaceutical industry in Pakistan' <https://pdfs.semanticscholar.org/7188/5cf914c3b6183c86a3706a42d79ffa913020.pdf>; SD Olaru, E Gurgu 'Ethics and Integrity in Multinational Companies' <http://rmci.ase.ro/ro/no10vol1/Vol10_No1_Article10.pdf>; K Manjunatha & AN Maqsud 'Pertinent Relationship of Unethical Practices of Business on Company's Credibility' (2006) *Journal of Business and Management* 13(2) 18,18.

[135] J Saee 'Cultural, multiculturalism and racism: an Australian perspective' (1993) 25 *Journal of Home Economics of Australia* 99, 102; J Saee 'Fundamental challenges of social responsibility, ethics, consumerism & law confronting the world of advertising' (1994) *ANZAM Conference paper*; KO Ojumu 'The Need for Ethics in Business' (2007) 16(3) *Journal of Organizational Studies* 136, 140.

[136] YH Godiwalla 'Business Ethics and Social Responsibility for the Multinational Corporation (MNC)' (2012) 8(9) *Journal of Modern Accounting and Auditing* 1381, 1386; K Bondy, D Matten & J Moon 'The Adoption of

despite the existence of these codes of ethics, there still remains the existence of numerous unethical business practices amongst MNCs.

A study by Robertson said the problem was caused by a vacuum on the effective enforcement of codes of ethics.[137] Even the international code of ethics that provide guidelines for MNCs are not effective because they are unenforceable.[138]

Some scholars have linked the ability of MNCs to act in an ethical manner with good corporate governance. They argue that a company that is well directed and controlled (in other words a company that has good CG) is going to act in an ethical manner and thus participate in CSR initiatives. The relationship between CG and CSR in the quest to ensure that MNCs act in an ethical manner is discussed below.

3. THE RELATIONSHIP BETWEEN CG AND CSR IN PROMOTING ETHICAL PRACTICES AMONGST MNCS

The focus on the relationship and existence of CG and CSR has increased.[139] As such, in recent times, corporations are now incorporating CSR into their CG practices because most corporations have realised that they cannot function in the long-run in isolation from the wider society in which they operate.[140]

This is primarily because of the strong link between the two in that they both focus on how ethical corporations are in their business dealings and how they respond to the needs of stakeholders and the environment in which they operate.[141]

Voluntary Codes of Conduct in MNCs: A Three-Country Comparative Study' (2004) 109(4) *Business and Society Review* 449, 461.

[137] C Robertson 'Ethical Performance of Multinational Enterprises' (2005) 6(4) *Journal of Management Research* 206,210; M Murray & A Dainty 'CSR Travels Abroad: No Busman's Holiday for UK Construction?' in M Murray & A Dainty (eds) 'Corporate Social Responsibility (CSR) in the Construction Industry' (2009) <https//:www.irbnet.de/daten/iconda/CIB16234.pdf> (argues that it is important to note that codes are generally unenforceable and this coupled with the fact that there is poor CG amongst MNCs increases their unethical practices).

[138] Murray & Dainty (note 126 above) (Murray and Dainty suggested enforced minimum standards that could provide a way of ensuring adherence to ethical treatment of workers in the future).

[139] W Donham 'The social significance of business' (1927) 4 *Harvard Business Review* 406,413.

[140] Verma & Kumar (note 139 above) 25.

[141] DP Baron, DM Harjoto & H Jo 'The Economics and Politics of Corporate Social Performance' (2017) 13(2) *Business and Politics* 1, 28; R Garcia-Castro, RM Anno, & M Canela 'Does social performance really lead to financial performance?' (2010) 92 *Journal of Business Ethics* 107,116; D Whetten, G Rands, & P Godfrey 'What are the responsibilities of business to society?' (2002) in A Pettigrew, A Thomas & R Whittingen (eds.) *Handbook of strategy and management* (2001) 380; A Khan 'Corporate Governance and Corporate Social Responsibility Disclosures: Evidence from an Emerging Economy' (2013) 114 *Journal Busines Ethics* 207, 212; MB Muttakin & J Siddiqui 'Corporate Governance and Corporate Social Responsibility Disclosures: Evidence from an

This view is encapsulated by Sir Adrian Cadbury through his definition of corporate social responsibility: [142]

> *'The broadest way of defining social responsibility is to say that the continued existence of companies is based on an implied agreement between business and society' and that 'the essence of the contract between society and business is that companies shall not pursue their immediate profit objectives at the expense of the longer-term interests of the community.'*[143]

Jamali et al. in elaborating the relationship between CSR and CG argues that: 'CG is a pillar of CSR; while CSR is a dimension of CG.'[144] This is illustrated as follows: A MNC decision to engage in CSR activities is often made by those that manage and control the day to day affairs of the corporation. Therefore, CG comes in through the procedures (which may include a combination of laws, regulations, listing rules, and voluntary private sector practices)[145] to control the way decisions (generating of profit, attraction of capital, efficient performance and legal obligations) are made in corporations to ensure that the public interest is protected. [146]

CG deals with the way authority is delegated throughout the organization; management of the board of the corporation; relationship between the stakeholder and the society.[147] In its simplest

Emerging Economy' (2013) 207,214 (argues that a strong relationship exists between corporate governance and corporate social responsibility).

[142] Sir Adrian Cadbury Report of 2002.

[143] Ibid

[144] D Jamali, A Safieddine, & M Rabbath 'Corporate Governance and Corporate Social Responsibility Synergies and Interrelationships' (2008) 16(5) *Corporate Governance: An International Review* 443,447; A Bhimani & K Soonawalla 'From Conformance to Performance: The Corporate Responsibilities Continuum' (2005) 24 *Journal of Accounting and Public Policy* 165, 169 (they view that all corporate financial reporting, CG, CSR, and stakeholder value creation are part of a corporate-responsibility continuum); M Jensen 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2002) 12 *Business Ethics Quarterly* 235, 248; R Aguilera, D Rupp & C Williams et al. 'Putting the S Back in CSR: A Multi-level theory of social change in organizations'(2007) 32(3) *Academy of Management Review* 836,858 (Jensen and Aguilera et.al assert that both CG and CSR are manifestations of firms' fiduciary and moral responsibilities toward stakeholders.).

[145] S Claessens & BB Yurtoglu 'Corporate governance in emerging markets: A survey' (2013) 15 *Emerging Markets Review*1,3.

[146] S Turnbull 'Corporate Governance: Its scope, concerns and theories' (2002) 5 *Corporate Governance: An International Review* 180,201.

[147] MM Blair 'Ownership and Control: Rethinking Corporate Governance for the twenty-first century' (1995) in RV Aguilera & G Jackson 'Comparative and International Corporate Governance' (2010) 4(1) *The Academy of Management Annals*' 485, 489. (Blair encapsulates the definition beyond private contractual agreement as "the whole set of legal, cultural and institutional arrangements that determine what publicly traded corporations can do, who controls them, how control is exercised, and how the risk and returns from the activities they undertake is allocated."); IM Millstein 'The Evolution of Corporate Governance in the United States: Remarks to the World Economic Forum' (1998) in HJ Gregory 'Building the Legal and Regulatory Framework: Discussion' <https://www.bostonfed.org/-/media/Documents/conference/44/cf44_4.pdf?la=en>.

form, it is the way the corporation is directed and controlled.[148] Thus a poor CG system means that the corporation is most likely not going to engage in CSR but will rather participate in corrupt activities that will be detrimental to an organization.

Scholars argue that though CG and CSR are linked, their objectives and corporate frameworks are different but they help each other attain their goals.[149] For example good CG and CSR engagements help improve a corporation's image and directly affects the performance of an organisation.[150] Good CG is also said to be a means to cater for economic efficiency, sustainable growth and financial stability.[151] It helps companies' gain access to funds for long-term investment and assists in ensuring that shareholders and other stakeholders who actively

[148] The 1992 Report of the Committee on the Financial Aspects of Corporate Governance; J Casson 'A Review of the Ethical Aspects of Corporate Governance Regulation and Guidance in the EU' <https://www.ibe.org.uk/userassets/publicationdownloads/ibe_report_a_review_of_the_ethical_aspects_of_corporate_governance_regulation_and_guidance_in_the_eu.pdf>

[149] L Van den Berghe and C Louche 'The Geneva Papers on Risk and Insurance. Issues and Practice' (2005) 30(3) *Special Issue on Corporate Governance and Corporate Social Responsibility* 425, 430; KK Rao & CA Tilt 'Corporate Governance and Corporate Social Responsibility: A Critical Review' <https://pdfs.semanticscholar.org/7aea/3647af54e7108a712c2c61b55ffc5d58be10.pdf>; D Oleg, K Nino 'Corporate Governance, Social Responsibility and Financial Performance of European Insurers' (2017) 65(6) 1873, 1874; Z Mahmood & Z Riaz 'Using Case Study Research Method to Emergent Relations of Corporate Governance and Social Responsibility' (2008) 4(1) *Journal of Quality and Technology Management* 9, 10.

[150] DP Verma & R Kumar 'Relationship between Corporate Social Responsibility and Corporate Governance' (2012)2(3) *Journal of Business and Management* 24, 25. Some of the objectives of the CG and the CSR which are similar include: a) Rebuilding of public trust and confidence by increased transparency in its financial as well as non-financial reporting and thereby increasing the shareholder value; b) Establishing strong brand reputation of the company; c) Making substantial improvement in its relationship with various stakeholders; d) Contributing to the development of the region and the society around its area of operation; e) Addressing the concerns of its various stakeholders in a balanced way so as to maintaining a strong market position. MM Rahim 'Legal Regulation of Corporate Social Responsibility, CSR, Sustainability, Ethics & Governance' <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&sqi=2&ved=0ahUKEwie7NrTl-XRAhUlKsAKHULlByQQFgg-MAU&url=http%3A%2F%2Fwww.springer.com%2Fcda%2Fcontent%2Fdocument%2Fcda_downloaddocument%2F9783642403996-c1.pdf%3FSGWID%3D0-0-45-1430619-p175388276&usg=AFQjCNEkZwCa7VceERId6SQ-efue2N1sUw&sig2=NdMn6nzrcbIcYdPbh7s_jw&bvm=bv.145822982,d.ZGg>; LE Mitchell 'The Board as a Path toward Corporate Social Responsibility' in D McBarnet, A Voiculescu & T Campbell 'The New Corporate Accountability: Corporate Social Responsibility and the Law' (2007) 171,279; OS. Zeidan & SG. Fauser 'Corporate Governance and Corporate Social Responsibility – the Case of FIFA' (2015) 13(2) *Problems and Perspectives in Management* 183,185.

[151] A Beltratti 'The Complementarity between Corporate Governance and Corporate Social Responsibility'. *Geneva Papers on Risk & Insurance* (2005) 30, 373 in A Khan, MB Muttakin & J Siddiqui 'Corporate Governance and Corporate Social Responsibility Disclosures: Evidence from an Emerging Economy' (2013) 114 *Journal of Business Ethics* 207,207; HJ Gregory 'Building The Legal and Regulatory Framework: Discussion' <https://www.bostonfed.org/-/media/Documents/conference/44/cf44_4.pdf?la=en>; JD Wolfensohn, 'A Battle for Corporate Honesty' (1999) *The Economist: The World,* 38 in HJ Gregory 'Building The Legal And Regulatory Framework: Discussion' (These studies show that CG and CSR mechanisms positively improve the market value of a corporation).

contribute to the success of the corporation are treated fairly.[152] For this reason CG and CSR are linked. A good CG structure will lead to an MNC participating more in CSR initiatives.

The question is how effective the current international codes of ethics have been in encouraging MNCs to participate in CSR initiatives. A comparative analysis of the application of these international codes of ethics in the USA, UK ad Nigeria will also be discussed to ascertain the deficiencies of these international codes and ways to remedy them.

4. ENFORCEMENT MECHANISMS FOR UNETHICAL PRACTICES THROUGH CORPORATE CODES OF ETHICS

There are no enforcement mechanisms for unethical practices through corporate codes of ethics because they are voluntary in nature.[153] Although they encourage companies to operate in a sustainable manner and help consumer's ascertain that the business meets certain standards, the existing codes of ethics are inadequate when there are serious consequences of non-compliance.[154] An example would be in cases where the activities of the MNC cause harm to the health, safety or the environment. In such instances, the code of ethics would be unenforceable because they do not have any significant sanctions.[155] Therefore, voluntary codes of ethics are not suitable for companies whose aim is to make profits, increase and maintain profit ratio, and establish their companies where they pay a minimal amount for production costs.[156]

It is argued that voluntary codes of ethics are developed and implemented to suit the socio-economic, local, cultural and environmental context of a country and therefore will not be

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[152] OECD 'G20/OECD Principles of Corporate Governance' <http://www.oecd.org/corporate/principles-corporate-governance.htm>; Casson (note 137 above).

[153] Voluntary codes are codes of practice and other arrangements that influence, shape, control or set benchmarks for behaviour in the marketplace. United Nations Environment Programme Industry & Environment (UNEPIE) 'Voluntary Codes: A Guide for Their Development and Use' <http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca00963.html>.

[154] OE Herrnstadt 'Voluntary Corporate Codes of Conduct: What's Missing?' (2001) 16(3) *The Labor Lawyer* 349, 352; R Pearson & G Seyfang 'New Hope or False Dawn? Voluntary Codes of Conduct, Labour Regulation and Social Policy in a Globalizing World' (2001) 1(1) *Global Social Policy* 48, 53; SS Prakash 'Standards for Corporate Conduct in the International Arena: Challenges and Opportunities for Multinational Corporations' (2002) 107(1) *Business and society review* 20, 20.5; UNEPIE (note 142 above).

[155] R Jenkins 'Corporate Codes of Conduct Self-Regulation in a Global Economy' <*http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/E3B3E78BAB9A886F80256B5E00344278/$file/jenkins.pdf*>; H Keller 'Corporate Codes of Conduct and their Implementation: The Question of Legitimacy' <http://www.yale.edu/macmillan/Heken_Keller_Paper.pdf>.

[156] K Greenfield 'Corporate Social Responsibility: There's a Forest in those Tree Teaching about the Role of Corporations in Society' (2000) 34 *TA Law Review* 1011 in Gill A 'Corporate Governance as Social Responsibility: A Research Agenda' (2008) 26(2) *Berkley Journal of International Law* 460, 464. (for a criticism of how normative justifications attributed to CSR become part of the neo-liberal logic rather than undermine it).

enough to incite all companies to participate in CSR activities.[157] This means that codes will be applied differently in different places; in some places, it would be more rigorous than others. This makes it difficult to enforce corporate codes of ethics and creates a disparity in the way companies participate in CSR initiatives. MNCs that are involved in unethical practices often go unpunished and this is due to lack of enforcement mechanisms. Therefore, there is need for an international mandatory code of ethics with sanctions for violations of unethical practices because there is no enforcement mechanism to ensure that MNCs abide by these instruments

Scholars have argued that in the case of the OECD Guidelines for MNCs, there is need to tighten procedures of implementing the OECD Guidelines.[158] OECD Member States are obliged to establish National Contact Points (NCP) which has the primary responsibility to ensure the follow-up on the Guidelines at the national level by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the Guidelines in specific instances.[159] The OECD Guidelines is criticised for being too lengthy and providing unspecific guidelines for addressing human rights violations.

Scholars argue that the domestic implementation of the OECD Guidelines remains a challenge in a number of countries and that international law is limited in its reach into domestic spheres for the stimulation of implementation.[160] Presently, victims of human rights violations by or involving corporations have little or no access to justice either in their home country or in the country where the corporation in question is registered or, indeed, in the international arena.[161]

This is clear from the documented reports of the NCPs. It is reported that they cannot impose sanctions on MNCs when they are found to be in violation of the OECD Guidelines.[162] It appears that most of the problems in relation to the implementation of the OECD Guidelines can be traced to the vague nature of the formulation in the Guidelines. For example, the NGO RAID indicates that the UK NCP has adopted the inconsistent treatment of different companies and that it has often failed to determine whether certain conduct complies with the Guidelines.

[157] UNEP 'Voluntary Industry Codes of Conduct for the Environment' (1998) *Environmental Law* 1, 9.
[158] JL Černič 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational enterprises' (2008) *Hanse Law Review* 3(1) 71, 72.
[159] Decision of OECD Council 27 June 2000 - C (2000)96/FINAL para 1
[160] JL Černič (note 160 above) 77; S Robinson 'International Obligations, State Responsibility and Judicial Review under the OECD Guidelines for Multinational Enterprises Regime' (2014) 30(78) *Utrecht Journal of International and European Law* 68, 72.
[161] JL Černič (note 160 above) 82.
[162] O De Schutter *Transnational Corporations and Human Rights* (2006) 34.

Scholars argue that the NCP lacks uniform structure.[163] The Council Decision itself asserts that states 'have flexibility in organising their NCPs, seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations and other interested parties.[164] As a result, some NCPs are government entities or ministries, while some remain a single person; some are housed in one government office, while others have taken on a multi-partite structure, representing various stakeholders, such as businesses, unions and NGOs.[165]

The lack of a prescribed structure by the OECD is said to detract from the organisation, consistency and capabilities of the NCP system as a whole.[166] There are no set, uniform procedures that NCPs must follow when receiving and considering a specific instance complaint.[167] Consequently, the procedures that NCPs have established to handle complaints vary from NCP to NCP.[168] Therefore, a complainant must first decipher the rules that a particular NCP has adopted before drafting and filing a complaint.[169]

Despite these arguments above, other scholars argue that the NCP is great in that it can provide an effective method for indigenous peoples to have their concerns addressed before development begins.[170] This view can prevent at least some of the human rights abuses and environmental degradation that may occur either during the course of development or when a disenfranchised people retaliate in an attempt to regain what they believe was wrongfully taken.

[163] S Robinson (note 149 above) 72.
[164] OECD 'Decision of the Council on the OECD Guidelines for Multinational Enterprises' (OECD Decision C (2000)96/FINAL as amended by OECD Decision C/MIN(2011)11/FINAL, 27 June 2000) I(1)-(4) (Decision).Procedural Guidance I(A)
[165] For a discussion of the various formats and functions of the various NCPs, see TUAC OECD, 'National Contact Points' (TUAC on NCP Structures) <http://www.tuacoecdmneguidelines.org/contact-points.asp>. The Trade Union Advisory Committee to the OECD is another authoritative advisory body noted in the Council Decision itself. See Decision (n 6) II (2).
[166] OECD Watch *The OECD Guidelines for MNEs: Are they fit for the job?* (2009) 5-6.
[167] OECD Watch 'Guide to the OECD Guidelines for Multinational Enterprises Complaint Procedure: Lessons from Past NGO Complaints' (2006) 19 (Guide to the OECD Guidelines).
[168] OECD Watch, 'The OECD Guidelines for Multinational Enterprises: A tool for responsible business conduct' (2012) 6 (Tool for responsible business conduct).
[169]Ibid.
[170]H Bowman 'If I Had a Hammer: The OECD Guidelines for Multinational Enterprises as another Tool to Protect Indigenous Rights to Land' <https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/635/15PacRimLPolyJ703.pdf?sequence=12006 Pacific Rim Law & Policy Journal Association VOL. 15 NO. 3 703-732>.

Scholars have argued that the abovementioned international code of ethics instruments are intended for listed companies and where there is no effective legal and regulatory environment with adequate competition.[171]

One disadvantageous aspect of these regulations is that they are non-binding and their aim is not to provide solutions to national legislations.[172] Their sole purpose is to provide guidelines for policy makers to improve their legal and regulatory frameworks for CG and CSR which would encompass their economic, social, legal and cultural circumstances.[173]

Effective enforcement requires allocating responsibilities for supervision, implementation and enforcement among different authorities in a clearly defined way so that the abilities of the relevant bodies and agencies are catered for and used in the most effective manner

The ISO 14000 standards focus on the management processes behind the product. There is no guarantee that a quality process will yield a quality product or a better environment.[174] Additionally, despite the claims that these standards will help to reduce costs, there is no guarantee that certification in either or both will result in increased profits for a company.[175]

However, certain problems may not be obvious or easy to solve and ISO 14001 does not provide the tools and techniques to make the necessary improvements sought from their self-

[171] MR Iskander & *Corporate Governance: A Framework for Implementation* (2000) 185.
[172] Ibid.
[173].Iskander et al (note 175 above) 78.
In brief, the principles cover: a. The rights of shareholders (and others) to receive relevant information about the company in a timely manner, to have the opportunity to participate in decisions concerning fundamental corporate changes, and to share in the profits of the corporation, among others. Markets for corporate control should be efficient and transparent, and shareholders should consider the costs and benefits of exercising their voting rights. b. Equitable treatment of shareholders, especially minority and foreign shareholders, with full disclosure of material information and prohibition of abusive self-dealing and insider trading; all shareholders of the same class should be treated equally. Members of the board and managers should be required to disclose any material interests in transactions. c. The role of stakeholders in corporate governance should be recognized as established by law, and the corporate governance framework should encourage active cooperation between corporations and stakeholders in creating wealth, jobs, and financially sound enterprises. d. Timely and accurate disclosure and transparency on all matters material to company performance, ownership, and governance and relating to other issues such as employees and stakeholders; financial information should be independently audited and prepared to high standards of quality.
[174] ISO 14000 'ISO 14000: Costs, Benefits and Other Issues' <http://www.sis.pitt.edu/mbsclass/standards/martincic/discussn.htm>; P Bansal & T Hunter 'Strategic explanations for the early adoption of ISO 1400' (2003) 46(3) *Journal of Business Ethics* 289,290; M Delmas 'Stakeholders and competitive advantage: The case of ISO 14001 Production and Operations Management' (2001) 10(3) *Productions and Operations Management* 343,360 (ISO focused on the process and not the result to be obtained).
[175]King, MJ Lenox, & A Terlaak 'The strategic use of decentralized institutions: Exploring certification with the ISO 14001 management standard' (2005) 48(6) *Academy of Management Journal* (2005). 1091, 1092.

imposed targets.[176] Many environmental problems may need structured statistical analysis in order to identify root causes. Processes may exhibit high degrees of variation which demonstrate being out of control and many companies may not have the internal capability to solve these complex problems.[177]

ISO 14001 standards or certification is completely voluntary and companies who do not wish to obtain the certification cannot be forced to. However, this is problematic if one wishes to monitor companies who may be causing excessive environmental impacts.[178]

A major criticism by NGOs of ISO 14001 is that it is not strict enough. There is a believe that the ISO 14001 is too general in nature, as only an organisational structure is set while the rest is up to the organisation itself.[179] Another criticism is that it should not be enough to only intend to decrease environmental impacts in the future, but that certification should require meeting specific performance targets.[180] Any organisation, no matter how polluting its activities are, can obtain ISO 14001 certification.[181]

For example, certification can be received by both nuclear power plants and power plants that burn brown coal, despite their serious environmental impacts.[182] This causes damages to the credibility of ISO 14001.[183]

The UN Global Compact is criticised as being marked by 'inconsistent participation and relatively weak commitment by some companies.'[184] It is also criticised for its voluntary nature

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[176] H Yin & PJ Schmeidler 'Why do standardized ISO 14001 environmental management systems lead to heterogeneous environmental outcomes?' (2008) 18(7) *Business Strategy and the Environment* 469,482.

[177] J Marsh 'ISO 14001: Analysis into its strengths and weaknesses, and where potential opportunities could be deployed for tomorrows Global Business' <http://greenleansolutions.com/resources/ISO14001.pdf>.

[178] RA Jiang & P Bansal 'Seeing the need for ISO 14001' (2003) 40(4) *Journal of Management Studies* 1047,1062; G Lannelongue, J González-Benito & C González-Zapatero et al 'Time compression diseconomies in environmental management: The effect of assimilation on environmental performance' (2015)147 *Journal of Environmental Management* 203, 209; VF Vílchez 'The dark side of ISO 14001: The symbolic environmental behavior' (2017) 23 *European Research on Management and Business Economics* 33, 34.

[179]. ISO 'Strengths and Weaknesses available at: ISO 14001: irrelevant or invaluable?' <http://www.qmii.com/content/downloads/Impact%20of%20ISO%2014001.pdf; ISO 14001: one for all>; ISO 'Applauding the success of ISO 14001 should not deafen us to the challenges' <http://www.iso.org/iso/en/iso9000-14000/addresources/ articles/pdf/viewpoint_1-02.pdf>; ISO 'The future of management system standards' <http://www.iso.org/iso/en/iso9000-14000/addresources/ articles/pdf/viewpoint_6-02.pdf>.

[180] Ibid.

[181].ISO (note 184 above).

[182] Ibid.

[183] ISO (note 184 above).

[184]Bitanga 'Corporate Social Responsibility and The United Nations Global Compact' <http://www.larrybridwell.com/Corporate%20Social%20Responsibility%20and%20UN%20Global%20CompactBitangaBridwell.pdf>.

as there is minimal accountability for company members.[185] A main critic concerns thus the non-binding character of the membership.[186] There is neither serious monitoring nor any kind of sanctions. In 2004 less than 60% reported taking any action in compliance with the ten principles.[187] Critics also argue that as most members are from developed countries and thus there is no balance with the developing world.[188]

Another argument concerns the Global Compact's side effects. The participants stress that they consider this initiative as being complementary to other measures. The opponents though deny this and stress that the voluntary approach serves rather as a substitute for a binding code of conduct for transnational corporations than as a complement.[189]

Observance of the principles is not directly controlled. The only check on observance is the yearly progress reports, which are not subjected to further controls.[190] Although some 3,700 businesses have joined the UN Global Compact to date, this is but a tiny fraction of the 65,000 trans-national concerns active world-wide.[191]

The UN Global Compact has been criticised for being another code without accountability [192] and a public relations document without substance.[193] How does one know that a business that

[185]J Ibid. S Deva 'Global Compact: A Critique of the UN's 'Public-Private Partnership for Promoting Corporate Citizenship' (2006). 34 *Syracuse Journal of International Law and Communication* 107, 146.
[185] J Nolan. The United Nations Global Compact with Business: Hindering or Helping the Protection of Human Rights*? (2005)24 The University of Queensland Law Journal* 445,466.
[185] H Rizvi 'UN Pact with Business Lacks Accountability' <http://www.globalpolicy.org>.
[185] JP Thérien. & V Pouliot 'The Global Compact: Shifting the Politics of International Development' (2006) 12 *Global Governance* 55, 55-75.
[185] A Zammit, 'Development at Risk – Rethinking UN-Business Partnerships*'* <https://www2.ohchr.org/english/issues/globalization/business/docs/report5.pdf>.
[186] OF Williams 'The UN Global Compact: The Challenge and the Promise. Business' (2004).14 *Ethics Quarterly* 755,770.
[187] N Bandi 'United Nations Global Compact: Impact and its Critics' <http://www.ethicalquote.com/docs/UnitedNationsGlobalCompact.pdf>.
[188] Bandi (note 192 above); Global Policy Forum Europe (Ed.), 'Whose Partnership for whose development? Corporate Accountability in the UN System beyond the Global Compact' <https://www.cora-netz.de/wp-content/uploads/global_compact_alternative_hearing_2007-speaking_notes.pdf>; K Georg 'The Global Compact: Selected Experiences and Reflections' (2005) 59 *Journal of Business Ethics* 69, 69-79; Thérien. & Pouliot (note 191 above) 55-75; P Utting 'Global Compact: Why All the Fuss?' (2003) *UN Chronicle* 1, 2.
[189] Bandi (note 193 above); Georg (note 193 above) 74; Thérien. & Pouliot (note 193 above) 68; Utting (note 193 above) 2.
[190] United Nations 'UN Global Compact under criticism' <http://www.global-ethic-now.de/gen-eng/0d_weltethos-und-wirtschaft/0d-03-neue-art/0d-03-106-global-com-kritik.php#>.
[191] Ibid
[192] DM Bigge 'Bring on the Bluewash – A Social Constructivist Argument against Using Nike v. Kasky to Attack the UN Global Compact' (2004).14 *International Legal Perspectives* 6, 12; Deva (note 190 abover) 146; Nolan (note 190 above) 466; H Rizvi 'UN Pact with Business Lacks Accountability. *Global Policy Forum'*< http://www.globalpolicy.org>; Thérien. & Pouliot (note 193 above) 67.
[193] Nolan (note 190 above) 460; Bigge (note 197 above) 11; SD Murphy. 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 *Columbia Journal of Transnational Law* 388, 389.

claims to be following the principles of the Global Compact is actually doing so? NGOs view the UN Global compact as a cover story, giving legitimacy to an idea which has yet to prove itself.[194] They argue for a mandatory legal framework as the only way to guarantee that companies are accountable to the least advantaged in the global economy.[195]

It is in this spirit that Nolan[196] argues that 'accountability, or rather the lack of it, is the crucial issue that faces the Global Compact.' A lack of serious monitoring, sanctions, enforceable rules and independent space verification fosters the misuse of the UN Global Compact as a marketing tool.[197]

Smit proposes that there is need to turn to domestic remedies in order to establish whether enforcement is possible.[198] Issues such as jurisdictional competence (Kiobel v Royal Dutch); dependence on different national substantive laws that can all differ with regard to the potential range of claimants; damages they allow; and the legal consequences of the exact wording of the code has not been addressed by the international community in deterring possible enforcement of the international code of ethics instruments.[199]

5. DISPARITY IN REGULATING CORPORATE SOCIAL RESPONSIBILITY

Currently very few countries across the world have expressly incorporated CSR principles within their company laws.[200] The few that refer to CSR principles, have indirectly referred to it within their corporate laws. For example, in the United Kingdom, section 172 of the Companies Act 2006[201] enshrines in law the duty on directors to consider the interests of the

[194] Williams (note 191 above) 757.
[195] Ibid 758.
[196] Nolan (note 197 above) 462; Williams (note 200 above) 757.
[197] Deva (note 198 above) 107-151; H Rizvi 'UN Pact with Business Lacks Accountability' *Global Policy Forum* <http://www.globalpolicy.org>.
[198] JM Smits 'Enforcing Corporate Social Responsibility Codes under Private Law: On the disciplinary Power of Legal Doctrine' (2017) (24(1) *Indiana Journal of Global Legal Studies* 104, 141.
[199] Ibid; A Mickels 'Effectively Enforcing Corporate Social Responsibility Norms in the European Union and the United States' (2009) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.522.9599&rep=rep1&type=pdf>.
[200] The UK is an example of one of the countries that has incorporated CSR principles within their company laws. I Bantekas 'Corporate Social Responsibility In International Law' <http://www.bu.edu/law/journals-archive/international/volume22n2/documents/309-348.pdf>; P Mazurkiewicz 'Corporate Environmental Responsibility:Is A Common CSR Framework Possible?<https://siteresources.worldbank.org/EXTDEVCOMSUSDEVT/Resources/csrframework.pdf>. JK Jackson 'Codes of Conduct for Multinational Corporations: An Overview' <https://www.fas.org/sgp/crs/misc/RS20803.pdf>.
[201] Companies Act 2006 (c 46). Section 172 provides for the duty to promote the success of the company. It reads: "(1)A director of a company must act in the way he considers, in good faith, would be most likely to promote the

employees, suppliers, customers, the community and the environment in their corporate decisions. This legislation is one of the few in the world that makes express provision on CSR.

In Nigeria, there is no national law that makes express provision for CSR.[202] International CSR Instruments, such as the OECD Guidelines, United Nations (UN) Global Compact and the 1998 ILO Declaration on Fundamental Principles and Rights at Work have not been domesticated in Nigeria.[203] This means that companies in Nigeria employ their own discretion in the area of CSR. Likewise, in the United States of America (USA), there is no central body of company law and each state is free to establish its own statute. [204]

This disparity has led the body of scholarship commonly referred to as 'progressive corporate law' to reject the voluntary nature of CSR within its focus on self-regulatory ethics, and to suggest far more comprehensive, mandatory changes in the fundamental legal structures of corporations.[205] Arguments in support of this is that when MNCs operate in host nations, the laws and regulations of the host country seem more lenient in areas of environmental

success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to – (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationship with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company."

[202] B Ayorinde 'The Challenges of Corporate Social Irresponsibility in the Niger Delta Regions of Nigeria: The Imperative of Legislative Reform' (2007) *Paper presented at the 5th International Conference on International Environmental Law* held between 8-9 December at New Delhi 888.

[203] H Ijaiya 'Challenges of corporate social responsibility in the Niger delta region of Nigeria' (2014) 3(1) *The Journal of Sustainable Development Law and Policy* 60, 67.

[204] K Waring 'Effective Corporate Governance Frameworks: Encouraging Enterprise and Market Confidence' <http://www.icaew.com/~/media/corporate/files/technical/corporate%20governance/dialogue%20in%20corporate%20governance/effective%20corporate%20governance%20frameworks.ashx>; Institute of Chartered Accountants in England and Wales (ICAEW) 'Effective Corporate Governance Frameworks: Encouraging Enterprise and Market Confidence' <http://www.icaew.com/~/media/corporate/files/technical/corporate%20governance/dialogue%20in%20corporate%20governance/effective%20corporate%20governance%20frameworks.ashx>. J Armour, H Hansmann & R Kraakman 'The Essential Elements of Corporate Law: What is Corporate Law?' <http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf>.

[205] MM Rahim 'Legal Strategies for Incorporating CSR Principles in Corporate Self-Regulation' (2013) *Legal Regulation of Corporate Social Responsibility* 95, 96; JM Lozano, L Albareda, T Ysa et al. *Governments and Corporate Social Responsibility: Public Policies Beyond Regulation and Voluntary Compliance* (2008) 3, 3; V Christian & NM Pless 'Global Governance: CSR and the Role of the UN Global Compact' *Journal of Business Ethics* (2014) 122(2) 179,182; R Shamir 'Corporate Responsibility and the South African Drug Wars: Outline of a New Frontier for Cause Lawyers' in A Sarat & S Sheingold (eds) '*The Worlds Cause Lawyers make: Structure and Agency in Legal Practice*' (2005) 38 (Shamir defines CSR as 'the social universe where ongoing negotiations over the very meaning and scope of the term social responsibility takes place); K Greenfield (note 156 above) 1011.

protection, human rights, health and safety, and labour standards than they are in the home nation thus leading to violation of codes of ethics and non-compliance with CSR initiative.[206]

This is what happened with Shell BP in Nigeria. The communities in the Nigerian Delta have complained that Shell in Nigeria does not effectively contribute to the sustainable development of local communities in its area of operation.[207] Their argument was that Shell had been exploiting their oil wealth without giving back to the oil community in the form of sustainable development.[208] One case in this regard *Wiwa* v *Royal Dutch Petroleum*[209] where several human rights abuses were levelled by the people of Ogoni in the Nigerian Delta against Royal Dutch Petroleum Company and Shell Transport and Trading Company. There are three important aspects of this case applicable towards the argument for an international mandatory code of ethics: first the court did not make reference to any of the international codes of ethics because they are not enforceable and are only voluntary guidelines for MNCs on how to conduct their business.[210] Second, an amount of US$15.5 million was paid to compensate the plaintiffs towards administrative fees and not as penalty for the violation. This meant that they

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[206] E Garriga & D Mele 'Practice and Management of Ethics in Modern Business' (2004) 53(2) *Journal of Business Ethics* 52, 58; D Mayer & R Jebe in J O'Toole & D Mayer *Good Business: Exercising Effective and Ethical Leadership* (2013) 1,159; D Mayer & R Jebe 'The Legal and Ethical Environment for Multinational Corporations' <http://www.enterpriseethics.org/portals/0/pdfs/good_business_chapter_13.pdf>.

[207] F Tuodolo 'Corporate Social Responsibilities: Between Civil Society & Oil Industry in the developing World' (2009) 8(3) *An International E-Journal for Critical Geographics* 539, 540; B Omiyi 'Shell's Corporate Social Responsibility in the Niger Delta' <http://www.inasp.info/uploads/filer_public/2013/04/03/3_handout_4.pdf>; B Manby 'Shell in Nigeria: Corporate Social Responsibility and the Ogoni Crisis' <http://integritynigeria.org/wp-content/uploads/2012/07/Shell-in-Nigeria-Corporate-Social-Responsibility-and-the-Ogoni-Crisis-Bronwen-Manby.pdf>.

[208] Ecumenical Council for Corporate Responsibility (ECCR) 'Shell in the Niger Delta: A Framework for Change Five Case Studies from Civil Society' (2010) <http://www.eccr.org.uk/ShellintheNigerDelta>.

[209] *Wiwa* v *Royal Dutch Petroleum* Co 1 No. 96 Civ 8386. Other cases included: ("Wiwa I"); *Wiwa* v *Brian Anderson* No 01 Civ 1909("Wiwa II"); *Wiwa* v *Shell Petroleum Development Corp* No 04 Civ 2665("Wiwa III"). The intention was to suppress the Ogoni people's peaceful opposition to defendants' long history of environmental damage and human rights abuses in the Ogoni region. The lawsuit was filed by the Centre for Constitutional Rights (CCR) and co-counsel from Earth Right International, on behalf of the relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria. The lawsuit was brought against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell), the Nigeria subsidiary itself, Shell Petroleum Development (SPDC). The cases were brought under the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA). The case against Royal Dutch/Shell also alleges that the corporation violated the Racketeer Influenced and Corrupt Organizations (RICO) Act. One of the primary issues in the case was the issue of jurisdiction which does not necessarily apply to this thesis but what is particularly important is how on June 8, 2009, the parties agreed to a settlement for all three lawsuits. The settlement provided a total of US$15.5 million to compensate the plaintiffs, establish a trust for the benefit of the Ogoni people, and cover some of the legal costs associated with the case. This settlement was solely towards administrative fees. Even though this was recognised to a certain extent as a sign of victory for the Ogoni people, this thesis argues that Shell had gotten away free without any penalty or sanction on their part. The question is, "will the settlement amount they had paid hinder the company from being unethical in the future?'.

[210] *Wiwa* v *Royal Dutch Petroleum* Co. (note 215 above) 49.

had gotten away with non-compliance of their CSR obligations. Third, there was no reference to any company laws to hold the company liable for their CSR obligation.[211]

Despite these numerous benefits of legalizing CSR by virtue of mandating companies to comply with an international mandatory code of ethics (IMCE). Some scholars like Masaka contend that enforcing CSR is immoral. They argue that making CSR mandatory creates moral problems in that it violates the moral rights of owners of corporate organizations to freely choose to contribute towards social prosperity or not.[212] Masaka argues that corporate organizations should simply show social concern because it is the right thing to do.[213] However, what Masaka fails to understand is that corporate organizations are not concerned about social prosperity but they are more concerned about their organization's prosperity. Though on face value, it may seem that contributing to social responsibility is simply to advance the corporate ends of business and is devoid of moral value when companies are compelled to do it; however, this is not the case as the focus is on the greater good of the society. It is for this reason, therefore, that they regard enforced CSR or its manipulation as devoid of moral value because it is done not from a sense of duty but in accordance with duty.[214]

India is the first country to legislate CSR. Some scholars argue against the enforcement of CSR using India as a case study. They base their arguments on policy issues related to the Indian CSR legislation. The legislation mandates companies to give 2% of their net profits in the last three years to CSR and be reviewed at the end of each financial year by the boards' director to ensure compliance.[215] They consider this to be unfair.

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[211] Ibid 49.

[212] D Masaka 'Why Enforcing Corporate Social Responsibility (CSR) is Morally Questionable' (2008) (13(1) *Electronic Journal of Business Ethics and Organization Studies* 13, 17. Moral rights are rights that entitle all human beings to be permitted to do something entitled to have something done for them.

[213] Ibid 17.

[214] Masaka (note 218 above) 17.

[215] E Chhabra 'Corporate Social Responsibility: Should it be a Law?' <https://www.forbes.com/sites/eshachhabra/2014/04/18/corporate-social-responsibility-should-it-be-a-law/#65d10c813736>; A Beckers 'European University Institute Working Papers 'Regulating Corporate Regulators through Contract Law? The Case of Corporate Social Responsibility Codes of Conduct' EU Working Paper MWP 2016/12 at 4; A Beckers 'European University Institute Working Papers 'Regulating Corporate Regulators through Contract Law? The Case of Corporate Social Responsibility Codes of Conduct' EU Working Paper MWP 2016/12 at 4; S Timms 'Energy and Corporate Responsibility *Ethical Corporation, 2004 13* (Minister describing CSR as going beyond legal requirements). The UK government opted to retain CSR as a voluntary matter rather than making it a direct legal obligation, and the theme has been reiterated since.

The absence of CSR provisions in the company law of many countries and the unenforceable nature of the corporate codes of ethics creates a gap in that there is no proper guide on how MNCs can conduct their business to fulfil CSR obligations. Scholars have suggested that there is need to find a common ground in the corporate governance regulatory framework across the world.[216] This thesis argues that legislating CSR in the company laws of these countries would arguably have amounted to a step in the right direction in having MNCs operating in these countries comply with their CSR obligations.

6. SIGNIFICANCE OF THE STUDY

Most MNCs are not actively participating in CSR activities because there are no uniform regulations guiding their operations and this has given room to unethical practices in the host countries.[217] Although companies cannot be mandated to participate in CSR activities they can be compelled to act ethically in their operations. When this is done, it can be argued that most MNCs will divert that attention to CSR activities.

As such have an instrument that could define ethical practices catering for all industries and create uniform moral values for MNCs across the world becomes a necessity. Violation of such ethical provisions would attract sanctions to the MNC regardless of whether it is in the home country or host country. The international mandatory code of ethics needs to link the company's profit making ability to compliance with the international mandatory code of ethics as MNCs are often profit oriented and are likely to comply with anything that is connected to their ability to make profit.[218]

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[216] K Waring (note 210 above).

[217] Examples of countries where this is happening include Nigeria, Russia, Brazil, and India. See e.g. 'Archive Fire Naming Names: Top 12 Most Unethical Multinational Corporations' <http://www.archivefire.net/2010/08/naming-names-top-12-most-unethical.html>. Some examples include Chevron, Occidental Petroleum, Total SA, Barrick Gold Corporation, Amazon(tax avoidance; ill-treatment of workers at the Amazon fulfilment centres), ASDA Wall Mart(failed to embed corporate responsibility into its operations and supply chain around the world), Nestle(irresponsible marketing of baby milk to workers in developing world; use of unsustainable palm oil and genetic ingredients in its foods), Coca-Cola(workers' rights violation at its bottling plants; accused of taking water supplies from rural communities and falsifying environmental data).

[218] OC Ferrell & Gresham LA (note 24 above) 98; EF Carasco & JB Singh 'The Content and Focus of the Codes of Ethics of the World's Largest Transnational Corporations' (2003) 108 *Business and Society Review* in G Wood, G Svensson G & J Singh et al. 'Implementing the Ethos of Corporate Codes of Ethics: Australia, Canada and Swede n' (1999) 13(4) *Business Ethics: A European Review* 389, 393.

The few research done on codes of ethics,[219]is incomplete in that it creates a gap in the scholarship. There is limited research on a mandatory international code of ethics which contains universal moral values. Currently, the existing corporate codes of ethics are not based on universal core moral values and thus lack ethical justification and therefore normative legitimacy.[220]

Schwartz examines the global code of ethics that have been endorsed by numerous companies and argues that they lack sufficient clear normative basis.[221] He uses the UN Global Compact established in 1999 to illustrate this.[222] He argues that while the Global Compact is grounded in and enjoys 'universal consensus' from other important international agreements (i.e. The Universal Declaration of Human Rights, The International Labour Organization's Declaration on Fundamental Principles and Rights at Work, and The Rio Declaration on Environment and Development), the Global Compact unfortunately does not explicitly set out the core universal moral values upon which the principles themselves are based.[223]

Scholars have highlighted the importance of identifying universal moral norms. For example O'Brien states that: 'if civilization is to endure, it is imperative that human beings discover and conform to universal ethical principles.'[224] Rallapalli puts the importance into business context by suggesting that there is '...an urgent need for a common global code of ethics.'[225]

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[219] Examples of such research include C Mason & J Simmons. 'Embedding Corporate Social Responsibility in Corporate Governance: A Stakeholder Systems Approach' (2014) 119(1) *Journal of Business Ethics* 77, 82; B Tricker *Corporate Governance: Principles, Policies & Practices* 3 ed (2015) 120; N Egels-Zandén 'Revisiting Supplier Compliance with MNC Codes of Conduct: Recoupling Policy and Practice at Chinese Toy Suppliers' (2014) 119(1) *Journal of Business Ethics* 59, 68; MA Cleek, SL Leonard & MS Schwartz 'Effective Corporate Codes of Ethics: Perceptions of Code Users' (2004) 55(4) *Journal of Business Ethics* 321, 330; YK Lee, J Choi & BY Moon et al. 'Codes of Ethics, Corporate Philanthropy, and Employee Responses' (2014) 39 *International Journal of Hospitality Management* 97, 103; S Webley & A Werner 'Corporate codes of Ethics: Necessary but not Sufficient' (2008) 17(4) *Business Ethics: A European Review* 405, 408.

[220] MS Schwatz 'Universal Moral Values for Corporate Codes of Ethics' *Journal of Business Ethics* (2005) 30,35.(Schwartz gives an example of a corporate code of ethics that is based merely on the desired moral values of the individual CEO, the legal department, or even an ethics consultant, is arguably a relativistic document that merely suits the objects of the author. While such a code may serve certain purposes, such as leading to certain desired behaviour on the part of the employees or the organization, the code might not be sufficiently ethically grounded and remains susceptible to ethical critique).

[221] MS Schwatz (note 78 above) 37.

[222] Ibid.

[223] Note 48 above, 37.

[224] JC O'Brien 'The Urgent Need for a Consensus on Moral Values' (1992) 19(19) *International Journal of Social Economics* 171 in MS Schwatz 'Universal Moral Values for Corporate Codes of Ethics' (2005) 30, 59 *Journal of Business Ethics*.

[225] KC Rallapalli 'A Paradigm for Development and Promulgation of Global Code of Marketing Ethics' (1999) 18 *Journal of Business Ethics* 1125 in MS Schwatz 'Universal Moral Values for Corporate Codes of Ethics'(2005) 59 *Journal of Business Ethics* 30, 31.

Scholars have also indicated that there is a need to establish 'corporate global business conduct principles' to avoid a 'race to the bottom' with respect to global business practices.[226] According to Payne, Raiborn and Askevik 'the need for a comprehensive, cohesive, and universal code of conduct for MNCs, as well as small organizations doing business internationally, is paramount.'[227] It has been argued that if it is important for human beings, and corporate agents to identify and conform to a set of universal ethical norms or principles, then all corporate ethics should also include at a minimum a set of core universal moral values.[228]

This thesis is particularly important because it will seek to engage in an in-depth research on the need for global corporate universal moral values expressly stated in an international mandatory code of ethics that will hold MNCs legally bound to act ethically.
It will use Nigeria, UK and USA as models to determine and define some ethical and unethical conducts which MNCs often get involved in. An international mandatory code of ethics will help hold directors liable for MNCs unethical practices.

This thesis is also significant as it will recommend ways to tie the international mandatory code of ethics to MNCs profit making abilities. As such it seeks to bridge the gap created by the OECD Guidelines and the UN Global Compact.

7. CORE RESEARCH QUESTIONS

a. Whether a uniform international mandatory legal standard on corporate ethics will be sustainable.
   i. How effective will an IMCE be in promoting corporate social responsibility?
      The primary aim of this thesis is to find a way of making it compulsory for MNC to comply with their corporate social responsibility. However, CSR is voluntary in nature. Therefore, there is no way of compelling MNCs to actively participate. Thus, the best way is to ensure that corporate ethics is uniformly legalized. This means that if companies are obligated to be ethical in their activities, most of them will direct their attention to CSR. As there is a great link between ethics and CSR, this part of the research question

[226] KC Rallapalli (note 53 above) 63.
[227] D Payne, C Raiborn & J Askevik 'A Global Code of Ethics' (1997) 16 *Journal of Business Ethics 1735* in MS Schwatz 'Universal Moral Values for Corporate Codes of Ethics' (2005) 59 *Journal of Business Ethics* 30, 31.
[228] YH Godiwalla (note 78 above) 1387.

seeks to identify the extent to which a uniform and mandatory code of ethics, IMCE, will help to promote CSR.

ii. How will an IMCE be drafted?

It is one thing to propose an IMCE and yet another for it to be drafted. This part of the research question will discuss the contents of the IMCE; the stages of drafting the IMCE and components of the IMCE that will be crafted from the laws of different relevant countries.

iii. Who will draft the IMCE?

The parties that will form the drafting committee of the IMCE are so important. They must be skilled individuals in the area of CSR and corporate ethics. This question answers how the drafting committee be constituted.

All these sub-questions will help to answer the main questions of how sustainable or lack thereof the IMCE will be. It will also help to ascertain whether the proposal for an IMCE is a futile or worthwhile suggestion.

b. Will the IMCE's framework be enforced and who will be responsible for its enforcement?

The effectiveness of any legislation is not in how good it was drafted or the substance of its contents. It is in the enforcement mechanisms that are in place. The IMCE will only be as good as it is enforced. Failure to enforce it means that it will be a good law on the shelf. The enforcement mechanisms, bodies and processes will be discussed. The challenges of enforcing it and the responsibilities of each party that will form part of the enforcement committee will also be discussed. Domestic and international enforcement will be discussed.

8. METHODOLOGY

This thesis will be conducted by means of desktop research. A comparative approach will also be employed to juxtapose the legal framework of selected developed and developing countries and their ability to sustain an international uniform code of ethics for the MNCs operating in the different countries: Nigeria, UK and the USA.

The rationale for the use of these three countries is as follows: first, the UK and USA are developed countries and more economically advanced than Nigeria.[229] A study of the corporate governance framework of these countries will be used as sample representation for both developed and developing countries.

Second, it has been argued that issues of CSR are taken for granted in developing countries such as Nigeria while the UK and the USA have well-developed and relatively stable institutional characteristics such as strong institutional standards.[230] The weak standards in Nigeria pose considerable challenge to UK and USA firms practicing CSR in Nigeria. Therefore, there is need to compare these countries and to adopt some of the institutional characteristics of the developed countries for the international mandatory code of ethics and to also ascertain if these institutional characteristics can function in a country like Nigeria (which will be used as a representation of many other developing countries).

Third, research has shown that the theoretical perspectives of CSR in Nigeria, the UK and USA are different.[231] Therefore it is important to understand the differences so that the IMCE could bridge the gap that may hinder its ability to be adopted by any country.

9. CHAPTER OUTLINE

This thesis consists of five chapters. Chapter 1 is the introductory chapter which introduces the topic and outlines the importance of this thesis. The International Regulatory Framework on corporate governance (particularly corporate ethics) and CSR will also be discussed and their inadequacies with respect to encouraging MNCs to participate with CSR initiatives in the UK,

[229] Categorization of countries into 'developed' and 'developing' countries is usually based on the economic advancement of the country measured against its gross development profit, per capita income, or human development index; See 'G8 Summit Participants' <http://www.g-8.de/Webs/G8/EN/G8Summit/Participants/G8/g8.html>. (For a list of developed countries).

[230] W Chapple & J Moon 'Corporate Social Responsibility (CSR) in Asia: A Seven-Country Study Of CSR Website Reporting' (2005) 44(4) *Business & society* 415, 417; A Willi 'Corporate Social Responsibility In Developing Countries: An Institutional Analysis'<http://opus.bath.ac.uk/44849/1/AWilli_Thesis_Final_Version.pdf>; OI Obasi 'What Role Can Developed Nations Play in Enhancing Corporate Social Responsibility in Extractive Industries Operations in Developing Countries?' <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=17&cad=rja&uact=8&ved=0ahUKEwjqjajwn8jMAhVkL8AKHRdnDrU4ChAWCEQwBg&url=http%3A%2F%2Fwww.dundee.ac.uk%2Fcepmlp%2Fgateway%2Ffiles.php%3Ffile%3DCAR-12_19_887840143.pdf&usg=AFQjCNHKPcqYuHSdHhv8Z6IM25pasuKACg&sig2=wW9Okf6EoKsMx_ljCOW2xQ>.

[231] SO Fadun 'Corporate Social Responsibility (CSR) Practices and Stakeholders Expectations: The Nigerian Perspectives' (2014) 1(2) *Research in Business and Management* 13,15; K Tilakasiri, I Welmilla & A Armstrong et al 'A Comparative Study of Corporate Social Responsibility in the Developed and Developing Countries'<*http:// http://www.kln.ac.lk/uokr/ICBI2011/A&F%20120.pdf*>.

USA and Nigeria will be highlighted in Chapter 1. Chapter 2 discusses whether a uniform international mandatory legal standard on Corporate Ethics will be viable and sustainable in the long term.

Chapter 3 discusses the contents of the international mandatory code of ethics, how it will be applied in each country, who will draft it and its framework. Chapter 4 is based on a discussion on how USA, Nigeria and UK will be used as model countries to test its success and its coexistent with the current regulatory framework in the respective countries will be analysed. The effectiveness of an IMCE in promoting CSR will also be discussed.

Nigeria, USA and UK are selected for the following reasons:

i. In Nigeria there is little or no check and balance; and no operating rule of law. The implementation of international laws and policies is poor primarily because of a lack of political will, lack of continuity of programs and corruption.[232] These have led to an implementation gap which is a widening distance between the stated policy goals and the realisation of such planned goals.[233]

   A well implemented policy will improve the quality and standard of services the Nigerian government delivers to its people[234] and reinforce favourable images of a country to the external world.[235] We use Nigeria as a case study to represent many developing countries where it is apparent that policies are regularly created; however, most of the time, they do not achieve the desired results[236] and where the environment may not allow for such.

ii. The USA is a country of 50 states covering a vast swath of North America, with Alaska in the northwest and Hawaii extending the nation's presence into the Pacific Ocean.[237] Most countries in the world see America as a market opportunity that has consistently proven to

[232] SD Bolaji, JR.Gray, G Campbell-Evans 'Why Do Policies Fail in Nigeria?' *Journal of Education & Social Policy* (2015)2(5)57, 59.
[233] T Makinde 'Problems of policy implementation in developing nations: The Nigerian experience' (2005).11(1) *Journal of Social Sciences* 63, 67.
[234] DB Lysa, T Terfa & S Tsegyu 'Nigerian Foreign Policy and Global Image: A Critical Assessment of Goodluck Jonathan's Administration' *Journal of Mass Communication & Journalism* (2015) 5(10) 1, at 1.
[235] Ibid.
[236] Makinde (note 239 above) 1.
[237] Andiamo 'United States' <https://www.andiamo.co.uk/resources/country-fact-files/united-states/ >; World Meters 'Population of the United States (2018 and historical)'<http://www.worldometers.info/world-population/us-population/>.

be a strong partner in business and industry.[238] The United States is used in this thesis because most MNCs in the United States (US) are already compliant with various codes and regulation on CSR so lessons will be adapted from the USA.

iii. The UK has the world's fifth largest economy by Gross Domestic Product (GDP) (nominal), and the second largest economy in the European Union.[239] The United Kingdom (UK) consists of England, Scotland, Wales, and Northern Ireland. This region practices a free market economy, which means that buyers and sellers have most of the decision-making power and are not restricted by government policies.

England and Wales have a common law legal system. Scotland has its own independent and in parts, clearly different judicial system with its own jurisdiction.[240] The law of Scotland is not a pure common law system, but a mixed system. The UK has various legal systems and it is used to represent countries around the world with different legal systems. The ability of the IMCE to survive in a country with various legal systems.

Chapter 5 is the recommendations and conclusion based on the findings of the research.

10. CONCLUSION

CSR is no longer a desirous expectation from companies, but it is now a necessity that requires all companies especially MNCs to participate in. As discussed above, CSR encompasses social, economic and environmental issues. It requires all MNCs to ensure that their activities do not in any way hamper the economic, social and environmental structures of the country in which they are operating.

However, what is currently evident is that there is little or no check and balance mechanisms that has been put in place to ensure that these MNCs participate in their CSR initiative. For

[238]Ouissam Youssef 'Ten Reasons the United States Economy could remain the strongest in the world' <https://www.worldatlas.com/articles/10-reasons-the-united-states-economy-could-remain-the-strongest-in-the-world.html>; Environmental Protection Agency 'The Basics of the Regulatory Process' United States' <https://www.epa.gov/laws-regulations/basics-regulatory-process>.

[239] World Atlas 'The Economy Of The United Kingdom' <https://www.worldatlas.com/articles/the-economy-of-the-united-kingdom.html>

[240] S Rab 'Legal systems in UK (England and Wales): overview' <https://uk.practicallaw.thomsonreuters.com/5-6362498?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1>; S Harvie-Clark 'The Scottish Civil Court System' <https://www.parliament.scot/Research%20briefings%20and%20fact%20sheets/SB09-52.pdf>; K Raustiala 'The Domestication of International Commitments' <http://pure.iiasa.ac.at/id/eprint/4481/1/WP-95-115.pdf>.

example, the OECD Guidelines encourage member states to have an NCP but this has been ineffective because they take so long to finalise matters and everyone even individuals can report companies to the NCP. Thus, the NCP lacks a stable monitoring structure.

CSR has been made voluntary and several international instruments that deal with CSR are merely recommendations and will continually remain politically ineffectual. The OECD Guidelines for MNEs, the ISO 14000 Series and the UN Global Compact are all voluntary. They seem to exist solely for the sake of public awareness used to ease consumers' consciences.

There is no proof that these voluntary codes of conduct have any improving effect. Though some of these MNCs are members of these international instruments, these instruments do not have any means of ensuring that their members are compliant. What often happens is that these MNCs move to countries where the production costs are lowest, and the national law is overruled by international lawlessness. Where these MNCs are likely to have little competition that is the area where less importance is given to the human beings that produce the goods, or to the environment. This nullifies the effect that the voluntary rules would have had on the MNCs.

Furthermore, these companies have their own voluntary codes of ethics that deal with different aspects of CSR and if they do not adhere to it, there is certainly no way that they will adhere to the OECD Guidelines, the UN Global Compact and the ISO 14000 Series.

Based on the various human rights violations and corrupt activities that most MNCs are involved in, there is need for an international legal framework that makes provisions for sanctions. The UN Global Compact lacks adequate accountability structures and seems to be a means to enhance the reputation of big business than aiding the environment and people in need. This instrument welcomes both companies with good and bad reputation for malpractice and the conditions which the UN Global Compact imposes on business to comply with the principles are very weak. Companies can pick and choose among the nine principles they want to address and there is no monitoring of compliance.

The ISO 14000 Series is said to be a generic and voluntary standard that can be adopted by all organisations. This means that they can implement the ISO 14001 in a way that it sees fit and most organisations get the ISO 14001 certification without changing their organisational culture which is a vital success to the implementation of an EMS. The ISO 14000 Series is

voluntary and will not inexplicably improve the MNCs or organizational environmental system without top management commitment from an early stage.

There is need to hold MNCs accountable in an international legal framework and these instruments are not enough.

CHAPTER TWO

SUSTAINABILITY OF A UNIFORM INTERNATIONAL MANDATORY LEGAL STANDARD ON CORPORATE ETHICS

1. INTRODUCTION

As indicated in the previous chapter, the need and importance of an international mandatory code of ethics (IMCE) that would hold Multinational Corporations (MNCs) accountable for ethical violations cannot be overemphasised. MNCs are the major violators of environment and social policies through their practices.[241] In an attempt to hold them accountable, the OECD guidelines, the UN Global Compact and all the other international instruments mentioned in the preceding chapter which attempted at uniting the power and influence of MNCs were not as effective as anticipated.

The sole aim for proposing an IMCE is to: a) ensure that MNCs act ethically; and to b) ensure that as companies act ethically, they comply with their Corporate Social Responsibility (CSR) initiatives. However, this will not be possible if: a) MNCs are not recognised as legal personalities with legal obligations under international law; and b) if CSR remains voluntary.

Presently, corporation and human beings are said to possess similar rights but international law generally does not recognize corporations as bearers of legal obligations under international law or international criminal law.[242] Thus far it has been difficult to hold corporations accountable through international law. This is largely because of the vacuum that exists

[241]P Wijesinghe 'Human Rights Violations by Multinational Corporations: Nestle as the Culprit' <https://ssrn.com/abstract=3136321>; Friends of the Earth International 'Violations of human and environment rights continue' <https://www.foei.org/news/5-years-failure-un-voluntary-measures-arent-stopping-bad-business-behavior>; FO Adeola 'Environmental Injustice and Human Rights Abuse: The States, MNCs, and Repression of Minority Groups in the World System' (2001) 8(1) *Human Ecology Review* 39, 44; S Bagazi 'Reputational Risk Under MNCs Environmental Violations' < http://alfredlahaibrownell.com/reputational-risk-under-mncs-environmental-violations/>; WorldWatch Institute 'Multinational Corporations Violating China's Environmental Laws and Regulations' <http://www.worldwatch.org/node/4764>; EK Nartey 'MNCS and Human Rights Violations-Litigation in the Intersection of National and International Law' (2018) *Global Legal Review* 1, 23.

[242] MY Mattar *'Corporate Liability for Violations of International Human Rights Law'* (2001) 114 *Harvard Law Review* 2030-31 in E Duruigbo 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6(2) *Northwestern Journal of International Human Rights* 221,223; C Soh 'Extending Corporate Liability to Human Rights Violations in Asia'(2013) 20(1) *Journal of International and Area Studies 23, 25 (*M Donur 'Corporate Liability Towards Human Rights Violations'(2015)1(3) *International Journal For Legal Developments And Allied Issues* 81,87.

between international law and corporate obligations; and the controversies on the place of MNCs in international law.[243]

The liability of MNCs for violations of human rights; their human rights obligations and their mechanisms to enforce such obligations is stipulated by International law particularly international human rights law.[244] For MNCs to be liable, they have to be subjects of international law but scholars are divided as to what constitutes legal personality under the international legal system.[245] For example, Charney,[246] and Lauterpacht[247] posit that MNCs possess international legal personality. Ijalaye[248] and Okeke[249] identify MNCs participation in international law through contract law.

They argue that MNCs are bound by principles of public international law when contracting or rendering any form of services. Lauterpacht traces the developments in modern international system of agreements in dispute settlement mechanisms, investment treaties developments, and in investor-state arbitration to support his assertion that MNCs possess international legal personality.[250]

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[243] K Nowrot 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities' <*http://www.esil-sedi.eu/sites/default/files/Nowrot.PDF*>; A Grant 'Global laws for a global economy: A case for bringing multinational corporations under international human rights law' (2013) 6(2) *Studies by Undergraduate Researchers at Guelph (SURG)* 14,19; J Wouters & A-L Chané 'Multinational Corporations in International Law' (2013) *KU Leuven Working Paper* 1, 14.

[244] H Booysen *Principles of International Trade Law as a Monistic System* Interlegal (2003) 55; MJT Calatayud, JC Candelas & PP Fernández 'The Accountability of Multinational Corporations for Human Rights' Violations' (2008) 64(65) *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* 171,173; R Meeran 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3(1) *City University of Hong Kong Law Review* 1, 2.

[245] ND White *The Law of International Organizations* (1996) 27 (International personality appears to be a nebulous concept in international law); P Alston '*The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors? in* Non-State Actors
And Human Rights'<*http://www.ivr.uzh.ch/dam/jcr:ffffffff-abae-0dd7-ffff-ffffd5220c3b/03%20-%20Not%20a%20Cat%20Syndrome.pdf*> (critiquing Bin Cheng's articulation of the criteria for ascertaining whether an actor possesses international legal personality); R Portmann 'Legal Personality in International Law' <*http://assets.cambridge.org/97805217/68450/excerpt/9780521768450_excerpt.pdf*>; PK Menon 'The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine' (1992) 1 *Journal of Transnational Law and Policy* 151,152.

[246] JI Charney 'Transnational Corporations and Developing Public International Law' (1983) 32(4) *Duke Law Journal* 748,764 (stating that the accountability of corporations to international legal rules appear to be linked to the extent of their ability to be direct participants in the international legal process).

[247] E Lauterpacht, 'International Law and Private Foreign Investment' (1997) *Indiana Journal of Global Studies* 258, 272.

[248] DA Ijalaye *The Extension Of Corporate Personality In International Law* (1978) 221-223 (he holds a similar view, advancing the claim that MNCs can now be regarded as selective subjects of international contract law for contracts entered into with states).

[249] CN Okeke *Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and Their Treaty-Making Capacity* (1974) 19.

[250] Lauterpacht (note 245 above) 272-276.

Okeke and Lauterpacht have adopted an approach that is not necessarily legally right.[251]

This position finds support in international arbitral practice such as in the *Libya-Oil Companies Arbitration*,[252] where Umpire Dupuy applied international law in a dispute between a state and a private oil company. International law was accepted as part of the governing law of the contract (in addition to Libyan law).

Those that oppose the view that MNCs possess international legal personality argue that MNCs are 'private, non-governmental entities; are subject to applicable national law, and therefore are not subject to obligations and do not enjoy rights under international law.'[253] A similar sentiment is expressed by Rigaux who states that 'transnational corporations are neither subjects nor quasi-subjects of international law.'[254] Brownlie asserts that corporations of municipal law do not have international legal personality and a concession or contract between a state and a foreign corporation is not governed by the law of treaties.[255]

Malanczuk adopts a similar position in his study on MNCs. He rejects outright the notion that special "internationalized contracts" with a sovereign state suffice to render a corporation a subject of international law, "even in a partial or limited sense."[256]

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[251] Okeke (note 247 above) 19.

[252] R Dolzer 'Libya Oil Companies Arbitration' in R Bernhardt (ed) The *Encyclopedia of Public International Law* (1997) 1,215-216.

[253] LF Damrosch *International Law: Cases And Materials* 4 ed (2001) 249 (There are arguments by several authors in this book); P Muchlinski, '*Corporations in International Law*' (2012) < http://www.uio.no/studier/emner/jus/jus/JUS5851/v13/undervisningsmateriale/muchlinski-(2009)-corporations-in-international-law-max-planck-enc.-of-pil-co-1.pdf>; E De Brabandere, 'Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility' (2010) 4(1) *Human Rights and International Legal Discourse* 66,80; E Duruigbo 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6(2) *Northwestern Journal of International Human Rights* 222,238 (those who oppose it argue for the abandonment of the subject-object dichotomy); D Muhvić 'Legal Personality as a Theoretical Approach to Non-State Entities in International Law: The Example of Transnational Corporations' (2017) 1 *Pécs Journal of International and European Law* 7,15 (full international legal personality is enjoyed by States only, while the international legal personality of other entities would be limited to certain rights and obligations); R Higgins *Problems and Process: International Law and How we Use It* (1995) 1, 48-49.

[254] F Rigaux 'Transnational Corporations' in M. Bedjaoui (ed) *International Law: Achievements and Prospects* (1991) 1, 121, 129 (Rigaux states that: 'the attribution of rights and duties, and of an international legal capacity, do not follow from legal personality, as if to give a certain substantive content to that legal personality once it is recognized; rather, international legal personality follows from the attribution of rights and duties').

[255] I Brownlie *Principles of Public International Law* 6 ed (2003) 65 (a subject of law is an entity capable of possessing rights and duties and having the capacity to maintain its rights by bringing international claims') (citing *Reparations for Injuries Suffered in the Service of the United Nations* Advisory Opinion 1949 ICJ 174, 179 (Apr. 11)). Law of Treaties deals with how treaties come into being and how the process of making and administering treaties is regulated.

[256] P Malanczuk 'Multinational Enterprises and Treaty-Making: A Contribution to the Discussion on Non-State Actors and the 'Subjects' of International Law in V Gowlland-Debbas, H Hadj-Sahraoui & N Hayashi *Multilateral Treaty-making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process* (2000) 1, 58.

It is evident that there is a divide amongst scholars: those who view MNCs as subjects of international law because they are able to enter into contracts with states, can advise states and arbitrate against states. Thus, during arbitration, the MNC is the one accountable and not the directors or shareholders. Those who oppose it argue that MNCs are private non-governmental entities and are governed by Municipal Laws and not international law even if they contract with states.

However, this thesis supports the argument that MNCs have legal personalities and further argues that MNCs have the potential to be legal personalities based on the factors identified by Okeke[257] and supported by Shaw.[258] These are:

a. MNCs possess duties and can be punished if they violate those duties;
b. MNCs have the capacity to benefit from legal rights as a direct claimant and not as a mere beneficiary; and
c. MNCs are in some capacity, able to enter into contractual or other legal relations with other subjects of the system.[259]

MNCs meet all these requirements and, at least to a certain extent, are subjects of international law. [260] This thesis also argues that it is possible to make CSR mandatory as there is a great relationship between CSR and human rights. MNCs are already bound to ensure that they do not violate the human rights that are applicable in the host countries. Therefore, making CSR mandatory will simply not only promote the objectives of International Human Rights but will also ensure that MNCs comply with their CSR obligations.

This chapter aims critically discuss the sustainability of the IMCE bearing in mind that MNCs can have international legal personality and can be held liable under international criminal law for violations of human rights obligations. The sustainability of the IMCE will be analysed by looking at the uniformity; strong institutional support system; and country or organization specificity of the IMCE. It will further discuss the importance of mandating MNCs to participate in CSR activities.

Some may argue that the use of the word ‘code’ devalues the IMCE, but this is not the case. At the African Union level, the word ‘code’ is being used for the current draft of the Pan African

[257] Okeke (note 247 above) 19; Brownlie (note 253 above) 57-58.
[258] MN Shaw *International Law* 5 ed (2003) 224–225 (Shaw argues that the question of the international personality of transnational corporations remains an open one).
[259] Okeke (note 247 above) 9.
[260] Shaw (note 256 above) 223.

Investment Code (PAIC).[261] Though it is not a binding instrument, the fact the word code is being used for it at a national (African) level should mean that using code for an instrument does not in any way devalue it.

2. DEBATE ON THE RECOGNITION OF MNCs UNDER INTERNATIONAL LAW

The debate on the recognition of MNCs in international law is primarily based on whether or not they are subjects of international law.[262] More specifically it is premised on their ability to possess international rights and duties, and to maintain their rights by bringing international claims.[263] This debate spans into three approaches: the doctrinal and formalistic approach (corporations do not have international legal personality); policy oriented approach (whereby corporations have a measure of corporate rights and obligations under international law); and traditional formal approach (corporations are bound by certain customary rules relating to the admissibility of claims for diplomatic protection of corporations).[264]

States are generally known to be the primary subjects of international law. This means that their rights and duties are enforceable at law. However, some international organizations have distinctive legal personality.[265] For example, in the case against Israel following the assassination of Count Bernadotte, a UN official, the ICJ delivered an Advisory opinion in 1949 in which it stated that the UN was a subject of International law and could enforce its rights by bringing international claims.[266]

Under international investment law, corporations are considered as possessing rights not to be discriminated against *vis-à-vis* national firms and a right to receive compensation in the event

[261] The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime. The Journal of World Investment & Trade. Makane Moïse Mbengue and Stefanie Schacherer Volume 18: Issue 3 The Pan-African Investment Code (PAIC) is the first continent-wide African model investment treaty elaborated under the auspices of the African Union. The PAIC has been drafted from the perspective of developing and least-developed countries with a view to promote sustainable development. The PAIC contains a number of Africa-specific and innovative features, which presumably makes it today a unique legal instrument.

[262] Brownlie (note 253 above) 57 (subjectivity under international law); A Cassese *International Law* (2005) 71-150; M Dixon *Textbook on International Law* 7 ed (2007) 111-141.

[263] Dixon (note 260 above) 121.

[264] Muchlinski (note 251 above).

[265] Shaw (note 256 above). Shaw notes that a ruling can be applied to embrace other international institutions, like the ILO, Food and Agriculture Organization each month which have a juridical character.

[266] The Advisory Opinion of the International Court of Justice concerning Reparation for Injuries suffered in the same Service of the United Nations ICJ Rep 149 (April 11, 1949) (the case recognised that there were 'degrees' of personality).

of expropriation.[267] While under human rights law corporations enjoy various rights such as the right to a fair trial, the right to privacy, the right of freedom of expression and property rights.[268]

Not only do corporations have rights under international investment law and human rights law, they also *locus standi* before some international tribunals.[269] The European Convention on Human Rights made this possible and this means that a corporate entity can be an applicant even before a human rights supervisory body.[270] In some cases, the legal person may be the only appropriate victim that can complain to the Strasbourg Court.[271] In 2011 the Strasbourg Court ruled on a case where the applicant was a publicly-traded private open joint-stock company.[272]

Though corporations have rights, scholars argue that they can also be imposed with some human rights obligations.[273] Though it may be argued that if obligations are imposed on corporations, enforcement may become a problem. Currently, there are no enforcement mechanisms and in the absence of international enforcement mechanisms open to claims

[267] M Pentikäinen 'Changing International 'Subjectivity' and Rights and Obligations under International Law – Status of Corporations' (2012) 8(1) *Utrecht Law Review* 145, 147-148.

[268] JA Zerk *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International* (2006) 1, 75

[269] This is the case before the International Convention for the Settlement of Investment Disputes (ICSID) Tribunals. Corporations may also submit amicus briefs to WTO panels. The Iran-United States Claims Tribunal was established in the aftermath of the Iranian Islamic revolution of 1979 to resolve claims between Iran and the United States as well as between Iranian and US nationals, including corporations.

[270] A Clapham 'Human Rights Obligations of Non-State Actors: Where are we now?' <https://ssrn.com/abstract=2641390>; A Meijknecht 'Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law' (2003) 13 *European Journal of International Law* 387,394-395; In the case of *The Sunday Times* v *United Kingdom* (1979) 2 ECHR 30 *(European Court of Human Rights)* (in this case, the first applicant was Times Newspapers Ltd).

[271] Clapham (note 268 above) 81. Clapham refers to the case of *Agrotexim and Others v Greece* (1995) 42 ECHR (European Court of Human Rights). The Strasbourg Court interpreted the concept of 'non-governmental organisations', regarded as possible victims of violations of the rights stipulated in the Convention, as extending to legal persons more broadly, hence also corporations.

[272] *OAO Neftyanaya Kompaniya Yukos v Russia* (2011) 1342 ECHR (European Court of Human Rights) (among other things, the Court found that the respondent state had violated the company's rights under Article 6 of the European Convention on Human Rights (right to a fair trial). For remarks on the standing of corporations before the Strasbourg Court.

[273] Zerk (note 266 above) 76-79. D Uribe 'Setting the pillars to enforce corporate human rights obligations stemming from international law' <https://www.southcentre.int/wp-content/uploads/2018/10/PB56_Setting-the-pillars-to-enforce-corporate-human-rights-obligations-stemming-from-international-law_EN.pdf>; P Dumberry & G Dumas-Aubin 'How to Impose Human Rights Obligations on Corporations Under Investment Treaties?' (2012) 4 *Yearbook on International Investment Law and Policy* 569,576; CM Vázquez 'Direct vs. Indirect Obligations of Corporations under International Law' (2005) 43 *Columbia Journal of Transnational Law* 927, 930; C Okoloise 'Contextualising the corporate human rights responsibility in Africa: a social expectation or legal obligation?' (2017) 1 *African Human Rights Yearbook* 191-200.

against corporate actors, international law is said to be 'used to hold corporations accountable for human rights violations at the national level.' [274]

However, it must be noted that all the debate around the recognition of MNCs or corporations in general has several factors in common: subjectivity, capacity, and personality on an international legal plane of corporations.[275]

This thesis supports and adopts the policy-oriented approach that corporations have a measure of corporate rights and obligations under international law primarily because they are subjects of international law.

2.1 The two Approaches to the Debate

States and insurgents[276] were the first subjects of the international community and international law.[277] Other non-state actors have emerged such as international organizations, individuals[278] and MNCs.[279]

As stated above, States are said to be the only ones that possess full legal capacity in the area of international rights and obligations. The capacity of international organizations was established in *Reparation for Injuries case*.[280] Despite the development in international law and the fact that activities of MNCs have a huge impact on the international communities and MNCs are one of the major role players of an international community, international law till now has not awarded them legal capacity.

Generally, scholars argue that a subject of international law should be able to:[281]

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[274] Clapham (note 268 above) 64 (Clapham challenges this circularity); Meijknecht (note 29 above) 58.
[275] J Klabbers *An Introduction to International Institutional Law* 2ed (2009) 1-420 at 39; J Wouters, E Brems & S Smis et al *Accountability for Human Rights Violations by International Organisations* (2010) 1, 44 (points out that hypothetically entities can possess legal personality under any legal system).
[276] Insurgents came into being through their struggle against the State to which they belong. They are born from a wound in the body of a particular State and are therefore not easily accepted by the international community unless they can prove to exercise some of the sovereign rights typical of States. Their existence is by definition provisional: they either win and turn into fully fledged States or are defeated and disappear.
[277] Cassese (note 260 above) 71.
[278] Ibid.
[279] DP Fidler DP 'WHO Trade, foreign policy, diplomacy and health: International Law' < *http://www.who.int/trade/distance_learning/gpgh/gpgh7/en/index3.html 1/>*.
[280] *Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ Rep (Advisory Opinion) 174, 179 (the court arrived at this by looking at the intention of the organization) (other subjects are said to possess limited capacity).
[281] JE Alvarez 'Are Corporations "Subjects" of International Law?' (2011) 9(1) *Santa Clara Journal of International Law* 1, 6; D Kristina 'How and Why International Law Binds International Organizations' (2016) 57(2) *Harvard International Law Journal* 325, 326.

a. bring claims before international and national courts and tribunals to enforce their rights, for example, the International Court of Justice (ICJ);
b. have the ability or power to come into agreements that are binding under international law, for example, treaties;
c. enjoy immunity from the jurisdiction of foreign courts; for example, immunity for acts of State; and
d. be subject to obligations under international law.

These are discussed below using the two approaches (doctrinal and formalistic approach; and the policy approach) outlined above.

i. The doctrinal and formalistic approach

This school of thought argues that corporations do not have international legal personality.[282] This thesis contends that this approach is not well founded especially considering that there are four elements that can be used to determine international legal personality for non-state actors:[283]

a. an independent or autonomous existence;
b. the ability to possess international rights or obligations;
c. the actual possession of those rights and obligations; and
d. the ability to enforce rights on the international plane.

On the basis of that, it can be argued that corporations can have both explicit and implicit obligations.[284] Non-state actors, like corporations, are deemed to have those rights by implication and this rights are said to be important for performing their duties.[285] These necessary rights do not appear in treaty law,[286] but are found in international law. This suggests that the rights stem from the other sources of international law, customary international law or

[282] JM Beneyto & D Kennedy 'New Approaches to International Law: The History of a Project' (2016) 27(1) *European Journal of International Law* 215, 220; H Aufricht 'Personality in International Law' (1943) 37(2) *The American Political Science Review* 217,230; JE Hickey 'The Source of International Legal Personality in the 21st Century' <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1564&context=faculty_scholarship>.
[283] *ICJ's 1949 Reparations for Injuries advisory opinion* (1949) 177-179.
[284] T Van Ho 'International Legal Personality of Corporations: How Investment Law Answers the Supreme Court Question in Jesner' <https://www.justsecurity.org/45543/international-legal-personality-corporations-investment-law-answers-supreme-court-question-jesner/ >.
[285] Ibid.
[286] Treaty Law deals with the subject matter of treaties, i.e. how treaties address particular issues such as the Law of the Sea or extradition measures.

general principles of law.[287] The specific rights accorded are subject to the needs of the actor in the performance of their duties as most often expressly stated or implied in its integral documents and developed in practice over time. Corporations can therefore have rights that are explicitly granted, implicitly given, or developed through practice on the international plane. The determining factor is only whether the right is necessary in order for corporations to carry out their international purpose and function.

But, if non-state actors are conferred rights by sources other than treaties, the logical conclusion is that those same sources can confer obligations.[288] In fact, at the heart of the ICJ's opinion was an implied obligation on the UN to provide: 'agents with sufficient international protection in order that they may carry out their mission.'[289]

While rights and responsibilities do not always develop in tandem, nothing in international law suggests that only rights can be implied. When examining corporate obligations, the question is the same as for their rights: what obligations are explicitly given, developed through practice, or implicitly granted because they are necessary for corporations to fulfil their international purpose? That question will only be answered hopefully once the Supreme Court rightly decides on issues in *Jesner*[290]on whether corporations can breach some international obligations.[291]

Corporations including MNCs possess rights and obligations founded under customary international law, investor-state contracts, over 3,000 bilateral and multilateral investment treaties (or free trade agreements with investment protections).[292] The rights range from the ability to freely transfer profits in and out of the host state[293] to the expansive 'fair and equitable treatment' standard, which has been interpreted as protecting procedural rights, such as due process, as well as substantive interests in the stability of a state's regulatory standards.[294]

[287] Article 38 of the International Court of Justice Statute.
[288] C Ryngaert 'Non-State Actors in International Law: A Rejoinder to Professor Thirlway' (2017) 64(1) *Netherlands International Law Review* 155, 159; C Ryngaert 'Non-State Actors: Carving out a Space in a State-Centred International Legal System' (2016) 63(2) *Netherlands International Law Review* 183, 188; DB Hollis 'Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23(1) *Berkeley Journal of International Law* 102,144.
[289] ICJ (note 281 above).
[290] *Petitioners* v *Arab Bank PLC* (2015) *United States Court of Appeals for the Second Circuit* 13-4652.
[291]Van Ho (note 282 above).
[292] Ibid.
[293] Article 7 of the United States Model Bilateral Investment Treatment.
[294] Van Ho (note 282 above).

The place, role and value of non-state actors to the international legal system is still under debate. One leading authority, Brownlie, has maintained that states remain the primary subject of international relations and that this would only change 'if national entities, as political and legal systems, were absorbed in a world state.'[295] Others argue that their full 'subject hood' will never be complete even if they are granted rights and duties.[296]

Others are of the view that recognising the rights of corporations could lead to a development of certain areas of international law.[297] Professor Dhooge, for instance, has argued that concurrent recognition of freedoms and guarantees imbues human rights law with enhanced standing[298]and such recognition is essential in convincing corporations to appreciate human rights and their responsibilities.[299] Surely if corporations have rights, they must have duties under international law. Rights cannot be awarded without duties and once those duties are violated, what measures can be taken to ensure that the violators are accountable especially under international law. It is evident that no successful mechanism has been employed till date.

ii. The Policy oriented approach

This theory purports that corporations have a measure of corporate rights and obligations under international law[300] and as such may have the capacity to claim for breaches of international law; capacity to make valid treaties and agreements; and to enjoy various privileges and immunity from other jurisdictions.[301]

[295] Brownlie (note 253 above) 58.
[296] P Alston 'The Not-a-Cat' Syndrome: Can the International Human Rghts Regime Accommodate NonState Actors?' <http://www.ivr.uzh.ch/dam/jcr:ffffffff-abae-0dd7-ffff-ffffd5220c3b/03%2520-%2520Not%2520a%2520Cat%2520Syndrome.pdf>.
[297] RR Drury 'The regulation and recognition of foreign corporations: responses to the "Delaware syndrome"' <https://ore.exeter.ac.uk/repository/bitstream/handle/10036/48873/drury.pdf?sequence=1>; P Ireland 'Limited liability, shareholder rights and the problem of corporate irresponsibility' (2010) 34 *Cambridge Journal of Economics* 837, 843; S Blankenburg, D Plesch & F Wilkinson 'Limited liability and the modern corporation in theory and in practice' (2010) 34 *Cambridge Journal of Economics* 821,829.
[298] LJ Dhooge 'Human Rights for Transnational Corporations' (2007) 16 *Journal of Transnational Law & Policy* 197.
[299] Ibid.
[300] J Cantegreil, 'Legal Formalism Meets Policy-Oriented Jurisprudence: A More European Approach to Frame the War on Terror' (2008) 60(1) Maine Law Review 96, 110.
[301] Dixon (note 260 above) 123.

They are said to enjoy protections under international law that are meant foreign investors[302] and they are arguments that these rights should be extended to other human rights instruments, such as the International Convention on Civil and Political Rights (ICCPR).[303]

However, these claims of corporate rights are constantly challenged by difference that exists in the national laws in which they operate or are registered; and because of the rise of different kinds of business associations-including limited partnerships, limited liability corporations, trusts, non-profit institutions, and professional corporations that may or may not have the kind of legal personality typically required for corporate rights to exist.[304] The solution to this would be have a process of treaty-making that would grant states some power to make variations for particular rights, corporate forms, and other circumstances.[305]

For these reasons, this thesis argues that business corporations generally enjoy rights under international law only when such rights are explicitly authorized through formal law making processes such as international treaties or national statutes.[306]

The re-conception of corporations as independent legal persons was confirmed in the US by the well-known Supreme Court decision in *Trustees* of *Dartmouth College v Woodward*.[307] This was how treaties began to protect corporations in the same way that they sought to protect individual human beings. For instance, an 1853 treaty between the US and Great Britain explicitly recognized the ability of companies and corporations, as well as individuals, to bring claims against sovereigns due to injuries suffered during the War of 1812.[308]

Corporations were no longer considered part of the government, but instead were persons akin to private individuals.[309] Like private individuals, corporations under the treaty were eligible

[302] Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 03 September 1953) (1950)213 UN Treaty Set 221.
[303] International Covenant on Civil and Political Rights (entered into force 23 March 1976) (1966) 999 UN Treaty Set 171. Only few scholars have directly considered the issue of corporations' rights. M Emberland *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (2006) 1,109; Dhooge (note 296 above); MK Addo 'The Corporation as Victim of Human Rights Violations' in MK Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 187.
[304] Dhooge (note 296 above).
[305] JG Ku 'The Limits of Corporate Rights Under International Law' (2012) 12(2) *Chicago Journal of International Law* 729, 732.
[306] Ibid.
[307] *Trustees* of *Dartmouth College v Woodward* 17 US (1819) 518 (Supreme Court of the United States) (holding unconstitutional state interference with the contract of a corporation); LS O'Melinn 'Neither Contract Nor Concession: The Pubc Personality of the Corporation' (2006) 74 George Washington Law Review 201, 256 (discussing Dartmouth College v Woodward).
[308] Ku (note 303 above) 739-740.
[309] Ibid.

for diplomatic protection by their governments and could therefore present their claims to the commission. Similar language granting corporations' protection under international law appeared in other treaties of this period.[310]

2.2 MNCs operation in the global environment

There various forms through which MNCs operate globally forms[311] and this includes: adopting strategic business initiatives, such as foreign direct investment, joint ventures, and licensing agreements.[312] Sometimes they reorganise themselves even though they are within the same corporate group.[313] For instance, the parent companies may deliberately embrace or drop business enterprises to protect themselves from liability or risk to the corporate group.

They are also treated differently[314] as separate legal personalities in the different jurisdictions in which they operate regardless of where the parent company is based.[315]

These MNCs often try to shield themselves from the legal risks that may arise from their operations in various jurisdictions[316] by operating in business forms that adopts intricate organisational structures.[317] These business forms are often independent of the parent company and this may place both the parent company and its subsidiaries in a position of impunity in some domestic jurisdictions.

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[310] Article 1 of the Convention between the United States of America and the Republic of Mexico, for the Adjustment of Claims (1868) (adopted 1 January 1996) 679 Stat 212.

[311] A Yaprak, S Xu & E Cavusgil 'Effective Global Strategy Implementation: Structural and Process Choices Facilitating Global Integration and Coordination' (2011) 51 *Management International Review* 179, 183; GI Zekos *Economics, Finance and Law on MNEs* (2007) 23. Examples of MNCs business forms include: importing and exporting goods and services; making significant investments in a foreign country; buying and selling licenses in foreign markets; engaging in contract manufacturing-permitting a local manufacturer in a foreign country to produce their products; opening manufacturing facilities or assembly operations in foreign countries etc.

[312] GI Zekos *Economics, Finance and Law on MNEs* (2007) 23; JF Corkery & B Welling *Principles of Corporate Law in Australia* (2008) 82; J Bray 'Attracting Reputable Companies to Risky Environments: Petroleum and Mining Companies' in I Bannon & P Collier (eds) *Natural Resources and Violent Conflict: Options and Actions* (2003) 321.

[313] C Wells 'Corporate Criminal Responsibility' in Stephen Tully (ed) *Research Handbook on Corporate Legal Responsibility* (2005) 150.

[314] AA Robinson 'Corporate Culture' as a Basis for the Criminal Liability of Corporations' <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>.

[315] A limited liability company is one in which the owners have limited personal liability for the debts and liabilities of the company

[316] P Muchlinski 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34 *Cambridge Journal of Economics* 915, 915.

[317] Ibid.

However, this obstacle is not insurmountable because piercing the corporate veil would be the most practical means to challenge the notion of limited liability.[318] In essence, the act of piercing the corporate veil refers to circumstances where the courts look within the business form to ascertain the real controllers and hold the corporate shareholders accountable.[319]

However, courts in most domestic jurisdictions will only consider piercing the corporate veil in exceptional circumstances.[320] For example in *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd*, the court held that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil.[321]

Although MNCs on the global environment conduct business by adopting strategic business initiatives, they can be held accountable by the application of the principle of piercing the corporate veil.

2.3 MNCs operation in the regional environment

MNCs often enjoy multi-jurisdictional status because they participate in large-scale, cross-border activities. [322] They operate in jurisdictions of different cultures. For this reason, their obligations and responsibility vary from country to country and there is no way of holding them liable. Scholars argue that there is need for a cultural control system to not only make it difficult to attribute individual liability but, at times, shield enterprises within the same corporate group.[323] To illustrate, these control systems allow parent companies (headquarters) to influence and control the activities of their businesses operations throughout the world.[324]

This poses several challenges. For instance, at times, the corporate culture promoted by the parent company may cultivate criminal offences by a subsidiary in another country.[325]

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[318] K Vandekerckhove *Piercing the Corporate Vei*l (2007) 11.
[319] *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd and Others* 1995 ZASCA 53 para 28 (the court held that in determining whether or not a company is legally appropriate in given circumstances to disregard corporate personality one must bear in mind the fundamental doctrine that the law regards the substance rather than the form of things, a doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim *plus valet quod agitur quam quod simulate concipitur*.
[320] *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) para 9 (where it was held that piercing the corporate veil is an exceptional procedure to be used as a remedy of last resort and that there must be a compelling reason for a court to ignore the separate legal existence of a company); A Gibson & D Fraser *Business Law* 5 ed (2011) 691.
[321] *Cape Pacific Ltd* (note 317 above) para 28.
[322] JB Cullen & KP Parboteeah *Multinational Management: A Strategic Approach* 5 ed (2011) 313.
[323] Ibid.
[324] A de Jonge *Transnational Corporations and International Law: Accountability in the Global Business Environment* (2011) 14.
[325] Ibid.

Regrettably, in some jurisdictions, a parent corporation located in one country may not necessarily be held liable for the actions of its subsidiary located in another, even where the former committed crimes through the latter.[326] In such circumstances, the subsidiary becomes the scapegoat for the offence that more appropriately should be attributed to the parent company.[327] Holding the subsidiary or the parent company accountable all depends on the place of MNCs in international.

2.4 Proponents and Opponents for MNC recognition under International law

Scholars like Cassese, are of the view that states are reluctant to grant MNCs standing and as such, they do not possess international rights and duties.[328] Conferring legal personhood on corporate entities enables them to operate as autonomous legal entities.[329] In essence, the law treats a corporation as a separate legal person in its own right,[330] one that enjoys rights and duties.[331] Registration or incorporation is a required act to form a company[332] and once registered, the company is considered a separate legal person.[333]

The concept of the company being a separate legal person is regarded as creating a veil of incorporation.[334] This enables a corporation to use its name to acquire property, engage in contractual obligations, and be held liable for criminal or tort offences. Having a legal personality also entitles a corporation to perpetual succession, long after its members, management, or employees have departed. This is an indispensable feature that facilitates trade. The idea that a corporation could be regarded as a separate legal person with distinct rights and obligations is a *sine qua non* of any corporate law model.[335]

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[326] JG Ruggie 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 824.
[327] Ibid.
[328] Cassese (note 260 above) 121.
[329] K Vandekerckhove *Piercing the Corporate Veil* (2007) 3; A Ashworth *Principles of Criminal Law* 6 ed (2009) 146–148.
[330] L Sealy & S Worthington *Cases and Materials in Company Law* 8 ed (2008) 31; Corkery & Welling (note 310 above) 36–44 (the authors provide a detailed account tracing the historic developments of corporate personality); O Amao 'Corporate Social Responsibility, Social Contract, Corporate Personhood and Human Rights Law: Understanding the Emerging Responsibilities of Modern Corporations' (2008) 33 *Australian Journal of Legal Philosophy* 100, 105.
[331] Sealy & Worthington (note 328 above) 31.
[332] P Latimer *Australian Business Law* 30 ed (2011) 55.
[333] Ibid.
[334] Gibson & Fraser (note 318 above) 691. This veil of incorporation essentially means that the law treats the corporate directors and shareholders as separate from the corporate entity.
[335] D Milman *National Corporate Law in a Globalised Market: The UK in Perspective* (2009) 60. In *Salomon v Salomon & Co Ltd* (1897) AC 22 (Aron Salomon and his family ran a private business. They decided to incorporate their business by transforming it into a company that was limited by shares. Aron Salomon borrowed

There are two competing philosophical views regarding the concept of legal personality: the nominalist and realist views. The nominalist view, also referred to as the atomic view, suggests that legal persons, specifically corporations, are fictitious, artificial persons and essentially nothing more than a collection of individuals.[336] However, according to the realist view, corporations are, indeed, real and exist independently; they possess a separate legal personality in their own right.[337] Corporations can, and should, indeed, be punished. Although corporate entities cannot be imprisoned,[338] most domestic jurisdictions apply a variety of corporate punishments and penalties.

Those who oppose the granting of international legal personalities for MNCs base their arguments on the following factors for consideration:[339]

a. State sovereignty;
b. Difficulty with notions such as corporate responsibility: uncertainty that international corporate responsibility would bring to international law;
c. Fears of a race to bottom (States laxing regulations to attract FDI); and
d. States free-riding on corporate responsibility.

Though these may seem to be valid grounds to oppose the view that MNCs cannot have international legal personalities, however, they are not a reflection of the true situation of what happens in developing countries and further these concerns can be solved with state consent or if states sign treaties to regulate corporations directly under international law.[340]

money from a mortgagee, which he then lent to the family business in return for shares. The company went into liquidation. When the time came for the liquidator to pay the company debts, one of the contentious issues was whether Aron Salomon and the company were one and the same. If they were, Aron Salomon would forfeit his right to payment as a valid debenture holder ahead of the unsecured debtors. The Court held that the company was a separate legal entity. The Salomon precedent is well established as a leading authority applied in most common law jurisdictions; it has also been adopted in some civil law jurisdictions).

[336] J Clough & C Mulhern *The Prosecution of Corporations* (2002) 4-5.

[337] Ibid 64–65

[338] On this, critics of corporate criminal liability often question whether it is appropriate to impose corporate criminal sanctions as opposed to civil or administrative sanctions given that corporate entities cannot be imprisoned; in such circumstances, criminal law is seen by some as an unsuitable means of dealing with corporate behaviour. For further discussion on the views regarding this, and counter arguments see PH Bucy 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095, 1097–1098. Also, on the issue of why corporations are not fit subjects for criminal law because they are said to be incapable of moral fault. SR Wolf 'The Legal and Moral Responsibility of Organizations' in JR Pennock & JW Chapman (eds) *Criminal Justice* (1985) 270.

[339] J Huston 'The Legal Basis for the International Legal Personality of the Individual and the Question of its Independence from the State' <https://www.cambridge.org/core/books/beyond-human-rights/legal-basis-for-the-international-legal-personality-of-the-individual-and-the-question-of-its-independence-from-the-state/067B623D2F8BD0919AC61BFF234BAFAF>.

[340] Nowrot (note 241 above).

State sovereignty and State's fear of a race to bottom will be discussed as they are the most cited reasons for opposing the granting of international legal personalities to MNCs.

2.4.1 State Sovereignty

State sovereignty is a principle under international law whereby states are considered to have the power to rule over matters considered to be within its national jurisdiction.[341]

The argument against imposing direct legal obligations on MNCs is that it would infringe state sovereignty because it would disempower states, block or reduce evolution of international law where state consent is absent or not forthcoming. However, the inability of governments to protect human rights in developing countries and the failure of MNCs to respect human rights should outweigh the argument of power that would be conferred on MNCs and removed from states.[342] There is need to hold MNCs liable for violations of human rights (e.g. right to a clean environment) when it is linked to their financial status and power.

One needs to decide which is more important; human rights or state sovereignty? If human rights are more important than when states or municipal laws fail to protect citizens from human rights violations by MNCs in their countries, international law needs to step in.[343]

The precise contents of the objections raised against the concurrence of state obligations and corporate obligations are somewhat of a mystery. It seems that concurrence of international obligations of states and of non-state actors is an inevitable result of the globalization process.[344] The intention of the drafters of the Norms[345] obviously was that obligations of companies would *supplement* and not *replace* the obligations of states[346] just as individual responsibility under international law has not replaced but coexists with state responsibility for the same offences.[347]

Perhaps what really concerns some states is that by holding companies accountable at the international level their sovereign powers may be threatened. This was evident in the Shell case

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[341] K Gevorgyan 'Concept of State Sovereignty: Modern Attitudes' <http://www.ysu.am/files/Karen_Gevorgyan.pdf>; MP Snyman-Ferreira 'The evolution of state sovereignty: a historical overview' (2006) 12(2) *Fundamina* 1, 18.
[342] Gevorgyan (note 339 above).
[343] Snyman-Ferreira (note 339 above)
[344] Ibid.
[345] United Nations Sub-Commission, Draft Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Respect to Human Rights (Draft Norms) (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2
[346] Ibid.
[347] A Nollkaemper 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *International & Comparative Law Quarterly* 615,623.

as the Nigerian government did not lay a case against Shell Petroleum for its impact on the Ogoni people.[348] The Ogoni people had to do it themselves. Surely this is a much greater challenge to state sovereignty than holding business enterprises accountable internationally.[349]

The drafters of the Norms[350] anticipated the reaction of the critics and included a clause in Principle I providing that states continue to have *primary* responsibility to ensure respect for human rights. The same Principle provides that companies only have responsibilities 'within their respective spheres of activity and influence'. This means that, unlike states, companies do not, in principle, have uniform obligations.[351] It implies that companies are not expected to play government and that bigger companies such as MNCs have wider responsibilities than small businesses. In other words, small, local firms do not need to be concerned that they will have to comply with far-reaching obligations.

Moreover, Principle 19 of the Norms contains a savings clause according to which 'Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of states'. This would be in line with the case law of the supervisory bodies of human rights treaties.[352]

In most instances where the host nation is a developing nation which needs foreign direct investment (FDI), the MNC is more powerful, economically and *de facto* politically connected than the host state.[353] In such a case, the MNC may threaten to disengage from the state if the state increases its regulation on activities while other states offer greater deregulation e.g. with labour rights whereby a state could offer an MNC cheap labour forces because of its need for FDI.[354] This puts MNCs in a powerful position against developing nations and hence their domestic operations cannot be controlled by States.[355]

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[348] *Okpabi and others* v *Royal Dutch Shell Plc* (2018) EWCA Civ 191 (in a ruling handed down on the 14th of February 2018, the Court of Appeal found that London-based Royal Dutch Shell is not responsible for oil pollution in the Niger Delta by its Nigerian subsidiary). The 40,000 villagers from the Niger Delta are now set to take their oil pollution case to the UK Supreme Court

[349] Ibid

[350] Note 100 above.

[351] Ibid.

[352] *Costello-Roberts v. United Kingdom* (1993) 19 ECHR 112 (European Court of Human Rights)

[353] OK Tedi Mine Continuation Agreement Act 7 of 2001 (this Act indemnifies BHP Billiton from damages for environmental pollution at its OK Tedi coppermine).

[354] Ibid.

[355] D Kinley & S Joseph 'Multinational Corporations and Human Rights: questions about their relationship' (2002) 27(1) *Alternative Law Journal* 1, 4 (they argue that there is need for extraterritorial regulation & International regulation of MNCs human rights obligations).

In these scenarios the classic method of host state responsibility offers no effective remedy because host governments are either unable to stand up to companies or they can afford to ignore international pressure because of the mineral riches they are able to exploit with the help from foreign business. Self-regulation and soft law are even less likely to be helpful in these circumstances.[356]

It would be an anomaly if it continued to be accepted that companies, unlike other non-state actors, should have only minimal obligations under international law. Why should individuals[357] and armed opposition groups[358] have fundamental international legal obligations while companies that may be much more powerful have practically none? It would appear that all companies and governments of good will have a shared interest in creating a level playing field by addressing minimum obligations on corporate social responsibility directly to companies. That leaves the question whether by extending direct corporate obligations under international law state obligations and state responsibility could somehow be undermined?

However, other scholars have argued that, because of the decentralized nature of the international legal order, where no centralized law-making and law-enforcing authorities exist, possession of rights and duties alone is not sufficient to confer legal personality.[359] An international person, the argument continues, should be capable of making[360] and enforcing international law.[361]In essence, there has to be a public component in which the role of the subject transcends private interests and includes some functions of a public character.[362]

It has been argued that this view adopts a restricted approach to the definition and inclusion of subjects of international law. A more helpful approach would be to recognize, first, that states

[356] A Boyle 'Soft Law in International Law- Making' in MD Evans (ed) *International Law* (2006) 1,144 (argues that soft-law is flexible).
[357] Articles 6-8 of the Statute of the International Criminal Court (for the crimes listed there)
[358] Protocol II to the Geneva Conventions on international humanitarian law.
[359] A Orakhelashvili 'The Position of the Individual in International Law' (2001) 31 *California Western International Law Journal* 241,244.
[360] Soviet jurists also held the view that an important aspect of legal personality is an active participation in the international law-creating process.
[361] This view was also a foundational principle for some Soviet scholars. *See e.g.*, the following excerpt from the work of Professor LA Modzhorian: *A] necessary attribute for any subject of international law is the to be represented on the international plane by a supreme authority which is capable of participating in law-creating processes, is capable of undertaking international legal obligations and of fulfilling them, and is also capable of taking part in measures aimed at the enforcement of the observation of norms of international law by other subjects.*C Osakwe 'Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations' (1971) 65 *American Journal of International Law* 502, 505 (quoting Prof Modzhorian 17 (1958)).
[362] Orakhelashvili (note 357 above) 241.

are the primary and predominant subjects of international law,[363] but that this recognition is not exclusionary.[364] Accordingly, other legal entities are not necessarily non-subjects, nor are they precluded from gaining international legal personality at some point in time. Second, a subject of international law does not have to possess the same character or share all attributes of a state to fit into the definition of a subject.[365] Third, there are degrees of legal personality and so all subjects do not have to be on the same plane at the international level.[366]

As Okeke puts it, "any subject of law must be capable of having certain rights and duties under the given legal system, any differences in the degree of capacity notwithstanding."[367] Viewed from those perspectives, it becomes easier to conclude that MNCs to an extent have, or at least have the potential to possess, international legal personality.[368]

The failure to recognise the international legal personality of MNCs and their obligations to respect human rights, labour or environmental standards imposed by international law has been

[363] H Charlesworth & C Chinkin 'The Boundaries of International Law: A Feminist Analysis' (2001) 9(2) *American Journal of International Law* 459, 463.

[364] LFL Oppenheim & RY Jennings *Oppenheim's International Law: Peace* 9 ed (2008)16 (States are primarily, but not exclusively, the subjects of international law. States may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subjects of international law.).

[365] O de Schutter 'The Challenge of Imposing Human Rights Norms on Corporate Actors' in O. De Schutter (ed) *Transnational Corporations And Human Rights* (2006) 1, 33-34.

[366] *Reparations for Injuries Suffered in the Service of the United Nations*(Advisory Opinion) 1949 International Court of Justice *178*; H Hahn 'Euroatom: The Conception of an International Personality'(1958) 71 *Harvard Law Review* 1001, 1045 (neither in municipal nor in international law are all persons possessed of the same status.); Charney (note 244 above) 764 (noting that many scholars recognize varying degrees of legal personality); W Friedmann 'The Changing Structure of International Law' (1965)14(1) *The International and Comparative Law Quarterly* 233, 218-19 (there is no reason why there should not be different degrees of subjectivity in international law); Damrosch (note 251 above) 249 (as in any legal system, not all subjects of international law are identical in their nature or their rights and one must constantly be aware of the relativity of the concept of international legal person.).

[367] Okeke (note 247 above) 19.19; J Balaskas 'The International Legal Personality of the Eastern Orthodox Ecumenical Patriarchate of Constantinople' (1997) 2 *Hofstra Law & Policy Symposium* 135, 157 (a non-state entity may indeed have a limited scope of international legal personality either for a specific purpose or event, or for a temporary period of time. Individuals, international organizations, nongovernmental organizations (NGOs), and multinational (or transnational) corporations all have been acknowledged to possess a limited degree of international legal personality).

[368] FT Maassarani, MT Drakos, J Pajkowska 'Extracting Corporate Responsibility: Towards A Human Rights Impact Assessment' (2007) 40 *Cornell International Law Journal* 135, 166 (indeed, international law may soon confer upon corporations the rights and responsibilities of international legal personality); Human Rights Council 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (2014) *UN Resolution* A/HRC/RES/26/9; J Zhang 'Negotiations kick off on a binding treaty on business and human rights' <https://www.iisd.org/itn/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-businessand-human-rights/>.

described by some international law experts as a *legal vacuum*[369] or an *accountability gap*[370] with reference to MNCs.

Just like Human rights were once considered a domestic affair to be regulated nationally but can now override national sovereignty and necessitate international interaction, CSR can also be the same as it falls under human rights of citizens.[371]

2.4.2 Claims of a race to bottom (States laxing regulations to attract FDI)

The race to the bottom refers to a competitive state where a company, state or nations attempts to undercut the competition's prices by sacrificing quality standards or worker safety, defying regulations, or paying low wages.[372] This is because they are more concerned about attracting FDI than they are about corporations acting ethically. States would then relax their regulatory standards in environment and labour laws to attract prospective investors or because of fear that the capital they desire will be invested in another State. The only way to prevent this is to ensure that MNCs have direct corporate responsibility.

Hence the need for the IMCE which would map out for what and how MNCs can be held responsible. Under the IMCE, there would be uniform and consistent application amongst states. Accredited NGOs and international organizations may need to be granted the rights to enforce such norms by taking guilty corporations to specialised agencies and courts.

It is evident that States have no valid grounds for restricting MNCs from acquiring international legal personality. Once this right is granted to MNCs, there will be a shift from unethical practices to ethical practices by MNCs thus redirecting their focus to CSR activities. However, the shift to focus on CSR would be impossible if CSR remains voluntary.

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[369] D *Kinley* & J *Tadaki* 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 Virginia *Journal of International Law Association* 931,933.

[370] B *Stephens* 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20(1) *Berkeley Journal of International Law* 45, 56; F Duncan *Accountability of Multinational Corporations for Human Rights Violations under International Law* (2016) (submitted in accordance with the requirements for the degree DOCTOR OF LAWS at the University of South Africa) 1, 31-32 <http://uir.unisa.ac.za/bitstream/handle/10500/21071/thesis_mnyongani_fd.pdf?sequence=1>.

[371] S Joseph 'An Overview of the Human Rights Accountability of Multinational Enterprises' in MT Kamminga & S Zia-Zarifi (eds) *Liability of Multinational Corporations under International Law* (2000) 75 -93; C Avery 'Business and Human Rights in a Time of Change' in MT Kamminga & S ZiaZarifi (eds) *Liability of Multinational Corporations under International Law* (2000) 17-24. (quoting an official of Shell Nigeria during the dictatorship in Nigeria saying that: "For a commercial company trying to make investments, you need a stable environment. Dictatorships can give you that."; F Duncan *Accountability of Multinational Corporations for Human Rights Violations under International Law* (2016) (submitted in accordance with the requirements for the degree Doctor of Laws at the University of South Africa) 1, 31-32 <http://uir.unisa.ac.za/bitstream/handle/10500/21071/thesis_mnyongani_fd.pdf?sequence=1>.

[372] W Kenton 'Race to the Bottom' <https://www.investopedia.com/terms/r/race-bottom.asp>.

The question is thus how CSR can be moved from being voluntary to mandatory? For this to happen, first corporations must possess international human rights and must be bearers of legal obligations under international criminal law; and second, CSR must be a mandatory obligation for corporations under human rights. The issue of MNCs possession of international human rights and CSR moving from being voluntary to mandatory is discussed chapter.

3. OBLIGATIONS OF MNCS UNDER INTERNATIONAL LAW

The argument that MNCs do not have any obligations under international law is arguably not well founded because under international human rights law, MNCs are obliged to ensure that they do not violate any human rights. The focus on obligations of MNCs under international law would be centred on international human rights law and international criminal law in this thesis.

Since the 1970s a range of initiatives has attempted to close the perceived 'governance gap' and to rein in the power of MNCs by subjecting them to binding obligations under international law. Their success has been limited. According to the prevailing view, MNCs have no direct obligations under international law,[373] although there is a growing body of non-binding 'soft law' regulating their conduct.

Most international law and treaties hold states and not companies liable and proposals to reverse this such as by the granting the International Criminal Court (ICC) jurisdiction to try not only natural persons but also legal persons for offences listed in the statute have failed due to lack of sufficient support.[374] Under domestic law, they can be held liable under labour and environmental law if they breach their obligations by imposing criminal sanctions such as fines.[375]

Nevertheless, some long-standing multilateral treaties do directly impose obligations on companies. The 1969 Convention on Civil Liability for Oil Pollution Damage provides that the

[373] A Cassese *International Law in a Divided World* (1986) 83(1) *American Journal of International Law* 186,187; J Crawford *Brownlie's Principles of Public International Law* 8 ed (2012) 122; DM Chirwa '*Towards Binding Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Survey of Emerging Norms*' (submitted in accordance with the requirements for the degree of Doctor of Laws at University of the Western Cape) 1, 249 <http://etd.uwc.ac.za/xmlui/handle/11394/261>.

[374] Rome Conference held in 1998 that adopted the Statute of the International Criminal Court came close to providing the Court with jurisdiction to try not only natural persons but also legal persons for the offences listed in the Statute.

[375] A Clapham 'The Question of Juridiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T. Kamminga and S Zia-Zarifi (eds.) *Liability of Multinational Corporations under International Law* (2000) 139, 150.

owner of a ship (which may be a company) shall be liable for any pollution damage caused by it.[376] The 1982 UN Convention on the Law of the Sea prohibits not only states but also natural and juridical persons from appropriating parts of the seabed or its minerals.[377]

There seems to be no evidence that by adopting these provisions states have undermined or 'privatized' their own responsibility. On the contrary, the drafters of these treaties apparently considered companies to be such important players that in order to achieve the treaty's objectives they had to be addressed directly, in addition to states.

These instances demonstrate that there are no reasons of principle why companies cannot have direct obligations under international law. The proper question to ask therefore is not whether direct international legal regulation of companies is possible but whether or not it is appropriate in specific instances.

The case of *Doe v. Unocal*[378] (hereinafter referred to as the Unocal case) is regarded as having had the greatest impact on the scope and interpretation of the ATCA. It was the first case which recognised that the ATCA could be used to hold an MNC liable for violations of universally recognised human rights standards, committed jointly by the MNC and its foreign business partners.[379]

Although the *Unocal* case illustrates an option for pursuing direct corporate liability claims, there are limitations to its use, such as issues of jurisdiction and interpretation.

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[376] Art. III of the International Convention on Civil Liability for Oil Pollution Damage (1969) reads: *'... the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident'.*

[377] Art. 137(1) of the UN Convention on the Law of the Sea (1982) reads: '*No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized'.*

[378] *Doe v. Unocal* 963 F.Supp 880 (1997) C.D. Cal (United States District Court for the Central District of California). (in this case the Earth Rights International, the centre for constitutional rights and two California based law firms assisted 11 Plaintiffs from Burma in bringing a lawsuit against Unocal and others. The lawsuit alleged that Unocal, a MNC which was in a joint venture with the Myanmar Ministry for Oil and Gas Enterprise and Total, was complicit in human rights crimes against humanity, forced labour, torture, loss of homes and property, as well as rape. The argument was that since the Burmese government's military and intelligence personnel were using force deemed illegal under international law to the benefit of the joint venture, and since Unocal had knowledge of this and was making payments to the personnel these personnel were Unocal's agents. The military government on its part was able to plead sovereign immunity); *Wiwa v. Royal Dutch Petroleum Co 226 F.3d 88* (2000) (Federal Reporter).

[379] SM Hall 'Multinational Corporations' Post-Unocal Liabilities for Violations of International Law' (2002) 34 *George Washington International Law Review* 401, 405; T Bridgeford 'Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism' (2003) 18 *American University International Law Review* 1009, 1112 (for a general discussion on ATCA and *Doe v Unocal*); C Carey 'Unocal Corporation can be liable for Human Rights abuses in Burma' (1999) 7 (1) *Human Rights Brief* 9,10.

The direct responsibility of MNCs brought about by ATCA is still an emerging area of law. There are controversies over the scope of its application and to date, no US-based MNC has yet been subject to an enforceable judgment in the US for acts performed abroad.[380] The *Unocal* case was finally was settled out of court.[381] In October 2006, a US federal court urged an appellate court to clarify key issues of corporate liability using ATCA.[382]

In addition, ATCA applies to civil tort claims in the US only.[383] It does not apply to potential claims in other jurisdictions which may be the headquarters of some MNCs. Therefore, it is safe to say that although ATCA is very useful, it is not a panacea for corporate violation of human rights.

Adeyeye[384] agrees with the notion that there is need for hard laws which have enforcement mechanisms and appropriate sanctions for abuse to ensure corporate responsibility. He proposes for a multilateral treaty between states which would clearly map out what norms apply to MNCs and how such norms may be enforced.[385]

To date there is no international legally binding regulation which holds MNCs accountable for violations of human rights. The Draft Norms[386] which apply to all corporations-MNCs and other business enterprises were perhaps the most promising attempt to regulate MNCs internationally. They integrated human rights, labour rights, the environment, development, anti-bribery issues and consumer protection, and according to the Lawyers' Committee on Human Rights, presented most comprehensive, action oriented restatement of existing human rights laws applicable to global businesses to date.[387] Taken as a whole, they confirm in fundamentally new ways:[388]

a. The many laws that do apply; and
b. How they could be applied and implemented in practice with respect to business conduct.

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[380] Hall (note 377 above) 401.
[381] L Girion 'Unocal to Settle Rights Claims' <http://www.globalpolicy.org/intljustice/atca/2004/1214unocal.htm>.
[382] J Kay '11*th* Circuit asked to Clarify Corporate Liability'<http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1161939931304>.
[383] Ibid.
[384] A Adeyeye 'Corporate Responsibility In International Law: Which Way To Go?' (2007) 11 *Singapore Year Book of International Law and Contributors* 141, 147.
[385] Ibid.
[386] Draft Norms (note 343 above).
[387] Adeyeye (note 382 above).
[388] D Leipziger *The Corporate Responsibility Code Book* (2003) 107.

The UN Special Representative to the Secretary General (SRSG) found that the legal authority advanced for the norms, and the principle by which the norms propose to allocate human rights responsibilities between states and firms, were particularly problematic.[389] Though the Draft Norms had good intentions, the criticisms regarding the legitimacy of their binding approach, the nature of their monitoring and enforcement mechanisms, and the claim that they go beyond the current international law on State Responsibility[390] may suggest the need to look elsewhere for legal authority for direct corporate responsibility.

3.1 MNCs and International Human Rights Law

Human rights are rights universal to mankind.[391] They derive from the inherent dignity of the human person or group of persons ('peoples') suggesting that they can either be individual or collective/group rights[392] non-derogable in nature. Such rights include those relating to the security and liberty of the person, such as the right to life; civil and political rights such as the right to freedom of thought; conscience and religion; economic, social and cultural rights such as the right to work; and what have been called third generation or solidarity rights such as the right to development and the right to self-determination.

Rights that MNCs have been accused of violating in developing countries include:[393]

a. Rights-violations in the extractive industries of developing countries;

b. Violation of labour-rights in factories supporting apparel and footwear industries[394] Examples of such rights violations is the 1996 Ogoni case in Nigeria.[395]

[389] Commission on Human Rights Sixty-second session (2006) 57 UN Doc E/CN.4/2006/97

[390] Amnesty International 'Amnesty International's Public Statement on United Nations: Human Rights responsibilities of transnational corporations and other business enterprises' <http://web.amnesty.org/library/index/ENGPOL3001220033?open&of=ENG-200>.

[391] United Nations 'Human Rights' <http://www.un.org/en/sections/issues-depth/human-rights/>.

[392] The African Charter refers to human and Peoples' rights. The International Bill of Human Rights also refers to rights which can only be collective in nature such as the right to self-determination.

[393] MNCs can directly impact human rights in the societies they operate in, e.g. by employing children or forced workers, by operating on the territories of indigenous people without their consent, by using discriminatory recruitment policies, or by damaging the environment and thus endangering the life and health of people. They can also indirectly cause harm if they create incentives for state authorities to violate human rights for business purposes or if they support regimes engaged in human rights violations by providing infrastructure, financial means, or international credibility.

[394] HJ Steiner & P Alson *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (2000) 1357 (refers to the Human Rights Watch World Report 2000 illustrating the various types of Rights violated by MNCs in different sectors).

[395] *The Social and Economic Rights Action center for Economic and Social Rights v Nigeria* (2011) ACHR 5 (African Commission for Human Rights); Wouters & Chané (note 241 above) 30.

As very powerful entities in the world today, the activities of MNCs have had and continues to have detrimental impact on human rights protection. Legal and non-legal methods have been used to impose human rights accountability on corporations. Examples include:[396]

a. Hard Law and Soft Law (Quasi-legal regulatory regimes)

Hard law refers generally to legal obligations that are binding on the parties involved and which can be legally enforced before a court.[397]

These include domestic laws covering labour rights, anti-discrimination, environmental protection, occupational health and safety and product safety. It must be borne in mind that there is no hard law to regulate MNCs.[398]

The term soft law is used to denote agreements, principles and declarations that are not legally binding.[399] Soft law instruments are predominantly found in the international sphere. UN General Assembly resolutions are an example of soft law.[400]

These include the codes of conduct from intergovernmental organizations such as the UN Global Compact; the Draft fundamental Human Rights Principles for Business Enterprises, formulated by a working group of the UN Sub-Commission on the Promotion and Protection of Human Rights (2001-01);[401] the OECD Guidelines for Multinational Enterprises, as well as the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises.

Most MNCs have developed their own human rights policies and codes of conduct or ethics. Studies have shown that domestic laws are often inadequate for controlling the human rights excesses of certain MNCs.[402]

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[396] D Kingsley & S Joseph 'Multinational Corporations and Human Rights: questions about their relationship' (2002) 27(1) *Alternative Law Journal* 1, 7.

[397] European Centre for Constitutional Human Rights 'Hard Law/Soft Law' <https://www.ecchr.eu/en/glossary/hard-law-soft-law/>

[398] Harvard Law Review Association 'Developments in the Law: International Criminal Law' (2001) 114(7) *Harvard Law Review* 1943, 2025.

[399] Ibid

[400] Harvard Law Review Association (note 167 above).

[401] United Document Addendum (UN doc.) U.N.Doc.E/CN.4/Sub.2/2002/X/Add.1,E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 (Draft for Discussion November 2001) UNCTAD's the Social Responsibility of Transnational Corporations (UN doc.UNCTAD/ITE/IIT/Misc.21of6 (199)); M Kamminga Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC' in Alston P (ed) *The EU and Human Rights* (2000) 565, 566.

[402] Kinley & Joseph (note 353 above) 4.

Some legal scholars have also criticised the one sidedness of international human rights law which grants MNCs significant rights and benefits without holding them liable for abuses.[403] An accountability gap then occurs if host states are either *unable* or *unwilling* to hold companies to reasonable minimum standards (to borrow two concepts from the Statute of the International Criminal Court).[404]

3.2 MNCs and International Criminal Law

International criminal law provides a major precedent for direct enforcement of international law upon non-state actors.[405] International crimes in this context is the corporate complicity in the commission of international crimes in conflict-affected areas or weak-governance zones. Essentially, all corporate actors who are responsible for corporate crimes should be held accountable, whether it is the corporate entity or the corporate personnel.[406]

On this view, the rationale sometimes advanced is that corporate crime is merely indicative of a corporate governance issue relating to a principal/agent problem, whereby the criminal offence essentially lies with deviant corporate individuals.[407]

Generally, the idea of holding a corporate entity criminally responsible for international crimes has been widely debated and continues to be controversial.[408] Clapham recalls deliberations held at the 1998 UN Conference of Plenipotentiaries on the establishment of the International Criminal Court with respect to whether to include legal persons within the ICC's jurisdiction.[409] Clapham remarks that the question raised by a number of delegates at that time was what would be the point?[410]

There are a number of reasons why criminal liability should extend to the corporate entity and not be confined to the corporate personnel of the business enterprise. Firstly, imposing criminal

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[403] A Grear 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7 *Human Rights Law Review* 511, 514.

[404] For an explanation of the conceptual difference between hard law and soft law. T Li-ann, 'Soft law and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony' (2004) *Singapore Journal of Legal Studies* 414, 418.

[405] A McBeth International *economic actors and human rights* (2010) 158.

[406] JP Ongeso 'An Exploration of Corporate Criminal Liability in International Law for Aiding and Abetting International Crimes in Africa' (2015) (PhD thesis) <http://wiredspace.wits.ac.za/bitstream/handle/10539/19482/FINAL%20PhD%20Thesis%202015%20John%20Paul%20Ongeso%202015.pdf?sequence=1&isAllowed=y>.

[407] GS Moohr 'Of Bad Apples and Trees: Considering Fault-Based Liability for the Complicit Corporation' (2007) 44 *American Criminal Law Review* 1343, 1346–1347.

[408] Ibid

[409] Ongeso (note 404 above).

[410] A Clapham 'Corporate Criminal Liability and the Rwandan Genocide in Discussion: International Trends towards Establishing Some Form of Punishment for Corporations' (2008) 6 *Journal of International Criminal Justice* 947, 975.

sanctions on corporate entities is necessary to indicate society's condemnation of the corporate wrongdoing.[411] As stated above, corporations have been known to engage in business activities that inflict harm upon society; hence, as societal actors, it is expected that by imposing criminal liability, corporations would be brought before the most authoritative regulatory mechanism available in society.[412]

Secondly, imposing corporate criminal liability is necessary to deter corporations from engaging in criminal activities.[413] Although explanations vary, criminal penalties that tend to be imposed sporadically, or even leniently, are seen as the leading reason for the failure to deter corporations from engaging in criminal activities.[414] The deterrence theory distinguishes between its general and specific forms.[415] Specific deterrence is concerned with punishing criminals so as to deter them from committing criminal offences again.[416] Corporate punishment could take a number of forms, for example, a corporate death penalty, or subjecting the entity to a probationary period during which the courts monitor its business activities.[417]

These criminal sanctions include measures such as: fines; imprisonment of senior management or members of the board of directors; corporate probation; and, corporate capital punishment.[418]

General deterrence is concerned with what effect punishing a specific offender will have on society at large, given that it might dissuade society from trying to engage in similar criminal conduct.[419] General deterrence can be viewed as the most appropriate rationale for corporate criminal liability. This is premised on the notion that corporate entities through their senior management tend to pay close attention to similar cases that have gone before the courts. They

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[411] SS Beale & AG Safwat 'What Developments in Western Europe Tell us about American Critiques of Corporate Criminal Liability' (2004) 8 *Buffalo Criminal Law Review* 89, 103.
[412] P Bucy 'Corporate Criminal Liability: When does it Make Sense?' (2009) 46 *American Criminal Law Review* 1437, 1437.
[413] Ibid
[414] SS Simpson *Corporate Crime, Law, and Social Control* (2002) 45.
[415] There are several theories about punishment, these include, inter alia: deterrence, retribution, rehabilitation, restitution, incapacitation, and denunciation. D Ormerod *Smith and Hogan Criminal Law* 11 ed (2005) 5.
[416] A Weismann & D Newman 'Rethinking Criminal Corporate Liability' (2007) 82 *Indiana Law Journal* 411, 428.
[417] Ordinarily, this is carried out by imposing a term of imprisonment upon a natural person.
[418] AA Robinson 'Brief on Corporations and Human Rights in the Asia-Pacific Region' <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Legal-brief-on-Asia-Pacific-for-Ruggie-Aug-2006.pdf> ; A Ramasastry & RC Thompson (eds) 'Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Jurisdictions' <https://www.biicl.org/files/4364_536.pdf>; RC Slye 'Corporations, Veils, and International Criminal Liability' (2008) 33(3) *Brooklyn Journal of International Law* 955, 970.
[419] Weismann & Newman (note 414 above) 428.

do this when weighing up the risks and rewards of whatever business activities they are about to engage in.[420]

Thirdly, imposing corporate criminal liability would allow for sanctions against corporate assets which, in turn, could generate funds for victims or their beneficiaries.[421] On this view, corporate entities are likely to have substantially more assets than the corporate personnel. This also increases the likelihood of securing funds when enforcing a court order.[422] Finally, extending liability to the corporate entity would be beneficial because culpable individuals are not always easily identifiable.[423]

At times, undesirable conduct is carried out through the business form, which inevitably makes it difficult to identify culpable individuals. This uncanny ability of multinational enterprises to operate through various business forms poses challenges in attributing liability. Also, large multinational corporations often experience considerable movement of business personnel through their global organisation. They tend to experience a high turnover of corporate personnel. Individuals come and go and are easily replaced in the global business operations. This too, makes it difficult to identify culpable individuals.[424]

At least three theoretical objections have been voiced to the notion of corporate criminal responsibility. Firstly, there is an objection that corporate entities are 'incapable of possessing the requisite *mens rea*; they are amoral, and have no will of their own.'[425] Secondly, an objection is that corporate entities are legal fictions; they cannot function independently.[426] Lastly, that corporate entities, per se, cannot be punished.[427]

It is generally understood that the purpose of criminal law is to hold individuals responsible for morally reprehensible acts.[428] This view is often promulgated by those who hold fast to the

[420] Ibid.
[421] Robinson (note 416 above).
[422] M Kremnitzer 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8(3) *Journal of International Criminal Justice* 909, 913.
[423] Clough & Mulhern (note 334 above) 6 (for further discussion on some of the challenges that lie in identifying the culpable individual); J Kyriakakis 'Corporations and the International Criminal Court: The Complementarity Objections Stripped Bare' (2008) 19 *Criminal Law Forum* 115, 149.
[424] Clough & Mulhern (note 334 above) 6.
[425] G Stessens 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 *International and Comparative Law Quarterly* 493, 495; L van den Herik 'Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counterarguments and Consequences' in C Stahn & L van den Herik (eds) *Future Perspectives on International Criminal Justice* (2010) 363.
[426] Stessens (note 423 above) 495.
[427] Ibid.
[428] H Stacy 'Criminalizing Culture' in L May & Z Hoskins (eds) *International Criminal Law and Philosophy* (2010) 85.

traditional maxim that the deed does not make a man guilty unless his mind be guilty.'[429] Regardless, the idea that corporations might be found morally blameworthy has been problematic for centuries. This is evinced by the views of Lord Chancellor Thurlow in the eighteenth century when he commented that, corporations have neither body to be punished, nor souls to be condemned. Therefore, they do as they like.[430]

Such views are often relied upon by the critics of corporate criminal liability, who commonly argue that corporations are not real persons and, therefore, incapable of forming the requisite *mens rea*. [431] Indeed, criminal law requires that a crime involves both physical and mental elements, known in law as *actus reus* and *mens rea*.[432]*Actus reus* is defined as: all elements in the definition of the crime except the accused's mental element. [433]*Mens rea* is defined as the mental element required by the definition of the particular crime typically, intention to cause the *actus reus* of that crime, or recklessness whether it be caused.[434] Intention, knowledge, and recklessness are indicative of *mens rea*. In essence, a corporation's liability is established based on its corporate culture, policies, and knowledge. [435]

It is evident that MNCs can possess legal personality and be subject to punishment for criminal offences. When MNCs can be held accountable, they become ethical in their dealings and shift their attention to CSR issues. However, if they do not participate or perform their CSR activities there is no legal mechanism to hold them accountable as CSR is not mandatory. The question is whether CSR can move from being voluntary to mandatory

4. A SHIFT FROM VOLUNTARY TO MANDATORY CSR

The debate on whether CSR should be mandatory has been on going. In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights challenged the voluntary nature of CSR and in August 2003 it adopted a text entitled "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights".

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[429] *Actus no facit reum, nisi mens sit rea* discussed in A Pinto & M Evans *Corporate Criminal Liability* (2008) 18.

[430] Edward Lord Chancellor Thurlow, English Jurist and Lord Chancellor (1731–1806)

[431] A Clapham 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899, 900.

[432] M Kelt & H von Hebel 'General Principles of Criminal Law and the Elements of Crime' in RS Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 14.

[433] Ormerod (note 413 above)37; E Colvin & S Anand *Principles of Criminal Law* 3 ed, (2007) 122–133; J Gobert & M Punch *Rethinking Corporate Crime* (2003) 146–153; E Colvin 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1, 1.

[434] Ormerod (note 413 above) 92.

[435] See for example Part 2.5 of Division 12 of the Australian Criminal Code (Cth).

The Norms represent an ambitious attempt to codify the principles that companies must respect in the field of human rights, labour law, environmental protection, consumer protection, prevention of corruption etc. At the annual session of the UN Commission on Human Rights in the early 2004, the Norms received wide support from human rights and environmental groups but were criticized by business groups and some governments. The main criticism of the Norms was the likelihood of privatisation of company's obligation in the state that they operate in.

This means that states may be unable to enforce principles of CSR because globalization forces states to aggressively compete with each other to attract investments. The resulting race to the bottom obviously weakens their bargaining power *vis-à-vis* companies that may have a turnover that is much larger than the national income of the states they are investing in.

States may be unwilling to enforce principles of corporate social responsibility because unsavoury governments of host states may co-opt companies to collude with them against the local people and the environment. Studies by the OECD and others indicate that multinational enterprises involved in extractive industries, such as oil, gas and diamonds, are particularly prone to such complicity with the host state.[436] Angola, Congo, Myanmar, Nigeria and Sudan are among the states that have been referred to in this context. Companies may for example agree to pay their revenues secretly to the authorities of the host state thus enabling greedy officials to stuff their Swiss bank accounts or companies may conveniently look the other way if the authorities forcibly remove the local inhabitants from new exploitation areas.

There are two views on whether CSR should be mandatory or not: those who oppose the notion and those that agree that CSR should be mandatory for all companies. Though internal or self-regulation would seem to be the most desirable and most efficient way of ensuring that MNCs respect human rights,[437] it has proved to be an insufficient mechanism of regulation[438] and

[436] OECD 'Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses' <https://www.oecd.org/countries/myanmar/WP-2002_1.pdf>; KR Grey 'Foreign Direct Investment and Environmental Impacts-Is the Debate Over' (2002) 11(3) *Review of European, Comparative & International Environmental Law* 306, 310; R Revesz 'Rehabilitating Interstate Competition: Rethinking the "Race-to-the-bottom" Rationale for federal Regulation' (1972) *New York University Law Review* 47,47 (where he challenges the race to the bottom argument and shows that Federal regulation is likely to promote undesirable results).

[437] AM Slaughter 'A Liberal Theory of International Law' (2000) *American Society of International Law: Proceedings of the 94th Annual Meeting* 240, 245; S Picciotto 'Rights, Responsibilities and Regulation of International Business' (2003) 42 *Columbia Journal of Transnational Law* 131, 137.

[438] International Council on Human Rights Policy 'Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies' *<https://reliefweb.int/sites/reliefweb.int/files/resources/F7FA1F4A174F76AF8525741F006839D4-ICHRP_Beyond%20Voluntarism.pdf>*; M Baker 'Tightening the Toothless Vise: Codes of Conduct and the

hence the search for an efficacious method of external regulation continues. This is not to suggest however, that self-regulation through voluntary codes of conduct should no longer be pursued or promoted;[439] it simply means that external regulation should supplement and support internal regulation. It is also increasingly apparent that external regulation flowing solely from states will be inadequate by virtue of the simple fact that MNCs operate beyond state boundaries, and may even act in connivance with states.[440] This explains why there has been more emphasis in recent times on regulatory initiatives at regional and international levels.

Those who oppose the idea of mandatory CSR base their arguments on economic reasons, and the inability of government to get involved and regulate business activities effectively.

On the economic reasons, they argue that voluntary CSR initiatives are better at improving economic performance by increasing market value which will reduce economic risks[441] and helps create value for individuals.[442] Additionally, they aver that legislation cannot solve the issues of corruption, social norms and injustice, and issues related to integrity because different countries may view an integrity issue in diverse manners or traditions.[443] `

The supporters of mandatory CSR argue that legislation is meant to measure the self-regulatory performance of the firms[444] and increase the interaction of stakeholders, which impacts on the policymaking process.[445] They aver that there is no need for government to be involved in CSR

American Multinational Enterprise' (2001) 20 *Wisconsin International Law Journal* 89, 137–40; K Granatino 'Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?' (1999) 23 *Suffolk Transnational Law Review* 191, 197; R Toftoy 'Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?' (1998) 15 *Arizona Journal of International and Comparative Law* 905; M Baker 'Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?' (1993) 24 *University of Miami Inter-American Law Review* 399, 401.

[439] Slaughter (note 435 above) 243.

[440] S Deva 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19(1) *Connecticut Journal of International Law* 4–5, 48–9.

[441] G Moore 'Corporate social and financial performance: An investigation in the UK supermarket Industry' (2001) 34 (3-4) *Journal of Business Ethics* 299, 305; M Orlitzky & JD Benjamin 'Corporate social performance and firm risk: A meta-analytic review' (2001) *Business & Society* 40 (4), 369, 372.

[442] KB Backhaus, BA Stone & K Heiner 'Exploring the relationship between corporate social performance and employer attractiveness' (2002) *Business & Society* 41(3) 292, 304; DB Turban & DW Greening 'Corporate social performance and organizational attractiveness to prospective employees' (1997) 40(3) *Academy of management journal* 658, 663.

[443] A Lindgreen 'The design, implementation and monitoring of a CRM programme: a case study' (2004) 22(2) *Marketing Intelligence & Planning* 160-186.

[444] M Lückerath-Rovers & A De Bos 'Code of conduct for non-executive and supervisory directors' (2011) *Journal of Business Ethics* 100 (3) 465, 474.

[445] A Mathis 'Corporate social responsibility and policy making: what role does communication play?' (2007) 16(5) *Business Strategy and the Environment* 366, 371.

activities as the market offers enough motivation for firms to get involved in CSR initiatives.[446] For example, Doane[447] attributes liquidation of firms like Enron, WorldCom or Arthur Andersen for bad performance on social, environmental and ethical standards.

Currently, governments do not play a significant role in forming international labour rights or building a uniform code for multinational corporations and NGOs. Governments require more technical, economic and practical expertise to address environmental and social issues of the particular industries such as chemical industry, textile industry or petroleum industry etc.

For this reason, advocates of voluntary CSR support the use of self-regulation codes and standards.[448] Eden[449] found that self-regulation standards and systems are also invariably not entirely capable of fulfilling all the need for CSR since a variety of players and a variety of agendas are involved. Also, different players may have their preferred solutions.

These weaknesses of a voluntary global framework for self-regulation help to support the case for mandatory CSR.[450] Some of the benefits of mandatory CSR include:

a. Prevention of corporate conflict

Industrial conflict or corporate conflict is a condition of unsuccessful business practices.[451] Employees are becoming more and more militant[452] and demand several welfare measures such as better wages and better working conditions. Their demand derives its force from the fast changing social environment. Corporate social responsibilities will help avoid these class conflict between workers and corporate because the interests of workers will be protected.[453]

[446] MDLC González & CV Martinez 'Fostering corporate social responsibility through public initiative: From the EU to the Spanish case' (2004) 55(3) *Journal of Business Ethics* 55 (3), 275, 282.
[447] D Doane 'Rebranding Corporate Social Responsibility Strategy' (2003) 10(2) *International Journal of Corporate Sustainability* 1, 4.
[448] González & Martinez (note 444 above) 282.
[449] S Eden 'Regulation, self-regulation and environmental consensus: lessons from the UK packaging waste experience' (1997) 6(4) *Business Strategy and the Environment* 232, 237; M Leighton, N Roht-Arriaza& L Zarszky *Beyond deeds. Case studies and new policy agenda for corporate accountability* (2002) 123.
[450] Leighton, Roht-Arriaza & Zarszky (note 447 above).
[451] Ibid.
[452] Doane (note 445 above).
[453] O Falk, &S Heblish 'Corporate Social Responsibility: Doing well by Doing Good' (2007) 50 *Business Horizons* 247, 250; B Spector 'Business responsibilities in a divided world: the cold war roots of the corporate social responsibility movement' (2008) 9 *Enterprise & Society* 314, 318.

b. Fulfil long term interest

A business organisation must be sensitive to community needs in its own interest of having a better environment to conduct business in order to achieve better results.[454] As a result of social improvement, crime will decrease, less money will be required to protect property, labour recruitment will be easier.[455]

c. It supports the role of government to the society

It is not possible for government alone to improve the standard of living of people, if corporate collaborates with government the living conditions of people will be improved rapidly. A country where CSR is mandatory is India. It is important to analyse the impact of mandated CSR on companies. The question is how effective it is and do companies participate more in CSR activities.

4.1 The Case of India

India became the first country in the world to write CSR into legislation in April 2014, forcing companies to invest in sustainability programs.[456] Section 135 of the Indian Companies Act 2013 requires companies with a market cap of more than Indian Rupee INR 5 billion or a turnover above INR 10 billion to spend at least two per cent of their net profit on CSR activity.[457] The companies are required to 'comply-or-explain' non-compliance.

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[454] P Kotler & N Lee *Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause* (2005) 67.

[455] Ibid.

[456]Eco-Business 'Mandatory CSR in India: help or hindrance?' <http://www.eco-business.com/news/mandatory-csr-india-help-hindrance/ >.

[457] Section 135 of Companies Act 2013 reads: '(1) Every company having net worth of rupees five hundred crore (Rs 500 Crore) or more, or turnover of rupees one thousand crore (Rs 1,000 Crore) or more or a net profit of rupees five crore (5 Crore) or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. (2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee. (3) The Corporate Social Responsibility Committee shall, — (a) Formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;
(b) Recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and (c) Monitor the Corporate Social Responsibility Policy of the company from time to time. (4) The Board of every company referred to in sub-section (1) shall,— (a) After taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and (b) Ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company. (5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy: Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities: Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section

The Act also requires that firms above the threshold establish a CSR Committee of the Board of Directors.[458] This committee is responsible for formulating the firm's CSR policy, for ensuring that at least 2% of profits are spent on CSR activity, and (where applicable) for explaining why the firm failed to achieve the target. Schedule VII of the 2013 Companies Act provides an illustrative (but apparently not exhaustive) list of activities qualifying for CSR status for purposes of the mandate.[459] The activities listed are very broad and cover a large swath of what is typically considered CSR and perhaps more (e.g., spending on education, health, poverty eradication, environment, arts, gender equality, reducing other inequalities, some designated government programs, funds for technology incubators in Government Academic institutions), [460] thereby leaving firms with considerable discretion in directing their CSR spending. All publicly traded and privately held firms with operations in India (including foreign-owned firms) are subject to section 135 if they cross any of the thresholds.[461]

Failure to meet the 2% spending requirement would not trigger liability if an acceptable explanation for failing to meet it was provided (although it is not entirely clear to whom such an explanation must be provided and what the standard of "acceptability" is). If such an explanation is not provided and the firm failed to spend at least 2% of average net profits on CSR activities, then liability would be triggered here too. The penalty on the firm and every officer of the firm who violates section 135 is INR 10,000 for the first day of the violation plus an additional INR 1,000 a day if the violation continues.[462]

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(3) of section 134, specify the reasons for not spending the amount. Explanation. —For the purposes of this section ―average net profit‖ shall be calculated in accordance with the provisions of section 198.'

[458] Sections 135 (3), 135 (4), 135 (5) of the Companies Act 2013. Section 135 (5) also notes that the firm should give preference to CSR spending in its local areas; this has generated some negative commentary; If a firm crosses any of these thresholds, then: (i) it must constitute a "Corporate Social Responsibility" (CSR) committee with 3 directors, of which one must be independent, (ii) it must disclose the composition of the CSR committee,(iii) the CSR committee must formulate a CSR policy recommending the kinds and amounts of CSR spending the firm is to pursue and the committee must monitor that policy, (iv) the Board is to approve and publicize the firm's CSR policy (after taking into account the CSR committee's recommendations) and to ensure that the policy is followed, and(v) the Board is to ensure that the firm spends at least 2% of the firm's average net profits (over the last 3 years) on activities listed in the firm's CSR Policy or provide reasons for why this spending level was not achieved (i.e., a "comply-or-explain" rule). The other requirements (items (i) to (iv)) are mandatory and failure to meet them would trigger liability regardless of what explanation was provided.

[459] D Dharmapala & V Khanna 'The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013' (2013) 601 *Working Paper* 1, 2.

[460] Corporate Social Responsibility Rules (2014).

[461] Ministry of Corporate Affairs, Companies (Corporate Social Responsibility Policy) Rules (2014).

[462] Section 450 of the Companies Act 2013 (also attaching liability to other persons who are in default). Although it is not clear who is to enforce Section 135 from its wording, one can assume that it is the Ministry of Corporate Affairs. Note that if the violation is repeated within a 3-year period the fine can be doubled – Section 451 of the Companies Act 2013.

The business players in India have differing views about this legislation. For example, some feel that mandatory CSR is a welcome step towards contributing to society and helping a company achieve a balance of economic, environmental and social imperatives while addressing the expectations of shareholders and stakeholders; it is a novel solution to India's social problems.[463] They also feel that CSR should be a part of the deoxyribonucleic acid (DNA) of any organization because successful ventures have to also give back to society and not just always take from it. This way businesses can have an overall positive impact on the communities, cultures, societies and environments in which they operate.

Rather than direct legislation, some feel India should follow the example of countries like Sweden, which have put in place regulations that control business behaviour in areas like the environment and human rights and established anti-corruption measures. According to a senior official at Confederation of Indian Industries, an industry lobby, 'this system creates an enabling environment for the private sector to adopt sustainability practices by default without making it seem forced.' To put it simply, in cases where private profits and public interests are seamlessly aligned, the very idea of CSR becomes irrelevant."

Regardless of its effectiveness, however, industry observers say that the law has helped raise the profile of CSR among businesses in India. Shanthi Naresh, business leader of information solutions at global consultancy Mercer India, observes: 'the importance of CSR and sustainability is seeping deep into Indian companies as three out of four firms in India already have, or are planning to form a core team dedicated to CSR within the next one to two years.'

Other countries such as the USA and UK have CSR provisions in their laws though their provisions are not as expressly detailed as India. For example, in the USA, companies are required under section 404 of the Sarbanes Oxley Act to only give details of their spending. Reporting is mandatory but no amount is fixed. It makes the firm to be effective and efficient on improving and promoting good welfare of the society. It also makes the firm to recognise the needs and expectations of the society.

In the United Kingdom (UK), most companies report to the index. It is voluntary exercise. Sustainable exercise is considered vital to the valuation of the company, along with the profit.

[463] Dharmapala & Khanna (note 457 above).

With India as an example that mandatory CSR is possible and having ascertained that the benefits of a mandatory CSR are enormous, a discussion of the how sustainable the IMCE is will be discussed below.

5. SUSTAINABILITY OF AN IMCE

Owing to the weaknesses of the current mechanisms, the International Mandatory code of ethics (IMCE) is meant to do several things:

a. Compel MNCs to be ethical in their dealings;
b. Hold MNCs liable for non-compliance to ethical principles and rules; and
c. Make it obligatory for companies to participate in their CSR initiatives.

Having established that MNCs can be held liable under international law and that their obligations will not in any way undermine state obligations, and further that CSR is of such an important nature that there is need to move CSR from being optional (voluntary) for MNCs to mandatory (an aspect that has not been addressed by scholars at length), this section seeks to discuss several aspects that will determine how sustainable the IMCE will be and addressing some of the challenges that the IMCE may face.

An IMCE is sustainable and can last for a long time provided that:

a. There is uniformity in the application of the IMCE;
b. A Strong institutional system within which it can operate;
c. It provides solution to a country and its organizational issues; and
d. It is relevant and unique to each business and for modern businesses.

Several scholars are concerned about the sustainability of such an instrument. For example, Tévar & de Derecho argue that even if an appropriate international convention for the regulation (at State level) of MNCs were ever ratified by a reasonable number of states, there would still be hurdles to face, both theoretical and practical.[464] These include the need for uniform interpretation of its rules, principles and guidelines, and conflicts of courts, because several states would feel entitled to exert their adjudicative power over the same MNC.[465] Furthermore, they argue that such a convention would very likely contain obligations that would not carry enforceable sanctions, thus depriving the obligation of some of its force.

[464] NZ Tévar & C de Derecho 'Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations (2012) 4(2) *Transnacional* 398, 401.
[465] Ibid.

These concerns are addressed below.

5.1 Uniformity of the IMCE

Currently in international law, there are no relevant multilateral treaties regulating MNCs. The International Centre for Settlement of Disputes (ICSID) is a mechanism for the settlement of investment disputes between States and foreign investors through arbitration and gives MNCs legal personality to bring arbitration cases. However, the use of the ICSID is merely procedural in nature and does not provide for direct regulation of MNCs or direct corporate responsibility under international law.[466]

Furthermore, there is no uniform definition of what constitutes an ethical behaviour because it is based on either industry or company specific practices. The issue is whether it is possible to define what an ethical behaviour is for MNCs on a global scale. This would mean taking into consideration the professional, social and cultural settings of each MNC and the country in which they operate.

The general meaning of uniformity is consistency. Reference to uniformity in this thesis refers to the global principles based on corporate values.[467] The IMCE will allow for local policies based on cultural traditions.[468] The IMCE will reinforce the values the company seeks to promote its corporate culture to instil universal standards of business conduct.[469]

In making the IMCE uniform, the three tiers of the MNC's social and cultural environments: global, regional and host country will be considered.[470]

5.2 A Strong Institutional System

The regulation of the activities of MNCs attracts questions as to where regulation should take place. Should it be at an institutional, municipal, regional or international level? There is need for the IMCE to have a strong institutional structure that will be independent of the affairs of

[466] Adeyeye (note 382 above) 147.
[467] SD Olaru, E Gurgu 'Ethics and Integrity in Multinational Companies' (2009) 10(1) *Review of International Comparative Management* 113,114; Deva, Surya (2014): The Human Rights Obligations of Business: Reimagining the Treaty Business. Hongkong: City University. http://business-humanrights.org/media/documents/reimagine_int_law_for_bhr.pdf
[468] Ibid.
[469] Olaru & Gurgu (note 465 above) 114.
[470] YH Godiwalla & F Damanpour 'The MNCS Global Ethics And Social Responsibility: A Strategic Diversity Management Imperative' (2006) 1(2) *Journal of Diversity Management* 43, 43; J Gobert & M Punch *Rethinking Corporate Crime* (2003) 157.

the MNC at both municipal, regional and international level. A failure to have a strong institutional structure will lead to the failure of the IMCE.

This could be managed by multilateral developmental institutions (MDIs). One of the major advantages of MDIs is that they can act as honest brokers of the process.[471] MDIs are independent parties that are not directly affected by CSR activities, but whose mandate is to accomplish objectives that are similar to those that can be accomplished through CSR practices.[472] The ultimate objective is the enhancement of the quality of life of the population. This relative independence and commonality of objectives allows MDIs to play many roles.[473]

It also allows MDIs to exercise their ability to convene the parties to discuss the issues and persuade those involved to work together.[474] Furthermore, most MDIs tend to work with the parties involved in one way or another, some finance governments and the private sector. For their part, governments are either shareholders or members of MDIs, and civil society is a partner in development with all of them.[475] MDIs have relationships with all parties in the 'CSR market'.

Also, many MDIs have the capacity to address failures in the CSR market, by providing financial and technical support to the parties involved, ranging from providing financing to the private sector and governments, to providing technical assistance to civil society.[476] Their independent position, relationship with all the parties involved in the CSR market, and their ability to provide financial and technical support, indicate that not only do MDIs have a role to play in fostering CSR, but also given the common objective of CSR and MDIs (i.e. development), they have an obligation to do it.[477]

One of the most important roles that MDIs can play (which is possibly the one with the highest impact) is supporting the development of a conducive policy environment for CSR to thrive.[478]

A very important role that MDIs can play is that of ensuring a level playing field whereby all businesses are subject to the same rules, and that also ensures that no loopholes exist in the

[471] A Vives 'The Role of Multilateral Development Institutions in Fostering Corporate Social Responsibility Development' (2004) 47(3) *Society for International Development* 45, 46.
[472] Ibid.
[473] Vives (note 469 above) 46.
[474] Ibid.
[475] Vives (note 469 above) 46.
[476] RJ Hanlon *Corporate Social Responsibility and Human Rights in Asia* (2014) 1, 109.
[477] Ibid.
[478] B Sharma Contextualising 'CSR in Asia: Corporate Social Responsibility in Asian economies'

rules and regulations that would allow some businesses to acquire a competitive advantage at the expense of those who behave responsibly.

Support for strengthening institutions and educating individuals to exercise these roles is another task for MDIs. One of the most pervasive forms of irresponsible behaviour is that of corruption, which is fuelled by excessive regulations and weak institutions. Again, as part of their independent role, MDIs can promote policies, practices and institutions that minimize the potential for corruption and penalize its occurrence.

5.3 Addressing Country and Organizational Issues

Although multilateral agreements, are touted as the best for regulation of corporations, scholars argue that they come with so many challenges. These include the fact that there are cumbersome process to achieve because they would involve a large number of parties and disparate national interests.[479] The institutional mechanism of monitoring compliance with obligations may become complicated, as incentives to monitor are often low for any individual member and the aggregate costs of monitoring can be high;[480] and the enforcement of multilateral agreements is often weak or non-existent due to a number of factors, including the costs of enforcement and the lack of an authoritative supranational institution.[481] Due to these structural weaknesses, multilateralism has failed to solve the dangers of corporate agility and has led to a search for alternative solutions.

For the different governments, the IMCE would incorporate unilateral regulations into the IMCE and make it possible to enforce the multilateral regulation in their country. This means that each country will have its own unique jurisdictional challenge and enforcement may cost the countries a lot and also affect its foreign direct investment (FDI).

The IMCE will address these concerns as there could be no assumption of a one size fits all but various aspects of the code would cover specific issues of each country. This could be done by

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[479] RH Mnookin 'Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations' (2003) 8(15) *Harvard Negotiation Law Review* 1, 14–18 (describing the additional complexities associated with multiparty negotiations); GB 'Bilateralism, Multilateralism, and the Architecture of International Law' (2008) 49 *Harvard Negotiation Law Review* 323, 351(describing the inefficiencies of multilateral international negotiations).

[480] K Raustiala 'Form and Substance in International Agreements' (2005) 99 *American Journal of International Law* 581, 582 (arguing that there is often a trade-off between substantive obligations and the monitoring of those obligations).

[481] Ibid (stating that "the international legal system is distinguished by the rarity of courts and the weakness of those that exist"); RO Keohane *After Hegemony: Cooperation And Discord in The World Political Economy* (1984) 88 (arguing that, because governments "put a high value on the maintenance of their own autonomy, it is usually impossible to establish international institutions that exercise authority over states").

receiving input in various forms: citizen surveys, employee surveys, focus groups, stakeholder analysis. Once the data has been collated, it will be easy to address the concerns of each government and various organizations.

5.3.1 Jurisdictional Challenge

For states to be able to regulate foreign corporations directly, they must have jurisdiction to proscribe the regulated behaviour and to enforce the regulation against the particular defendant or property.[482]

These jurisdictional hurdles are generally met when the corporation is a national of the regulating state or is located within the territory of the regulating state.[483] However, if neither of these conditions is true, the state must rely on some other, potentially controversial, basis for jurisdiction. These include the "effects test," under which a state may assert jurisdiction over actions that have effects within the territory of the state,[484] and the "protective principle," under which a state may regulate extraterritorial conduct that is directed against the security of the state or against a limited class of other state interests.

The essential point here is that, as the nexus between the regulating state and the regulated corporation or activity decreases, the acceptable bases of jurisdiction under international law decrease as well. This requirement substantially limits a state's ability to regulate foreign corporations. In addition to procedural limits on a state's ability to enact unilateral regulations, international law also places substantive limits on how states can treat foreign corporations.[485] For example, international law places strict limits on a state's ability to expropriate the property of foreign nationals and requires compensation for certain inequitable treatment.[486]

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[482] SH Cleveland 'Essay, Embedded International Law and the Constitution Abroad' (2010) 110 *Columbia Law Review* 225, 231–32; International Commission of Jurists (2016): Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises. Geneva: ICJ. www.icj.org/wp-content/uploads/2016/10/Universal-OEWG-session-2-ICJ-submission-Advocacy-Analysis-brief-2016-ENG.pdf

[483] Nationality-based and territoriality-based jurisdiction are widely known as acceptable rationales for state regulation. J H Knox 'A Presumption against Extra jurisdictionality' (2010)104 *American Journal of International Law* 351, 355–61.

[484] International Bar Association 'Report of the IBA Task Force on Extraterritorial Jurisdiction' <https://www.ibanet.org/Document/Default.aspx?DocumentUid=ECF39839-A217-4B3D-8106-DAB716B34F1E>.

[485] The issue of corporate rights under international law is a controversial one. Traditionally, states were the sole subjects of international law, and some scholars argue that corporations have no rights under international law unless explicitly granted them under treaties or national law. Others argue that corporations may benefit from international legal rules, including human rights treaties. Emberland (note 62 above).

[486] C McLachlan, L Shore & M Weiniger *International Investment Arbitration: Substantive Principles* 2 ed (2017) 200.

So, for example, if the only way for a state to enforce carbon emissions laws on foreign corporations is to monitor factories around the world, then the cost of the regulation may exceed its benefits to the regulating state.[487] Similarly, if the very enactment of unilateral regulation creates costs for the regulating state, by, for example, generating conflict with other countries, the likelihood of regulation will decrease.[488] A state must consider the consequences of enacting regulations on relationships with other states and what their potential responses might be. If boomerang regulation, in which opposing countries enact harmful regulation aimed at the regulating state, is both expected and harmful to domestic interests, then unilateral regulation becomes more difficult.[489]

The IMCE will address a broad range of issues and myriad types of official and corporate activities. The IMCE will be a corporate code of conduct that represent individual companies' ethical standards, and; will address all industry-specific issues.

6. CONCLUSION

The sustainability of the IMCE is largely dependent on the recognition of the MNCs under international law and the granting of legal personality. Can MNCs be recognised under international law? Yes! Can MNCs be granted legal personality under international law? Yes

It is possible because till date, MNCs are not recognised under international law. They have not been granted legal personality and they do not possess legal rights under international law.

The IMCE is an international instrument that will be binding on all MNCs across the world. Therefore, as an international instrument, there can be no limitation on its application to MNCs as such legal recognition of MNCs under international law is important.

The argument against the recognition of legal personalities for MNCs is based on several factors some of which include that MNCs operate as autonomous legal entities; state sovereignty; and fears of a race to the bottom. States are concerned that if MNCs are granted legal personality, it will disempower the, block or reduce the evolution of international law where State consent is absent or not forthcoming.

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[487] Ibid.
[488] A Bradford & O Ben-Shahar 'Efficient Enforcement in International Law', (2012) 12 *Chicago Journal of International Law* 375, 380 (explaining the fundamental difficulties of enforcing international law).
[489] Ibid.

However, what States fail to understand is that ethical violations by MNCs is an infringement on the human rights of its citizens. Thus, which is more important? That MNCs are granted legal personalities so they can be held accountable for ethical violations or that States continue to be sovereign?

On the aspect of a race to the bottom, States refuse to grant MNCs legal personality because of foreign direct investment (FDI) thus they continuously relax their regulations. Furthermore, states are of the opinion that if MNCs are granted legal personality then it may cause MNCs not to invest in their countries. Once again this shows that States are more willing to allow MNCs be unethical than to grant them legal personality to hold them accountable.

Having established that MNCs can have legal personality and can be held accountable for violations, the IMCE will mandate them to act ethically and thus shift their focus from unethical practices to participating in their CSR initiatives.

CHAPTER THREE

INTERNATIONAL MANDATORY CODE OF ETHICS FOR MULTINATIONAL CORPORATIONS

1. INTRODUCTION

Having discussed the importance of the International Mandatory Code of Ethics (IMCE) in the previous chapters, this chapter will discuss the drafting process and the contents of the IMCE. As an international legally binding instrument, the IMCE will contain some important aspects such as:

a. Obligations of Multinational Corporations (MNCs) to respect all human rights, act ethically and participate in various corporate social responsibilities (CSR) initiatives;
b. Obligations of States to protect against human rights violations committed by MNCs;
c. The criminal responsibility of MNCs, their executives and their liability for activities of their subsidiaries; and
d. Mechanisms of enforcing and monitoring the implementations of the IMCE.

The IMCE will contribute immensely to the international body in several ways. First, MNCs commit various ethical violations using their multinational structure and complex schemes to avoid liability and evade responsibilities thus the IMCE will bridge the legal gap in international human rights law that needs to be closed to end these activities by MNCs. In most instances, their headquarters is far from where they carry out their major economic activities and their business activities which adversely affects human rights.[490] This makes it challenging to hold MNCs liable for the ethical violations arising from their activities.

Second, the IMCE will expressly state the obligation of States to protect against ethical violations committed by MNCs and list in detail the specific measures that States need to implement to enable access to justice and remedy for victims and affected communities. The

[490] G Cairns & S As-Saber 'The Dark Side of MNCs' in C DöRrenbächer & M Geppert (eds) *Multinational Corporations and Organization Theory: Post Millennium Perspectives* (2017) 1, 425 – 443; AC Fernando 'Business Ethics and Corporate Governance' <https://www.oreilly.com/library/view/business-ethics-and/9789332511255/xhtml/c12s9.xhtml>; EN ÇalIsk 'An Business Ethics, Corporate Social Responsibility and Multinational Companies' (2010) 43 *IÜ Siyasal Bilgiler Fakültesi Dergisi* 41, 42; MS Yunis, D Jamali & H Hashim 'Corporate Social Responsibility of Foreign Multinationals in a Developing Country Context: Insights from Pakistan' (2018) 10 *Sustainability* 1,2; CETIM '8 Proposals for the New Legally Binding International Instrument on Transnational Corporations (TNCs) and Human Rights' <https://www.cetim.ch/8-proposals-for-the-new-legally-binding-international-instrument-on-transnational-corporations-tncs-and-human-rights-2/>.

IMCE will provide guidelines for States on how to sue and sanctions to be imposed on MNCs when they violate human rights. The IMCE will also include the obligation of States to cooperate at the international level, including in all judicial fora, to prevent MNCs from ethical violations.

Third, the IMCE will require States to provide within their national jurisdictions for the legal liability (civil and criminal) of both MNCs and their executives (for example chief executive officers, managers, boards of directors). This civil and criminal responsibility must apply to crimes and offences committed outright by MNCs and the executives themselves as well as to those resulting from complicity, collaboration, instigation, omission, negligence or dissimulation. The IMCE will include strong provisions on the shared liability of MNCs with their subsidiaries (*de jure* or *de facto*).

Fourth, the IMCE will define MNCs specific obligations in detail. This includes the obligation to act ethically and to ensure that their subsidiaries, chain of suppliers, licensees and subcontractors also respect human rights. The IMCE will hold MNCs accountable for the ethical violations they commit outright as well as those they commit by complicity, collaboration, instigation, omission, negligence or dissimulation. The IMCE will obligate MNCs to respect international human rights law, international labour law and international environmental norms; to respect national laws and regulations, and abstain from interfering in their development.

The IMCE will further require MNCs to conduct their activities in accordance with national laws and regulations, administrative practices and policies on environmental protection. Provisions dealing with the end of environmental dumping will also be included. MNCs must be held accountable for the environmental impacts of their activities, such as water, soil and air pollution, or the destruction of ecosystems. They will be bound to provide compensation for the peoples, communities and States affected and, where appropriate, repair the damage and restore the environment.

The IMCE will have provisions stating that MNCs must rapidly, effectively and adequately compensate individuals, entities and communities harmed by their practices, providing compensation, restitution, retribution and rehabilitation for all damage caused or all goods depleted.

Finally, various mechanisms will be established at the international level to enforce the IMCE and monitor its implementation. As discussed in the preceding chapters, most international instruments lack enforcement and monitoring mechanisms at the international level as such, they have no way of holding MNCs liable.[491] This is a major gap that the IMCE will fill. Several regulatory bodies will be created which are necessary for their proper functioning of the IMCE. MNCs and States will have the obligation to cooperate with these bodies and provide them with all the necessary information and data.

The IMCE will also establish extraterritorial obligations for states to protect human rights. [492]

The International Mandatory Regulatory Body (IMCERB) will be established to monitor whether States and MNCs respect their obligations and implement the treaty. It will be able to receive individual and collective complaints regarding specific cases of breach of the IMCE. It will be mandated to analyse, investigate, document and inspect the practices of MNCs and their effects on human rights. Various focus groups will participate in the management and supervision of the IMCERB.

The regulation of ethical issues of MNCs by the IMCE will help keep MNCs focused while conducting their businesses. Thus, this Chapter discusses the contents of the IMCE; the enforcement and application of the IMCE; the drafting of the IMCE (the process of drafting of the IMCE and the organization that will draft the IMCE –IMCERB); the financial implications of maintaining the IMCE and the IMCERB.

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[491] International Commission of Jurists (2016): Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises. Geneva: ICJ. www.icj.org/wp-content/uploads/2016/10/Universal-OEWG-session-2-ICJ-submission-Advocacy-Analysis-brief-2016-ENG.pdf

[492] De Schutter 'Towards a New Treaty on Business and Human Rights Olivier' (2016) *Business and Human Rights Journal* 1(1) 41, 50. As stated by Olivier de Schutter, former UN Special Rapporteur on the right to food, "States may have to be reminded of their duties to protect human rights extraterritorially, by regulating the corporate actors on which they may exercise influence, even where such regulation would contribute to ensuring human rights outside their national territory […].";M Krajewski 'Ensuring the primacy of human rights in trade and investment policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights. Brussels: CIDSE' (2017). <www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/download/1375_b2cf35680353a999bc5900f6c4db1d4a.html>; J Martens & K Seitz 'Binding Rules On Business And Human Rights – A Critical Prerequisite To Ensure Sustainable Consumption And Production Patterns' <www.cambridge.org/core/services/aop-cambridge-core/content/view/45E25BD824C6EEB18CD8050752C119E7/S205701981500005Xa.pdf/towards_a_new_treaty_on_business_and_human_rights.pdf>; S Deva 'The Human Rights Obligations of Business: Reimagining the Treaty Business'(2014) <http://business-humanrights.org/media/documents/reimagine_int_law_for_bhr.pdf>

2. THE CONSULTATION PROCESS

The interest of several parties will be reflected in the IMCE. These parties are those that will be affected by the provisions of the IMCE. The starting point will be to have consultations with stakeholders, the citizens, employees and various focus groups.

2.1. Stakeholder analysis

This is a process used to identify all key (primary and secondary) stakeholders who have a vested interest in the issues with which the IMCE is concerned. The aim of stakeholder analysis process is to develop a strategic view of the human and institutional landscape, and the relationships between the different stakeholders and the issues they care about most.[493]

A stakeholder analysis can help to identify: the interests of all stakeholders, who may affect or be affected by the IMCE; potential issues that could disrupt the drafting of the IMCE; key people for information distribution during executing phase; groups that should be encouraged to participate in different stages of the IMCE; and ways to reduce potential negative impacts & manage negative stakeholders.

This information is used to assess how the interests of those stakeholders should be addressed in the drafting of the IMCE. Examples of stakeholders include government officials, policy makers, corporate social organizations (CSOs), and academics.

2.2. Citizens surveys

The views of citizens or nationals of different countries is important in the drafting of the IMCE to afford the citizens an opportunity to communicate their needs.[494] This will help citizens advocate their interests; ensure that their interests are protected; will improve the quality of the IMCE; and make the process of implementation at national law easier.

[493] Project Management 'What is Stakeholder Analysis?' <https://project-management.com/what-is-stakeholder-analysis/>.

[494] D Golubović 'Citizen Participation in Legislative Processes: A Short Excursion through European Best Practices'<http://www.ecnl.org/dindocuments/274_Brochure%20on%20citizen%20participation%20ENG.pdf>.

A study referenced in the Organization for Security and Co-operation in Europe (OSCE) Public Hearings Manual suggests that citizens are more inclined to embrace public policy if they have an opportunity to participate in the process, even if their proposals are not favourably met.[495]

This will also lead to a reduction in the cost of implementation of the IMCE because the citizens will be less inclined to resort to judiciary and other remedies to protect their interests. Citizen's survey will be done through information dissemination, consultation, active participation and accountability.

a. Information dissemination

This will entail informing the citizens through their governments about the IMCE. This will be done through public access to documents of significance, official gazette and government websites.

b. Consultation

Throughout the process of drafting the IMCE, the citizens will be asked to give feedback from the information given.

c. Active participation

During this process, the citizens will be asked to join working groups commissioned to prepare a draft IMCE.

The benefits of citizen survey are enormous, and this includes the fact that there will be a vast range of factors that will be considered throughout the drafting process of the IMCE which will make the IMCE a high quality international legal binding instrument. A citizen survey will also help make citizens feel more accountable.

2.3. Employee surveys

Employees of various companies will be consulted about the IMCE to ascertain their views about the IMCE and the kind of impact it would have on them.

Generally, the purpose of the IMCE is to compel companies to act ethically in all their dealings. Each MNC has employees so getting the views of the employees would help determine the practices of that MNC and the provisions that would be included in the IMCE. The employees that will form part of the survey include those in the legal department, logistics, managers and

[495] Ibid.

depending on the kind of company it is, employees in other select positions will form part of the survey.

2.4. Focus groups

It is important to have select focus groups as part of the survey as they have experience and exposure in CSR, business ethics, corporate governance, drafting and implementing regulations.

The focus groups will be selected based on their contributions, exposure and expertise in the different areas. For example, business ethics and CSR groups, international law and international criminal law experts, MNCs regulating bodies and members or officials of various courts.

2.4.1 Business ethics and CSR groups

These are groups that deal with different aspects of business ethics; organizations that regulate a company's policies and practices with respect to the company's corporate governance, insider trading, bribery, discrimination, CSR and fiduciary responsibilities. Examples of such companies include: Academy of Business in Society, Business for Social Responsibility, Business Roundtable Institute for Corporate Ethics, Committee Encouraging Corporate Philanthropy, Corporate Register, Corporate Responsibility Officer Association, CSR Asia, CSR Europe, Interfaith Center on Corporate Responsibility, Network for Business Innovation and Sustainability, Network for Business Sustainability, CSR Turkey and Triple Pundit.[496]

Some of these groups will be consulted to ascertain their views on CSR and business ethics.

2.4.1.1 International Law and International criminal law experts

One of the primary hindrances with the IMCE is to recognise MNCs as legal persons. As discussed in the previous chapters, it is possible for MNCs to be granted recognition under international law and also possible to hold MNCs criminally liable for violations of ethical practices. Thus, it is important to consult various international law and international criminal law experts particularly those that support the recognition of MNCs as international legal persons. These experts will be selected from various universities, research institute and corporates.

[496] University of Washington 'Social Responsibility & Business Ethics: Groups & Orgs' <https://guides.lib.uw.edu/c.php?g=344310&p=2318462>.

2.4.1.2 MNCs regulating bodies

Various organizations that regulate MNCs in different countries and on an international plane will be consulted. This will ascertain the challenges that some of these MNCs regulating bodies are facing or have faced to ensure that the IMCERB does not make that mistake.

2.4.1.3 Courts

Domestication of the IMCE is important. Therefore, members of the judiciary system will have to be consulted. This will help to understand how to domesticate the IMCE in various countries. The members of the judiciary will highlight some of the challenges that the IMCERB will face in that specific countries and how to overcome them.

2.5. Economists and tax practitioners

Economists and tax practitioners will be consulted to ascertain ways in which MNCs compliance with the IMCE can be tied to their profit-making ability in each country of operation.

The consultation process will form the preliminary stage of the drafting of the IMCE. The next step will be the drafting of the IMCE.

3. DRAFTING OF THE IMCE

The drafting of the IMCE will be in three phases: the first phase will consist of a drafting manual which will be based on findings during the consultation process. The manual shall be developed for the drafting of the IMCE. This manual shall serve as a guideline for the drafters of the IMCE. The contents of the drafting manual shall include but is not limited to the glossary and recommendations; symbols used; introduction (containing details about the standards of the IMCE); structure of the IMCE and recommendations; substantive content; drafting rules; and selected references and information resources. The drafting manual will provide a guideline for the IMCERB to follow.

The second phase will be the development of the Bill for comment from all the relevant stakeholders. The drafting of the Bill will be done by experts of CSR and business ethics that form part of the IMCERB. The IMCERB will be responsible for the drafting of the IMCE.

The third phase will be the final phase which will be based on finalizing the Bill after the comments from the different stakeholders have been received. As the IMCERB is the body that

will be drafting the IMCE, it is important to discuss the parties that will form part of the IMCERB and their different roles.

3.1 Members of the IMCERB

Members of the IMCERB will consist of the following who will have representatives from each country. It is important that each country in the world is represented to represent the interest of the country. However, it may be impossible to have representatives from each country. Therefore, country representation will be selected based on the following criteria:

i. CSR Individual Experts
ii. Non-governmental organization
iii. Legislative drafters
iv. Representatives from each industry

Each of the members of the IMCERB play a vital role in the drafting of the IMCE. These roles are discussed below.

3.1.1 CSR Individual Experts

CSR experts that form part of the IMCERB will be from various countries that are able to apply the legislation and the political, social and economic culture of each country. This will help to ensure that the affairs and practice of MNCs are well reflected in the IMCE. Each CSR expert will have to work with the governments in their countries.

The CSR individual experts will be those who have the systematic training and actual experience in CSR related issues. The level of experience or training will be nothing less than 10years on a national and international platform. These experts will come from private, government and non-governmental institutions. The experts will have to participate in a test to determine whether these experts are knowledgeable in the prevailing requirements and standards for the preparation of the IMCE.

They will help explain to the public and the MNCs the importance of CSR being mandatory and the cost implications.[497] They will also ascertain the time and effort that will be required in the drafting and implementation of the IMCE. The experts will help clarify the definition of

[497] SM Isa 'Corporate Social Responsibility: What Can We Learn from The Stakeholders?' (2012) 65 *Procedia - Social and Behavioral Sciences* 327, 330.

CSR because there is currently a confusion as to the meaning of CSR in many countries.[498] The experts will help clarify CSR contribution of each MNC in proportion with the size and profitability of the MNC.[499] As most people believe that merely donating money is being CSR-oriented, the CSR experts will have to work hard to change the mind-set of people toward more authentic CSR. The CSR experts will help to emphasize the different CSR aspects in the IMCE.

There will be room for promotion for these experts through the years based on performance appraisals of each experts. From time to time, there may be organized training for these experts to upgrade their skills. The findings and reports of these experts will have to be verified for faults by the seniors of the IMCERB.

3.1.2 Non-governmental Organizations (NGOs)

A non-governmental organization (NGO) is any non-profit, voluntary citizens' group which is organized on a local, national or international level.[500] Their tasks include but is not limited to variety of services and humanitarian functions, bringing citizen concerns to governments, advocate and monitor policies, encourage political participation through provision of information, dealing with human rights, environment or health.[501] They also provide analysis and expertise on various issues, serve as early warning mechanisms and help monitor and implement international agreements.[502]

NGOs are considered an important part of the drafting process for their ability to engage corporations and business associations to identify and disseminate corporate best practices.[503] They form partnerships to promote social and environmental actions, provide technical assistance to corporations, elaborate commonly agreed certification schemes, promote and design corporate social responsibility (CSR) standards as well as management and reporting processes, and participate in CSR monitoring and auditing.[504]

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[498] T Janggu, C Joseph & N Madi 'The Current State of Corporate Social Responsibility among Industrial Companies in Malaysia' (2007) 3(3) *Social Responsibility Journal* 1, 9.
[499] JY Lu & P Castka 'Corporate Social Responsibility and Environmental Management' (2009) 16 *Corporate Social Responsibility Environment Management* 146, 149.
[500] Non-governmental Organization 'Definition of NGOs' <*http://www.ngo.org/ngoinfo/define.html*>.
[501] Ibid.
[502] Non-governmental Organization (note 498 above).
[503] D Arenas, JM Lozano & L Albareda 'The Role of NGOs in CSR: Mutual Perceptions among Stakeholders' (2009) 88 *Journal of Business Ethics* 175,176.
[504] JG Ruggie 'The Theory and Practice of Learning Networks' in M McIntosh, S Waddock & G Kell (eds.) '*Learning to Talk: Corporate Citizenship and the Development of the UN Global Compact*' (2004) 1, 24.

Because NGOs are often engaged in social development and environmental development activities, they are good enough to support the industrial development by ensuring community and corporation participate in the developmental process.[505]

NGOs will be targeted strategically. For example those within the industrial location and closer to the community can better act as moderators and facilitators in the realization of their social need and better environmental protection.[506] The NGO will also help industrial management in convincing the community or the companies in that area thereby help develop a proactive IMCERB.

Several companies and MNCs may find it more convenient to participate in CSR initiatives through NGOs than directly by themselves. For example, companies give monetary fund to NGOs and show the CSR expenditure in their balance sheet.[507] Therefore, NGO-corporate partnerships will bring together a lot of resources and a variety of skills for the development of the IMCE.

3.1.3 Legislative drafters

The CSR experts could be consultants or legislative drafters from government. A legislative drafter is a lawyer who translates public policy objectives into a legally effective form.[508] Legislative drafters have an understanding of the legislative process as well as the impact and effectiveness of any policy on any country.[509] They work in close collaboration with the instructing ministry or office and ensure that, so far as possible, legislation is based on sound legal principles, gives effect to the intended policy and is as clear and understandable as practicable.[510]

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[505] KM Dileep 'Strategic Partnership with NGO'S to Corporate Social responsibility: HR Managers Role' available at: <*http://www.indianmba.com/Faculty_Column/FC292/fc292.html*>.

[506] S Poret 'Role of NGOs in India in Promoting CSR' <https://www.slideshare.net/reliancefoundation/role-of-ngos-in-india-in-promoting-csr>; S Poret 'Corporate-NGO partnerships in CSR activities: why and how?' <https://hal.archives-ouvertes.fr/hal-01070474/document>.

[507] VK Bharath 'NGO Corporate Partnership in Development' <https://www.slideshare.net/bhaveshmahida33/ngo-csr>.

[508] Pacific Islands Forum Secretariat 'Shaping laws in the Pacific – The role of legislative drafters: A study of legislative drafting services in Forum Island Countries' (2013) <http://www.pilonsec.org/images/stories/32nd/pifs_shapinglaws_report.pdf at 12>.

[509] The Ministry of Justice 'The Role of the Legislative Drafter' <http://www.moj.gov.na/the-role-of-the-legislative-drafter>.

[510] Ibid

These legislative drafters will ensure that the IMCE observes constitutionality; complies with fundamental legal principles; is workable and effective; is clear and unambiguous; withstands challenges or adverse criticism in Parliament and in court.[511]

3.1.4 Representatives from each industry

By industry, this thesis refers to the different economic sectors: fishing, mining, finance, agriculture, tobacco, technology, construction, chemical, pharmaceutical, real estate and defense. The representatives from each industry represents the views of the public. Therefore, including each industry representative as part of the IMCERB means that the public is part of the process and as such enhancing and promoting public participation.

In some countries, failure to involve the public in the process of passing laws could lead to the laws not being passed. For example, in South Africa, in *Matatiele Municipality and Others* v *President of the Republic of South Africa and Others*[512] the constitutional issue was whether the correct procedure was followed when the legislature sought to pass the Twelfth Constitutional Amendment that would in effect alter the provincial boundaries of KwaZulu-Natal and the Eastern Cape. The Appellants challenged the constitutionality of the Constitution's Twelfth Amendment Act of 2005 (Twelfth Amendment), as well as of the Cross-boundary Municipalities Laws and Repeal Related Matters Act 23 of 2005 on grounds that the KwaZulu-Natal Provincial Legislature had failed in discharging its duty to facilitate public involvement and therefore Acts were not passed according to the Constitutional provisions.[513]

Each country has a procedure that the national Assembly or Cabinet should follow when passing a law and, in most cases, the Constitution of that country will clearly outline the process.[514]

Having representative from each industry in the IMCERB is important for several reasons. First, The IMCE will affect them therefore it is important that they are include so that a dialogue can be had with them and to get their different views on the IMCE. Second, it will help resolve

[511] The Ministry of Justice (note 507 above).
[512] *Matatiele Municipality and Others* v *President of the Republic of South Africa and Others* (2006) ZACC 12.
[513] Section 74(3)(b)(ii): "(3) Any other provision of the Constitution may be amended by a Bill passed– (a) by the National Assembly, with a supporting vote of at least two thirds of its members; and (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment- (ii) alters provincial boundaries, powers, functions or institutions..."
[514] *Merafong Demarcation Forum and Others* v *President of Republic of South Africa and Others* (2008) ZACC 10; L Nyat 'Public Participation: What has the Constitutional Court given the public?' <http://www.saflii.org/za/journals/LDD/2008/15.pdf>.

contentious issues in the industry because they know these issues. Third, to ensure that the IMCE achieves and includes good governance principles.

Fourth it will lead to the following benefits: increased ease of implementation; consensus building; minimising costs and delay; maintaining credibility and legitimacy; addressing any anticipated public concerns and attitude.[515]

The industry representatives have direct access to the public therefore the public consensus can help to frequently produce decisions that are responsive to public values and substantively robust and will also help to resolve any conflict, build trust, educate and inform the members of that industry sector about the IMCE.

It will also help pave the way for the IMCE to run smoothly and help to build support and eliminate resistance.[516] Once the consultation process is complete the IMCERB will commence the drafting and it is important to provide a guideline for the IMCERB of the proposed contents of the IMCE. These contents are discussed below.

4. CONTENTS OF THE IMCE

The contents of the IMCE will consist of the preamble, interpretation guidelines to assist the courts in interpreting the provisions of the IMCE when a dispute arises, domestication of the IMCE into national laws and the role of the courts, the enforcement obligations and consequences of breach, incentives for MNCs complying with the IMCE by being ethical in their dealings and participating in CSR activities, functions of the IMCERB, and the financial sustainability of the IMCERB. This section is divided into different parts: Part A to Part K.
The content of the IMCE is meant to do two things: make it obligatory for MNCs to act ethical and participate in CSR activities; and to bridge the gap in the body of international law in that there is no international instrument that holds MNCs accountable for their ethical violations. The contents of the IMCE are discussed below.

[515] A Marzuki 'Challenges in the public participation and the decision making process' (2015) 201(01) *Sociologija I proctor* 21, 39; JM Bryson & AR Carroll 'The What, Why, Who, How, When, and Where of Public Participation' (2002) *Review and Action Planning: Handout* 1, 23; G Rowe & LJ Frewer 'A typology of public engagement mechanisms' (2005) 30(2) *Science, Technology, Human Values* 251, 266.
[516] J Midgeley, A Hall & M Hardman 'Community Participation and the State' (1986) London: Methuen 1,34; VA Clapper 'Advantages & Disadvantages of Citizen Participation' (1996) in K Bekker (ed) 'Citizen Participation in Local Government' *Van Schaik* 1, 76; R Masango R 'Public Participation: A Critical ingredient' at 65 Good governance' (2002) 21(2) *Politeia* 52, 58.

4.1 Part A: The Preamble

A preamble is an introductory statement, a preliminary explanation of a statute which summarizes the intention of the legislature in passing the measure.[517]

The preamble will set out the main objectives which the IMCE is intended to achieve. The proper function of preamble is to explain and recite certain facts which are necessary to be explained and recited, before the enactment contained in the IMCE could be understood.

Thus, the IMCE will contain a Preamble which will explain and recite important facts pertaining to MNCs, ethics, CSR amongst others.

4.2 Part B: Guidelines to Interpretation

This section of the IMCE will address how rules, principles, words, phrases, expressions and guidelines pertaining to various aspects of CSR, MNCs and ethics should be dealt with by the various States. The judiciary in various countries will have to apply the IMCE in the course of administration of justice. During this process, the courts will be required to interpret the words, phrases and expressions used in the IMCE.

The select guidelines to interpretation will help create a uniform understanding of the true sense or the meaning of what may seem to be unclear. There are some standard rules of interpretation which are employed by courts when interpreting statutes and these include: literal, golden, mischief rule, and the integrated approach (known as the purposive approach). The IMCE will encourage courts to apply some of these rules of interpretation discussed below. However, this thesis supports the literal rule of interpretation as the rule of choice.

4.2.1 The Literal rule

This is the process of finding out the true sense by making the statute its own expositor.[518] This rule is also known as the plain-meaning rule, is a type of statutory construction, which dictates that statutes are to be interpreted using the ordinary meaning of the language of the statute unless a statute explicitly defines some of its terms otherwise.[519] This implies that the law must be read word for word and should not divert from its true meaning.

[517] US Legal 'Preamble Law and Legal Definition' <https://definitions.uslegal.com/p/preamble/>.
[518] AP Ramnathan *Law Lexicon* 2 ed (2002) 1134.
[519] Ibid.

This rule provides guidance for courts faced with litigation that turns on the meaning of a term not defined by the statute, or on that of a word found within a definition itself.[520] Therefore, the absence of ambiguity means that there will be no need for construction.[521] The main role players in the interpretation of statutes are the courts. Where the literal rule of interpretation is employed in the interpretation of statutes, the duty of court of law is simply to take the statute as it stands, and to construe its words according to their natural significance.[522]

The words must be applied with nothing added and nothing taken away. Although on face value, the literal rule seems perfect, there are certain defects of the literal rule of interpretation: logical defect which constitutes of ambiguity, inconsistency and incompleteness; and absurdity or irrationality.

4.2.1.1 Ambiguity

Ambiguity occurs where a term or an expression used in a statute has various meanings and there is no clarity as to which meaning it represents in a particular context or place.[523] In such circumstance, the courts will be compelled to go beyond the statute and yet stick to the same literal words of the statute to ascertain its meaning.[524] In such cases it is the duty of the court to make up the defect by adding or altering something, but the court is not allowed to do more than that.[525]

4.2.1.2 Absurdity

Sometimes the court might ascertain a certain meaning to the statute which was never the intention of the legislature. This is also one of the problems of literal rule.[526] The traditional rule of literal interpretation forbids the court to attach any meaning other than the ordinary one. It closes the doors for any type of judicial innovation.[527]

Since the rule is to stick to the exact words of the statute few lawmen say that it is like imposing a rule even when you know that it is not right. If the court applies literal rule and feels that the interpretation is morally wrong, then they cannot avoid giving the interpretation.

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[520] J Langan *Maxwell on the Interpretation of Statutes* 12 ed (2008) 28.
[521]E Gurjar 'Literal Rule: A Tool for Statutory Interpretation' <https://www.ssrn.com/abstract=2002873>.
[522] Ibid.
[523] A Reddy 'Literally Interpreting the Law- A Appraisal of the Literal rule of Interpretation in India' <http://www.manupatra.com/roundup/338/Articles/Literally%20interpreting%20the%20Law.pdf>.
[524] Gurjar (note 519 above).
[525] Ibid.
[526] Reddy (note 521 above).
[527] Ibid.

4.2.2 The golden rule

This rule is a modification of the literal rule. It states that if the literal rule produces an absurdity, then the court should look for another meaning of the words to avoid that absurd result.[528] The rule was closely defined by Lord Wensleydale in *Grey v Pearson*[529] who stated:

> *'The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no farther.'*

So, the golden rule is a modification of the literal rule to be used to avoid an absurd outcome. The golden rule is also known as a logical rule that when two options are open, the court should adopt the more logical of two.

The advantages of the golden rule include:[530]

a. It respects the words of the parliament except in limited situations; the golden rule provides an escape route where there is a problem with using the literal meaning;

b. It allows the judge to choose the most sensible meaning where there is more than one meaning to the words in the Act or Statute;

c. It can also provide reasonable decisions in cases where the literal rule would lead to repugnant situations (this goes for the wider meaning) - This is present in the Re Sigsworth case in the case examples, because allowing the son to benefit from his crime would have been unjust.

d. The main advantage of The Golden Rule is that drafting errors in statutes can be corrected immediately. This is seen in the R v Allen (1872) case where the loopholes were closed, the decision was in line with parliament's intentions and it gave a more just outcome.

e. A major disadvantage of The Golden Rule is that judges can technically change the law by changing the meaning of words in statutes. They can, potentially infringing the separation of powers between legal and legislature.

Some of the challenges with the golden rule include:[531]

[528] Reddy (note 521 above).
[529] *Grey v Pearson* (1857) HL Cas 61.
[530] Langan (note 518 above)
[531] Ibid.

a) Judges are able to add or change the meaning of statutes and thereby become law makers infringing the separation of powers;
b) Judges have no power to intervene for pure injustice where there is no absurdity;
c) The golden rule provides no clear means to test the existence or extent of an absurdity. It seems to depend on the result of each individual case;
d) There are no real guidelines as to when it can be used;
e) what seems to be absurd to one judge may not be to another - this means a cases outcome is decided upon the judge, rather than the law;
f) It is very limited in it is use, so it is only used on rare occasions;
g) It's not always possible to predict when courts will use the golden rule, making it hard for lawyers and people who are advising their clients;
h) The Golden Rule won't help if there is no absurdity in the statute. For example, the *London and North Eastern Railway v Berriman case*[532] where the widow couldn't get compensation because the wording of the statute didn't allow for this circumstance.

4.2.3 The mischief rule

This third rule gives a judge more discretion than either the literal or the golden rule.[533] This rule requires the court to look to what the law was before the statute was passed in order to discover what gap or mischief the statute was intended to cover.[534] The court is then required to interpret the statute in such a way to ensure that the gap is covered.

The rule is contained in Heydon's case[535] where it was held in interpreting a statute, four things have to be considered:

a. What was the common law before the making of the Act?

b. What was the mischief and defect for which the common law did not provide?

d. The true reason of the remedy.

Once the above have been considered, then the courts (judges) are to make such construction as shall suppress the mischief and advance the remedy. This rule gives the court justification for going behind the actual wording of the statute in order to consider the problem that the

[532] *London and North Eastern Railway v Berriman* (1946)
[533] Langan (note 518 above).
[534] Ibid.
[535] Heydon's Case (1584),

particular statute was aimed at remedying.[536] At one level it is clearly the most flexible rule of interpretation, but it is limited to using previous common law to determine what mischief the Act in question was designed to remedy.

4.2.4 The integrated/ purposive approach

The purposive approach sometimes referred to as purposive construction, purposive interpretation, or the modern principle in construction is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (that is, a statute, a part of a statute, or a clause of a constitution) in light of the purpose for which it was enacted.[537]

The historical source of purposive interpretation is the mischief rule established in Heydon's Case.[538] Purposive interpretation was introduced as a form of replacement for the mischief rule, the plain meaning rule and the golden rule to determine cases. Purposive interpretation is exercised when the courts utilize extraneous materials from the pre-enactment phase of legislation, including early drafts, committee reports, etc.[539]

Critics of purposivism argue it fails to recognize the separation of powers between the legislator and the judiciary.[540] The legislator is responsible for the creating of law, while the judiciary is responsible for interpreting law. As purposive interpretation goes beyond the words within the statute, considerable power is bestowed upon the judges as they look to extraneous materials for aid in interpreting the law.[541]

The courts will use these rules in the interpretation of the IMCE where there is a grey area. The golden rule will first be applied and where it does not give a clear meaning, the courts will employ the mischief rule and if that is not possible the courts will apply the integrated approach. Further to the clear guidance on how to interpret any grey areas in the IMCE, the IMCE will have a section that defines various important keywords. This subsection under interpretation section of the IMCE will be called definitions.

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[536] I Mclead 'Literal & Purposive Techniques of Legislative Interpretation: Some European Community & English Common Law Perspective' (2004) 29(3) *Broklyn Journal of International Law* 1109, 1113.
[537] Ibid.
[538] DG Gifford 'A CASE Study in the Superiority of the Purposive Approach to the Statutory nterpretation: Brueswitz v Wyeth' *South Carolina Law Review* 1, 38.
[539] Ibid.
[540] Mclead (note 534 above).
[541] Ibid.

4.3 Definitions

The IMCE will contain provisions on the definition of the specific responsibilities of corporations and business enterprises.[542]

It will also contain a section that defines some of the primary key words such as: MNCs; companies; corporations; corporate ethics; ethical; corporate governance; investments; sustainability; stakeholders; green; value add; core competencies; best practices; leverage; philanthropy; accountability and ethics; environment; sustainability employees; customers; energy; community; impact; missions; ethical labor practices; volunteering; sustainable development; honesty; integrity; trustworthiness; loyalty; fairness; reputation; morale; leadership; code of conduct; code of ethics; code provisions; corruption; corrupt activities; ethics; good faith; focus group; governance; morals; transparency; values; reporting system; good faith; multinational company; small medium enterprises; transnational companies; organisational citizenship behaviour; international business; corporate performance; regulatory oversight; developed countries; developing countries, concern for others, respect for others, law abiding, commitment to excellence.

These keywords will be defined as they are the primary words that will form part of the core of the IMCE. It is important that these key words are clearly defined to provide clear guidelines for the MNCs and other stakeholders. For example, till date there is no standard definition of what an MNC is. The known definition is often associated with size of the company by its sales, the proportion of foreign sales or foreign assets, the number of foreign subsidiaries, the number of foreign workers,[543] its form and location in more than one country.[544]

It is important that the IMCE has a uniform definition of what kind of companies constitute MNC to avoid confusion in its application across the globe. This will include a definition of

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[542] International Commission of Jurists (2016): Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises. Geneva: ICJ. www.icj.org/wp-content/uploads/2016/10/Universal-OEWG-session-2-ICJ-submission-Advocacy-Analysis-brief-2016-ENG.pdf

[543] R Aggarwal & E Hutson 'What is a multinational corporation? Classifying the degree of firm-level multinationality' (2011) *International Business Review* 20 557–577 at 558; C Kwok & D Reeb 'Internationalization and firm risk: An upstream-downstream hypothesis' (2000) *Journal of International Business Studies* 31(4) 611–629; D Lecraw 'Performance of transnational corporations in less developed countries' (1983) *Journal of International Business Studies* 14(1) 15–34.

[544] B. Kogut 'Multinational Corporations' (2001) available at: < https://www0.gsb.columbia.edu/faculty/bkogut/files/Chapter_in_smelser-Baltes_2001.pdf> (accessed 6 June 2018).

the size of the company, exact figure of the amount of its foreign sales or foreign assets and the number of foreign subsidiaries. These will be expressly outlined in the IMCE.

Third, the meaning of business ethics, ethical and ethics will be expressly defined. Where business ethics is concerned, the IMCE will be more focused on corporate governance and corporate social responsibility.[545] The words ethics and ethical are related in that they are intertwined. Ethical relates to beliefs about what is morally right and wrong;[546] and ethics are these moral principles that govern a person's behaviour or the conducting of an activity. It is imperative that there is a uniform definition of what constitutes ethics and ethical behaviours for all MNCs to avoid any assumptions in interpretation. Ethical and unethical behaviours will be listed, and this will provide clear guideline for MNCs.

4.4 Part C: Application of the IMCE

The IMCE will address how the IMCE will apply to each MNC and various focus groups in all countries all over the world. By applying to MNCs it will deal with various aspects which include:

4.4.1 To MNCs

The IMCE will apply to all MNCs in all industries across the world and in all sectors. Some of these industries include finance and insurance, health and social care, durable manufacturing, retail trade, wholesale trade, non-durable manufacturing, federal government, information etc. It will adequately make provision for all MNCs and their practices.

It will apply to MNCs by addressing the ethical issues they face in each sector and industry and also addressing the issues of MNCs participating in CSR activities and on CSR spending. It will also apply to violations or abuses of human rights resulting from any business activity that has a transnational character, including by firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership.

All MNCs shall comply with all applicable provisions in the IMCE, wherever they operate, and throughout their supply chains. The IMCE will require the MNCs to implement internal

[545] D Payne, BE Joyner 'Evolution and Implementation: A Study of Values, Business Ethics and Corporate Social Responsibility' Journal of Business Ethics (2002) 3, 41(4) 297-311 at 298-299.
[546] Cambridge dictionary 'Ethical' <https://dictionary.cambridge.org/dictionary/english/ethical>.

policies consistent with IMCE to allow risk identification and prevention of unethical practices resulting directly or indirectly from their activity and establish effective follow up and review mechanisms, to verify compliance throughout their operations.

4.4.1.2 Ethical issues in each sector and industry

The IMCE will outline what is ethical for each sector and industry. For example, unethical issues in the service industry include invasion of privacy of customers; internet related problems; trust and reciprocity between service employee and customer; incident of misuse; and fraud.[547]

Unethical practices in the food industry include but is not limited to unfair and unjust treatment of food industry employees; food safety and labelling; food distribution and hunger; risks from additives; risk from pesticide residues.[548] The fashion industry experiences unethical practices such as child labour, low wages, health and safety risks, environmental degradation, and animal cruelty.[549] The financial service industry experiences unethical practices such as interest rates determination, protecting the depositor's funds, private issues, and questionable sales practices.[550]

The IMCE will take into consideration that MNCs are in different line of businesses. Once the MNC falls within that industry, they must operate their business or affairs in the manner outlined by the IMCE.

4.4.1.3 CSR spending

This section will contain a list of what constitutes CSR activities and the involvement of each MNC. Since the IMCE is mandatory, MNCs will be obligated to divert a certain percentage of their profits to CSR. Lessons will be taken from the case of India after the IMCERB has conducted a detailed study on whether mandatory contribution of company profits to CSR is actually working in India. The outcome of this study coupled with research from various local groups will help the IMCERB to determine whether to evaluate MNCs participation in CSR activities by mandatory profits contribution or to use other means.

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[547] JD Rendtorff & J Mattson 'Ethical Issues in the Service Industries' (2009) 29(1) *The Service Industry Journal* 1,1.

[548] PB Thompson 'Ethical issues Facing the Food Industry' (1993) Journal *of Food Distribution Research* 12, 12.

[549] R Stinson 'Ethical Fashion 101: The Top 5 Ethical Issues in the Fashion Industry' <https://ecowarriorprincess.net/2016/09/ethical-fashion-101-the-top-5-ethical-issues-in-the-fashion-industry/>.

[550] A Federwisch 'Ethical Issues in the Financial Services Industry' <https://www.scu.edu/ethics/focus-areas/business-ethics/resources/ethical-issues-in-the-financial-services-industry/>.

Some of the CSR areas which MNCs can get involved in include: eradicating extreme hunger and poverty; promotion of education; promoting gender equality and empowering women; reducing child mortality and improving maternal health; combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases; ensuring environmental sustainability; employment enhancing vocational skills; social business projects; contribution to the prime minister's national relief fund or any other fund set up by the central government or the state governments for socioeconomic development and relief and funds for the welfare of the scheduled castes, the scheduled tribes, other backward classes, minorities and women; and such other matters as may be prescribed.[551] However, most MNCs may prefer to direct their CSR activity to areas where they are familiar and this appears to be a factor in why spending on health CSR far outstrips that on Education.

Although the list is endless and will be determined based on the sector or industry in which each MNC operates, the IMCE will cater for each industry or sector and will ensure that no industry or sector is left out.

As active and mandatory participation in CSR activities is the primary objective of the IMCE, the IMCE will contain a detailed guideline of its CSR expectation on MNCs as follows: quantum of amount to be spent on CSR; how and what to spend the amount on; sanctions for failure to comply with the IMCE; MNCs role, purpose and objectives where CSR is concerned; and the consequences for MNCs not meeting its minimal CSR obligations. This will lead to uniformity amongst the companies and questions as to whether CSR is for public recognition will no longer be applicable.

With regards to the issue of quantum, India can be used as an example. Currently, India mandates companies to give 2% of their net profit to charitable causes. However, the case of India is unique to only India although examples can be borrowed from it. In the case of the IMCE, MNCs will be required to spend 2% of what they make in each country on CSR activities. This means that if an MNC is based in India, Nigeria, Ghana and Uganda, they will have to spend 2% of their net profit in each country on CSR activities.

If an MNC cannot meet these requirements, then it must satisfy with the use of its bank statement that it is incapable of doing so within the financial year and state the exact period within which it will satisfy that requirement. This is one way of ensuring that each MNC

[551] K Rangan, LA Chase & S Karim 'Why every company needs a CSR Strategy and how to build it' <https://www.hbs.edu/faculty/Publication%20Files/12-088.pdf>.

contributes towards the development of a country and also fulfils its CSR obligations. Whether this will work will be ascertained by those that will conduct field research on the issue.

4.4.1.4 Legal Personality

The legal personality of each MNC will have to be addressed by the IMCE. This will be after various international legal persons have negotiated with States and have reached an agreement on the place of MNCs in international law. This will be addressed by stating whether MNCs have full international legal personality or their legal personality is limited. If it is limited, the factors that limit them will have to be clearly identified. The application of their legal personality will be outlined.

There may be cases where some States have agreed to grant legal personality to MNCs while other States have not declined. This means that in those instances, the MNCs in the consenting States will be subject to the IMCE while the MNCs in the non-consenting States will not be subject to the IMCE. However, the objective of the IMCERB will primarily be to ensure that all States consent to the recognition of the legal personality of MNCs.

As MNCs will have international legal personality, this means that they can also be sued by individuals. The position of individuals suing MNCs will be addressed under this section in the IMCE.

4.4.1.5 Obligation of the MNCs

Currently, the operations of MNCs are not regulated in most developing countries. When MNCs enter the developing countries, they simply bribe their way through domestic laws or apply domestic laws in a manner suitable to their business. This is different with MNCs operating in developed where there are more stringent laws regulating their operations.

The IMCE will expressly state what is expected from MNCs in both developed and developing country. The IMCE will have provisions for MNCs operating in countries where there is relaxed regulations on the operations of MNCs and where there are stringent regulations. The obligations will be uniform and will apply to all MNCs regardless of their point of operations. Some of the obligations will include but not limited to acting ethically in all their dealings; participating in CSR initiative; contributing to the development of the environment in which they operate; not damaging the environment/country in which they operate in etc.

4.4.1.6 Ethics

Although ethics has already been defined in the section dealing with definitions, it is important to have a separate section that will address the issue of ethics in detail. Business ethics are moral principles that guide the way a business behaves.[552] Acting in an ethical way involves distinguishing between right and wrong and then making the right choice. It is relatively easy to identify unethical business practices.[553] For example, companies should not use child labour; they should not unlawfully use copyrighted materials and processes; and they should not engage in bribery.[554]

However, it is not always easy to create similar hard-and-fast definitions of good ethical practice. The IMCE will address the 12 ethical principles for business executives: e.g. honesty, integrity, promise-keeping and trustworthiness, loyalty, fairness, concern for others, respect for others, law abiding, commitment to excellence, leadership, reputation and morale; and accountability. The IMCE's expectation on MNCs regarding the application of these principles will be stated.

The ethical principles will be the same across all industries regardless of the nature of the business. This will help create uniformity. Although most MNCs have voluntary codes of ethics, each code of ethics will have to comply with the IMCE even in its voluntary state. This may mean the re-drafting of these codes.

Most MNCs must operate in many countries around the world and face a myriad of laws and customs or norms of behaviour that can be quite different from each other.[555] What is considered unacceptable or problematic business behaviour in one nation might be quite acceptable in another. This concept is referred to as cultural relativism. This means that different societies place different expectations and priorities on organizations for their ethical and socially responsible conduct. This variability of expectations and priorities set by different country cultures upon an MNC's multiple country subsidiaries indeed poses complexity.

An MNC with many subsidiaries or joint venture organizations in many diverse country cultures would expect to customize its detailed ethical and social responsibility strategies for

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[552] An Anglo American case study 'Business Ethics and Corporate Social Responsibility' available at: <https://businesscasestudies.co.uk/anglo-american/business-ethics-and-corporate-social-responsibility/what-are-business-ethics.html>.
[553] Ibid.
[554] SJ Carroll & MJ Gannon *Ethical Dimensional of International Management* (1997) 3.
[555] YH Godiwalla & F Damanpour 'The MNCs Global Ethics and Social Responsibility: A Strategic Diversity Management Imperative' (2006) 1(2) *Journal of Diversity Management* 1, 49.

different country cultures. It may choose to have common, global core values regarding ethical and social responsibilities, and, vary its detailed content and process regarding ethical and social responsibilities from one country culture to another. Cultural differences among countries would result in different culture-directed ethical and social responsibilities strategies.

Attitudes toward ethics are rooted in culture and business practices.[556] MNCs in acting ethically will be obligated to have respect for the integrity of the ecosystem and consumer safety; not to dump toxic products; and produce more good than harm for the host country.[557]

MNC's activities must benefit the host country. This means that they must contribute by their activity to the host country's development; respect the human rights of their employees; to the extent that local culture does not violate ethical norms respect the local culture and work with and not against it; pay their fair share of taxes; and cooperate with the local government in developing and enforcing just background institutions.

The IMCE will incorporate various corporate cultures so as to reduce unethical practices of businesses. Corporate culture is said to play an even greater role than formal programs when it comes to preventing unethical behaviours in organizations.

To determine if an MNC is ethical, the IMCE will look at the following factors: abiding by laws and appropriate regulations; if it operates honestly, competes fairly, provides a reasonable environment for its employees, and creates partnerships with customers, vendors, and investors. In other words, it keeps the best interest of all stakeholders at the forefront of all decisions.

Some characteristics of an ethical company include the following:

a. Respect and fair treatment of employees, customers, investors, vendors, community, and all who have a stake in and come in contact with the organization
b. Honest communication to all stakeholders internally and externally
c. Integrity in all dealings with all stakeholders
d. High standards for personal accountability and ethical behaviour
e. Clear communication of internal and external policies to appropriate stakeholders

These ethical characteristics will be incorporated into the IMCE.

[556] H Deresky *International Management: Managing Across Border & Cultures* 5ed (2004) 37.
[557] T Donaldson & TW Dunfee 'When Ethics Travel: The Promise and Peril of Global Business Ethics' (1999) 41(4) *California Management Review* 41(4) 1, 47.

4.5 Part D: Application of International laws

Having ascertained in the previous chapters that it is possible for MNCs to have legal personality, several provisions from various international laws will be crafted into the IMCE. These are provisions that deal with human rights.

Once these provisions have been incorporated into the IMCE, the IMCE will have to be domesticated by all the countries. The process of domestication is discussed below.

4.6 Part E: Domestication of IMCE into National Law

This part will address how the IMCE will be domesticated into the national laws of each country. Though it will address domestication on a jurisdictional level, it will also discuss the likely challenges that each country may face with domestication and how those challenges may be overcome.

Like any other international instrument, the IMCE will respect the fact that the Constitution of any country is the supreme law of the land and this means that the IMCE will be subject to the provisions of the Constitution. Although it is a generally accepted principle of international law that in relations between States who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty; even if that municipal law is the state's own Constitution. Likewise, a State once it has ratified a treaty, cannot successfully amend its domestic legislation with a view to evading obligations incumbent upon it under international law. In such a situation, international law prevails over municipal law.

Thus, a State that is uncertain about the compatibility of its policy on a particular issue would desist from ratifying a treaty that would oblige it to amend legislation that it is not ready to amend, especially so in view of the numerous international law decisions in this area.

This means that the IMCERB will have to do a study on the provisions of the Constitution that may serve as a hindrance to the domestication of the IMCE to the national laws of that country.

Even though international law requires a State to carry out its international obligations, the processes used by a State to carry out its international obligations will vary for example, from legislation, executive and/ or judicial measures.

For an international agreement to impose binding legal obligations on States that international agreement must enter into force for that State. Most contemporary bilateral treaties provide that they will enter into force only upon ratification by the States that are to become parties to the

agreement. Multilateral treaties, or conventions, usually provide that they will enter into force upon the ratification or accession of a stipulated number of states.

A state is under no legal obligation to ratify a treaty, even one that it has signed. Ratification is discretionary with signatory States and may be withheld for any reason. [558] Accession[559] also is a voluntary and discretionary act on the part of a state. Once a treaty does enter into force, the principle *pacta sunt servanda* imposes the legal obligation on the parties to carry out the agreement in good faith.

Thus, the domestication of the IMCE into national laws will follow the process of ratification or accession. The IMCE will make provision for both instances.

4.7 Part F: The role of the Courts

There are two types of courts that the IMCE will refer parties to. These are the national courts and the international courts. The IMCE will expressly state which court will have the jurisdiction to hear various types of disputes that may arise between MNCs and individuals; or MNCs and States.

Various international courts will be selected where a dispute can be adjudicated. With regards to national courts, the question will be whether the court has the capacity (experienced judges and resources of each court or nation) to adjudicate on such matters and the willingness of the judicial officers to hear the matters.

4.7.1 National Courts

In evaluating the role of national courts, it is helpful to distinguish among three types of treaty provisions: horizontal treaty provisions; vertical treaty provisions; and transnational treaty provisions.[560] Horizontal treaty provisions regulate relations between states; vertical provisions regulate relations between States and private parties; and transnational provisions regulate relations among private parties that cut across national boundaries.[561] The IMCE contains both vertical and transnational provisions because it regulates relations between States and MNCs (who are private parties) and relations between MNCs in various countries.

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[558] E Pratomo & RB Riyanto 'The Legal Status of Treaty/International Agreement and Ratification in the Indonesian Practice within the Framework of the Development of the National Legal System' (2018) 21(2) *Journal of Legal, Ethical and Regulatory Issues* 1, 3.

[559] Accession generally refers to subsequent adherence to a treaty by non-signatory states.

[560] D Sloss 'Treaty Enforcement in Domestic Courts' <http://law.scu.edu/wp-content/uploads/Introduction20Jan_202009.pdf 1-49>.

[561] Ibid.

Though some national courts like the United Kingdom (UK) courts do enforce treaty based rights on behalf of private parties, courts in countries like the United States of America (USA) do not.[562] In the USA although domestic courts have the authority to apply treaties directly in some cases, they rarely utilize their judicial power to remedy treaty violations committed by government actors.[563] Therefore, the question is whether national courts can play an active role in the enforcement of the IMCE and if yes, to what extent?

The national courts are important because they will have to provide remedies for the individual victims of IMCE violations. This is important for the following reasons: first, because if the domestic courts enforce the norms embodied in the IMCE, governments are more likely to comply with these norms. Although judicial enforcement by domestic courts is not the only factor that influences governmental compliance, but it is a significant factor.

Second, national courts act as a bridge any gap that may exists between the private rights granted to MNCs by the IMCE and the access to international dispute resolution mechanisms.[564] National courts bridge the gap between courts and international instruments but if national courts fail or refuse to apply treaty-based norms, there is a risk that those norms may be under enforced. National courts can help promote compliance with vertical and transnational treaty obligations, but where the IMCE creates an international dispute resolution mechanism, this would relegate the national courts to a secondary role.

This section will deal with the challenges that each MNC will face when their matter is heard in a national court and how some of these challenges can be addressed. Which national court will have the capacity to hear such matters: High Court, Supreme Court or Constitutional Court?

The aspect of resources of these courts will also be addressed in the IMCE. If a national court does not have the capacity to hear such matters brought to it by MNCs, where can the MNC go

[562] SD Murphy Does International Law Obligate States to Open their National Courts to Persons for the Invocation of Treaty Norms that Protect or Benefit Persons? (2008) in D Sloss & D Jinks (eds) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* 1, 35.
[563] Sloss (note 558 above).
[564] SA Riesenfeld & FM Abbott 'Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study' <https://doi.org/10.1111/1758-5899.12485>.

to? Can the matter automatically be referred to and be heard by international courts? Provision will be made for international dispute mechanisms as an alternative to national courts.

4.7.2 International Courts (ICs)

The IMCE will confer jurisdiction on International Courts (ICs) and include provisions, known as jurisdictional clauses, which will provide that certain categories of disputes shall or may be subject to one or more methods of dispute settlement. These jurisdictional clauses will provide for recourse to conciliation, mediation or arbitration; others will provide for recourse to the select international courts, either immediately or if other means of dispute settlement fail.[565]

This section will deal with some of the challenges that ICs may face with hearing various disputes. For example, some jurisdictions may have a domestic law that prohibits the application of the IMCE or the MNCs to have any matter that arises within their jurisdiction to be heard by any IC. This will be addressed by the IMCE in detail.

The IMCERB will conduct a detailed research into the domestic laws of each country to ascertain whether there are such limitations and why such limitations exist. Once a report has been compiled, a solution will be found for each limitation and crafted into the IMCE. The IMCERB will bring these matters against the MNCs or the corporates.

The jurisdiction of these international courts, the types of remedies the ICs can order and in some cases the scope of legal review that is allowed will also be covered.[566] The function of the ICs include but not limited to international administrative review and international dispute settlement.

4.7.3 International Administrative Review

As an international administrative review body, the IC will hear challenges to the decisions of the IMCERB or the national courts in cases raised by individuals whom the administration's decisions affect.[567]

They will review the decisions of IMCERBs set up in each country who are charged with implementing the IMCE. Where States creatively interpret the IMCE to promote national policy objectives, the ICs international administrative review may serve as a sort of

[565] KJ Alter'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review' <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1211&context=facultyworkingpapers>.
[566] *Hadidjatou Mani Koraou* v *The Republic of Niger* CCJ (2018).
[567] KJ (note 563 above).

international enforcement system for regulatory decision-making.[568] The judge's primary objective will be to check that the administrative decision complies with the IMCE.

The IC is important for the enforcement of the IMCE because they will help to ensure that there is uniformity in the interpretation of the IMCE, to provide guidance for domestic administrators and judges regarding new and complex technical legal issues, to provide a legal redress for victims of MNCs ethical violations.

4.7.4 International Dispute Settlement

This is the standard role of ICs. The IMCE will include provisions for dispute settlement and proposal will be made to parties to choose between non-legalized dispute settlement like arbitration and mediation or legalized dispute settlement. The IMCE will expressly state which specific body will be named as final venue for settling disputes regarding the agreement (often the International Court of Justice or a regional court).

The IMCE may propose some ICs for the parties and will obligate the proposed ICs to adjudicate matters that arise from the IMCE in accordance with provisions of the IMCE; or give advisory opinions on legal questions referred to it by the IMCERB and other specialized bodies.

4.8 Part G: Enforcement of Obligations placed by the IMCE on MNCs

The IMCE will contain provisions on sanctions for failure to comply with it. It will address the consequences for MNCs being unethical in their dealings and not complying with their minimal CSR obligations. This means that the minimal level of CSR compliance will be expressly stated by the IMCE. It will deal with the duties expected of its directors, or the information they are expected to disclose. The enforcement mechanisms expected of each state will be clearly outlined.

Enforcement of the IMCE will be twofold: enforcement against the States for violation of its obligations under the IMCE and failing to hold MNCs accountable for unethical practices; and enforcement against MNCs for failing to fulfil its obligations under the IMCE.

Obligation will be placed on States to ensure that MNCs comply with the IMCE and they will also be held liable for failing to fulfil these obligations. In addition, States have positive obligations to prevent abuses from being committed against people under their jurisdiction. For

[568] Ibid.

example, in the event a community is damaged because of the abuses of the MNC, the state may be in violation of its obligation under the IMCE to protect that community if it fails to undertake a serious and effective investigation into the practice of the MNC.

Each matter will be considered on a case by case basis to decide if the state is responsible, by act or omission, for the given action of the MNC. The extent of the liabilities of States will be expressly stated by the IMCE. The types of liability will also be stated accordingly. Under this section, the issue of breach and consequences of breach of the IMCE will be discussed in detail.

4.8.1 Breach of the IMCE

The breach of the IMCE refers to the act of failing to comply with the provisions of the IMCE or violation of a duty in the IMCE. The breach could be committed by a state or by the MNC because they failed comply with the obligation incumbent upon them. Having established that companies can have obligations under international law, this means that they can be held liable for breach. Currently, with voluntary codes of ethics, there are no consequences for breach of the code. However, the IMCE will state what amounts to breach and the consequences for such breach.

Under the IMCE, States will have an international responsibility to ensure that MNCs are compliant while the MNCs will be obligated to ensure that their activities are compliant with the IMCE. If an MNC is non-compliant or fails to meet its CSR objectives, as MNCs are juristic persons, the sanctions cannot be imprisonment but could be a monetary fine. It could be financial sanctions or impediments when doing business in certain areas.

Some of the consequences will include economic sanctions on the company, trial or imprisonment for the Director(s) of the MNC (this will obligate them to ensure that their company is ethical) which or who does not comply with its CSR objectives or criminal fines.

There will be a sanction for omission to act in conformity with the IMCE be it in the form of: a) single act; b) series of acts that are wrongful when taken together; or c) one MNC assisting another to commit the wrongful act (which could lead to attribution). All these could attract the sanctions listed above. Directors and Shareholders will be held liable for any breach by the MNCs if at the time of the breach or the moment of the violation or abuse of human rights they were in charge of the decision-making process.

4.9 Part H: Incentives for MNCs participating in CSR activities

Although the IMCE is mandatory, there will be several incentives awarded to MNCs that act ethically and participate in CSR initiatives. This will be a good way to motivate MNCs that are primarily profit oriented. One major incentive would be in the form of awards such as financial awards, international recognition, tax incentives, grants or loans, streamlining bureaucracy, grants or loans, and adoption of best practices of each company into the IMCE.

One incentive that will be appreciated by most MNCs will be the tax incentives and this include tax cuts by providing tax cuts to MNCs that operate based on CSR and are ethical in their dealings.[569] The IMCERB will negotiate with several countries for these tax incentives.

Further to the tax incentives, an award ceremony would be held on a yearly basis whereby the most complying MNC receives a lump sum in the millions and is awarded a certificate. Other companies that are compliant will also receive certificates and some financial reward. The awards and recognition will be publicized on various media platforms giving the MNC great international image.

The IMCERB will be responsible for ascertaining which MNCs were most compliant based on the MNCs annual reports and also the IMCERB's investigation into the legitimacy of what is claimed in that report. Reports will have to be submitted four to six months before the award date to give the IMCERB adequate time to investigate what is claimed in the reports. States will also be rewarded for their effort in ensuring that MNCs operating in their countries are compliant. The reward for States will be a certificate and recognition on various media platforms.

The question that may arise is how the IMCERB will raise the funds to reward MNCs. This is addressed in Part J below.

4.10 Part I: Functions of the International Mandatory Code of Ethics Regulatory Body (IMCERB)

The idea of an IMCE will be discussed with several countries in order to give them detailed brief on the purpose of the IMCE. Once the consent from several countries has been obtained, a representative body or organization from each country will form part of the IMCERB that will conduct further research into the laws of each country; the place of CSR; the regulation of ethical issues; MNCs unethical practices; and how CSR will fit into the laws of each country.

[569] D Georgaraki 'Tax incentives in corporate social responsibility' (2011) *Global Conference on Innovations in Management* 142, 159.

The IMCERB office will be based in a first world country. This is because the first world countries will have the resources and capacity to sustain it as opposed to developing country.

As the IMCERB will be an independent regulatory agency, its committee members will be the stewards of the IMCERB. They will provide general oversight to set strategic direction, ensure financial and operational viability of the IMCE. The IMCERB will function in two capacities: as an administrative body and as a legislative body.

The administrative function of the IMCERB will be to:

a. Direct the IMCE organization's operations;

b. Maintain effective relations with the community and other stakeholders;

c. Ensure the effectiveness of the IMCERB itself.

d. Setting, promoting, monitoring, enforcing standards of CSR; and

e. Ensuring that MNCs are ethical in all their dealings amongst other things.

The IMCERB will consult and work with universities (that have CSR departments), NGOs, professional organizations and many other entities to exchange information, increase awareness of the importance of mandatory CSR and get acquainted with any new CSR developments, understand and address the concerns of the corporate community.

The IMCERB will govern the affairs and functions of its sub-regulating bodies that will be established in each country. These bodies are very important because they will operate inside each country and therefore will have on ground experience on the operations of MNCs in each country, the applicable laws and the functions of existing regulating bodies if any. The insight received from these regulatory bodies will help the IMCERB in its functions and to improve the contents of the IMCE.

The legal functions of these IMCERB are discussed below.

4.10.1 Functions of the IMCERB in each country

There will be an established IMCERB in each country. The IMCERB is a regulatory body that will operate under the IMCE organization. Its primary activity will be to protect the public from the unethical practices of MNCs and to ensure that MNCs are actively involved with CSR activities as required by the IMCE.

Each country will have an IMCERB established on the basis of the legal mandate placed on States by the IMCE. The functions of the IMCERB will include but will not be limited to: imposing requirements based on the provisions of the IMCE, restrictions and conditions on the activities of the MNCs, setting standards in relation to any activity of the MNC, securing compliance and enforcement of the IMCE. The function of the IMCERB can be summed up as follows: quasi-legislative functions, executive functions, and judicial functions.[570]

a. Quasi-legislative functions

Under this function, the IMCERB will engage in rule making. The rules will be rules pertaining to the operations of the MNCs in as far as it relates to ethics and CSR activities.

b. Executive functions[571]

In performing their executive function, the IMCERB will have the primary responsibility of enforcing the IMCE. It will investigate complaints and identify conducts that seems to be in violation of the IMCE. It will also monitor compliance and will work to educate and advise lawmakers in the country about the IMCE.

c. Judicial functions[572]

As a judicial body, the IMCERB will have the status of a civil court though it is not the judiciary. The difference is that the judicial bodies generally deal with various interests, and in general, apply laws to facts. However, the IMCERB will be required to balance interests of multiple groups. The IMCERB will be expected to employ uniform procedures and processes in each country though this but may differ slightly to accommodate the legislations in different countries.

4.11 Part J: Financial Sustainability of the IMCERB

The IMCERB will be financially sustained through membership fees of each member of the IMCE, through contributions from international organizations and bodies; fees from different States; and fees received from penalties impeded on MNCs. With these finances, the complying MNCs will be rewarded, the operations of the IMCERB will be maintained and the general running and maintenance of the IMCE will be done.

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[570] US Legal 'Quasi-Legislative Power Law and Legal Definition' <https://definitions.uslegal.com/q/quasi-legislative-power/>.

[571] The Business Professor 'Functions of Administrative Agencies' <https://thebusinessprofessor.com/knowledge-base/function-of-administrative-agencies/>.

[572] S Sundar, SK Sarkar & P Kohli 'Regulatory interface with judiciary: the Indian experience' <http://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Sundar_Regulatory_Interface_with.pdf>.

4.11.1 Membership fees of each member of the IMCE

Each MNC will have to become a member of the organization established in respect of the IMCE. As members of this organization, they will have to pay a membership fee. This membership fee is what will be used to financially sustain the IMCERB.

The organization will have membership categories for each MNC. These categories will be set based on various profit levels or financial ability of MNCs. For example, the MNCs that make profit of between US$100million and US$150 million will pay a different membership fee from those that make a profit of between US$50million and US$100 million.

The marginal difference of the membership fees between MNCs will not be huge. This membership fee will be paid on an annual basis. It will be compulsory for all MNCs to be registered with the organization. Failure to register will limit their ability to operate in certain countries.

4.11.2 Contributions from International organizations and bodies

International organizations and bodies who are members of the IMCE and have interest in supporting the affairs of the IMCE will be asked to contribute. These international organizations and bodies include those who regulate corporate entities in various countries, international bodies that regulate the affairs of MNCs, bodies that regulate ethical practices of ethics, CSR organizations and any other organizations.

4.11.3 Donations from governments

Various governments will be approached to assist financially. The funds given will be used for the employment of the drafters of the IMCE. The funds will also cover personnel and organizational costs. Any reserve will be used to reward the different States and MNCs that are compliant. These governments will be made to understand some of the benefits of their contribution to the IMCERB.

4.11.4 Penalties on MNCs

Monetary penalties will be levied on the MNCs for non-compliance. The money paid by the MNCs will be used for maintaining the operations of the IMCERB.

4.12. Application of the IMCE widely other than in domestic context

The application of the legal standards of the IMCE would have to be wide. One way to make legal standards applicable widely than in a domestic context would be to hold the directors,

agents and employees of those MNCs which were incorporated in the country liable for any corrupt activity committed outside the country. This could also extend to the subsidiaries of those MNCs. The respective parties may be held liable for any violations if they cause, directly or through agents, an act in furtherance of the corrupt or unethical activities.

The MNCs would be vicariously liable for violations perpetrated by officers, directors, employees and third-party agents. They would also liable for the books and records violations of any majority owned subsidiary anywhere in the world.

One legislation that makes such provision is the United States Foreign Corrupt Practices Act of 1977 (FCPA) applies to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.[573] However, this thesis would only focus on the second category which is domestic concern.

The FCPA defines domestic concern very broadly to include 'United States (U.S) citizens, nationals, and residents, as well as, any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship that is either incorporated under the laws of a state or commonwealth of the United States, or whose principal place of business is in the U.S.'[574] Therefore, the foreign activity of private U.S. companies also falls within the FCPA's scope.

Domestic concerns may also be held liable for any act in furtherance of a corrupt payment authorized by employees or agents operating entirely outside the United States without any involvement from personnel located within the United States.[575]

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[573] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission 'A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act' <www.https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>

[574] 15 U.S.C. § 78dd-2(h)(1); G Sharfa & ILA Hunter 'Comparative Analysis of the Foreign Corrupt Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business' (2011) 18(1) *SA Journal of International & Comparative Law* 89, 94; CL Hall 'The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?'(1994) 2 *Tulane Journal of International and Comparative Law* 289, 294.

[575] Ibid.

Similarly, the MNCs would be held liable for the acts of their foreign subsidiaries if they authorized, directed, or controlled the activity in question. In the U.S. Domestic concerns may be liable if they were employed by or acting on behalf of the foreign-incorporated subsidiary.[576]

All MNCs will be subject to the IMCE and as such they would be vicariously liable for violations perpetrated by officers, directors, employees and third-party agents. They will also liable for the books and records violations of any majority owned subsidiary anywhere in the world.

4.13. Avoiding liability

If an MNC avoids liability using their subsidiaries, the IMCE would make provision for penalties in such instances. There would have to be a consideration into various factors as discussed below to ascertain whether the Parent company or the subsidiary would be liable.

4.13.1. Parent companies and subsidiaries

There are various impediments to good corporate governance, and these include but are not limited to companies avoiding liability through the use of under-capitalised subsidiaries, franchise networks and participation in corporate groups.

There are difficulties in holding a company liable because of the principle of company law, that a company has separate legal personality and limited liability.[577] The effect of this is that one company usually cannot be held liable for the actions, omissions or debts of any other.[578] In *James Hardie Industries plc* v *White (JHI)* the issue arose as to whether in some circumstances a parent company may be held liable for harm resulting from defective products produced by its subsidiary company.[579]

The New Zealand Court of Appeal (the Court) determined that there were three categories in which a duty of care may be imposed upon a parent company for the acts or omissions of its subsidiary so that such liability could arise such as: running the company; superior knowledge into the affairs of the company; or responsibility to carry out the business.

[576] Note 574 above.
[577] M Petrin & B Choudhury 'Group Company Liability' (2018) *European Business Organization Law Review* 19(2) 1,1.
[578] *Adams v Cape Industries plc* (1990) Ch 433 (CA) at 536.
[579] *James Hardie Industries plc v White* (2018) NZCA 580.

In *Smith, Stone, and Knight Ltd* v *Birmingham Corporation*,[580] Judge Atkinson set out guidelines as to when a subsidiary company can be said to be carrying out business on behalf of its parent company. These included details of: (a) the party carrying on the business, (b) whether the profits were treated like that of the parent company's, (c) whether the parent company was the head and the brain of the trading venture, (d) whether the parent company made investment decisions, (e) whether the parent company made a profit based on its skill and direction, and finally (f) whether the parent company was in 'effectual and constant control.[581]

The IMCE would impose liability on MNCs for the act or default of the subsidiary if it controls the subsidiary by piercing the corporate veil as discussed in Chapter two. For MNCs that fall under a corporate group, a method would be to impose a "group liability" on the corporate group that can be enforced against any of its asset rich members. In each case the liability of the subsidiary becomes the liability of the parent company either as the dominant shareholder or as a member of the integrated economic group.

Alternatively, the IMCE may affix a direct and separate liability on the parent company by reason of its failure to exercise a proper control over its subsidiary (sometimes referred to as "negligent governance"). The basis of the claim is still the factor of control, but that control gives rise to the legal obligation of the parent to the plaintiff. The argument is that the MNC has the power to prevent the harm, therefore, it should do so.

Despite the fact that the companies are separate legal entities and have limited liability, it is easier to hold the parent company liable than the subsidiaries. One of the benefits of suing the parent company is because the subsidiary has limited assets and offers little scope for recovery and may disappear altogether[582] In *Lubbe*, Lord Hope of Craighead said in the House of Lords: "In the present case the asbestos mines and mills in South Africa which were operated by the defendant's subsidiaries are all closed, and its subsidiaries are no longer present or available to be sued in that country."[583] In that case, as his Lordship concluded, there is little hope of recovery for the plaintiffs unless the parent company can be made liable. Even if the subsidiary is still available and has assets, or the parent corporation can be made accountable before local

[580] *Smith, Stone, and Knight Ltd v Birmingham Corporation* (1939) 4 All ER 116.
[581] Ibid.
[582] As was done in *Adams v Cape Industries* (note 580 above) at 1563, where American plaintiffs brought asbestos-related claims before a US Federal District Court in Texas against the English parent company.
[583] Ibid.

courts for its operations in a developing country because of its direct involvement in the mining, processing or manufacturing operation, there are often good reasons to proceed against the parent corporation in its own jurisdiction.

The MNC would make provision that the mere existence of a subsidiary relationship would not suffice. One of the requirements that would be stated would be for the parent company to be liable, there must be prove that the such parent company exercised *de facto* control over the operations of a subsidiary.

4.13.2. Liability of the company versus Liability of company directors and senior managers and the banks using the ethics theory

Companies or organizations are juristic persons, they do not have a voice or the ability to commit an act by themselves. They are controlled and managed by individuals and as such, the capacity of ethical or unethical behaviour vests on the individuals in that organization.

Drucker described ethical behaviour as a reflection process and a communal exercise that concerns the moral behaviour of individuals based on an established and expressed standard of individual values.[584] Ethical behaviour is an absolute requirement of all organizational leaders.[585] Employees' moral behaviour tends to show higher validity than knowledge-based measures.[586]

Leaders of organizations have a responsibility to uphold the highest standards of ethical behaviour.[587] Responsibility indicates that corporate leaders are most at fault for ethical or unethical company behaviour[588] Only individuals can be responsible, and not corporations.[589]

[584] WH Bishop 'The role of ethics in 21st century organizations' (2013) *Journal of Business Ethics* 118, 635-637.
[585] L DiGrande, L Neria &Y Brackbill et al 'Long-term posttraumatic stress symptoms among 3,271 civilian survivors of the September 11, 2001, terrorist attacks on the World Trade Center' (2011) *American Journal of Epidemiology* 173, 271-281.
[586] B Thun & EK Kelloway 'Virtuous leaders: Assessing character strengths in the workplace' (2011) *Canadian Journal of Administrative Sciences/Revue* 28, 270-283.
[587] J Li, & J Madsen 'Business ethics and workplace guanxi in Chinese SOEs: A qualitative study. Journal of Chinese Human Resource Management' (2011) 2, 83-99.
[588] AJ Stanaland, MO Lwin, & PE Murphy 'Consumer perceptions of the antecedents and consequences of corporate social responsibility' (2011) *Journal of Business Ethics* 102, 47-55.
[589] MT Dacin, PA Dacin & P Tracey 'Social entrepreneurship: A critique and future directions' (2011) *Organization Science* 22, 1203-1213.

Drucker contended that there is no such thing as business ethics a but what does exist is casuistry.[590]

Four viewpoints affect the outcome of ethical behaviours.[591] One viewpoint is cost–benefit ethics, in which a leader has a higher duty to confer benefits on others. Drucker called this viewpoint the ethics of social responsibility and noted it was too dangerous to adapt as business ethics because business leaders can use it as a tool to justify accepting unethical behaviour.[592]

The second viewpoint is the ethics of prudence, which means to be careful or cautious. The approach that Drucker[593] presented did not address anything about the right kind of behaviour, and leader must make decisions that are risky and that may be difficult to explain[594]

The third viewpoint is the ethics of profit, in which it would be socially irresponsible and unethical if a business did not show a profit at least equal to the cost of capital. The profit is an ethical metric that rests on very weak moral grounds.[595]

Leaders should take responsibility for the same code of ethics as employees and should not reduce their unethical activity to employees or cost benefit analysis.[596]
The research by Toubiana and Yair indicated the continued viability of the field of workplace ethics.[597] Ethical behaviour guidelines in the workplace often include a high level of importance on dedication.[598] Unethical behaviours enable workers to feel a strong alignment between their values and those of the business.[599] Workplace ethics direct organizational

[590] Casuistry means 'the resolving of moral problems by the application of theoretical rules'; F Pot 'Workplace innovation for better jobs and performance' (2011) *International Journal of Productivity and Performance Management* 60, 404-415.
[591] PF Drucker *The practice of management* (1954) New York, NY: Harper.
[592] M Toubiana & G Yair (2012) 'The solution of meaning in Peter Drucker's oeuvre' *Journal of Management History* 18, 178-199.
[593] Drucker (note 604 above).
[594] Toubiana et al (note 605 above).
[595] Ibid.
[596] ME Malik, B Naeem, & BB Ali 'How do workplace spirituality and organizational citizenship behavior influence sales performance of FMCG sales force' (2011) *Interdisciplinary Journal of Contemporary Research in Business* 3, 610- 620.
[597] Toubiana et al (note 605 above).
[598] FJ Yammarino, MD Mumford & A Serban, et al 'Assassination and leadership: Traditional approaches and historiometric methods' (2013) 24 *Leadership Quarterly* 822-841.
[599] R Suhonen, M Stolt, M & H Virtanen H et al 'Organizational ethics: A literature review' (2011) 18 *Nursing Ethics* 285-303.

leaders to achieve superior financial performance and productivity in harmony when facing unethical issues.[600]

As companies are separate legal entities and the liabilities of the companies in most cases are borne by the directors and senior managers; fault would have to be ascertained between the parties to determine which party contributed to the commission of the act, which party was in control at the time the act was committed and which party had knowledge that the act would be committed but still authorized or proceeded to commit it. The IMCE would make provision for the criteria for liability and the factors used to determine who should be liable for various actions and when such liability would eventually extend to the company.

This thesis would face challenges in proposing that lenders such as banks should be held liable. A Bank would lend the money based on the credibility of the documents submitted to it by the company. The bank may verify the documents submitted by the MNC, but if the MNC is fraudulent and has hidden its tracks well, the bank cannot be held liable as they would also be trying to recoup what they may have lost. The liability would solely fall on the MNC.

4.14. Application of environmental law and human rights law to IMCE standards

There is a persistent tension between private international law delimiting and distributing jurisdictions and the aspiration of universal application of international human rights and environmental protection norms.[601]

The privileges afforded to transnational corporations through private law are also well known: separate legal personality (allowing de facto control over subsidiaries despite the lack of such control being recognised de jure), limited liability (protecting shareholders from financial risks beyond their initial investment) and full legal capacity (companies' entitlement to own shares in other companies).[602]

In their current form, these privileges serve to undermine the objectives of international human rights and environmental law as well as the preventive and deterring functions of both criminal and tort law in domestic regimes.[603] Furthermore, the lack of transparency in corporate

[600] A Singh & N Rathore 'The organization is what the leader is: An ethical leadership framework for universities and research organizations' (2014) *Journal of Ethics in Science, Technology and Engineering* 1-6.
[601] N Jägers & MJ van der Heijden 'Corporate human rights violations: The feasibility of civil recourse in the Netherlands' (2008) *Brooklyn Journal of International Law* 33(3) 833–870.
[602] Ibid.
[603] Note 601 above.

governance and opaque decision-making processes make it often impossible to identify who is responsible within corporate networks, thus preventing the location of legal liabilities.[604]

It is partly due to these limitations that some scholars have argued that the characteristics of international law are symbolic of the emergence of an 'imperial global state' serving the interests of a transnational corporate capitalist class while undermining substantive democracy at intra- and inter-state level.[605] In this vein, Anderson highlights the "acute need to develop legal devices that can represent legitimate interests across national boundaries".[606]

To be sure, it is increasingly recognised that non-state actors hold responsibility also under international law. However, while international human rights law and environmental conventions places obligations on states to protect their citizens and environment, they do not provide international enforcement mechanisms to hold MNCs to account. For instance, under the European Convention on Human Rights (ECHR) states are not under an obligation to control their nationals outside the national territory.[607]

Similarly, existing environmental conventions and European Union (EU) directives do not provide legal remedies for plaintiffs outside the EU. For instance, the Aarhus Convention on the access to justice in environmental matters does not consider the potential for non-nationals to file claims in the EU and the EU Environmental Liability Directive specifies the liability of public authorities and not corporations.[608]

Because of the lack of implementing mechanisms for international human rights and environmental norms attention has been directed to the feasibility of applying national courts and domestic tort law. The mere fact that a company has obtained a licence to operate does not mean that it will not be liable for violations or non-compliance with the IMCE. if a company has obtained a pollution licence for its operations (e.g. a mine), would that shield it from any potential problems with compliance with the IMCE?

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[604] RK Larsen 'Foreign Direct Liability Claims in Sweden: Learning from Arica Victims KB v. Boliden Mineral AB?' *Nordic Journal of International Law* 83(4): 404-438 at 407.
[605] BS Chimni 'International institutions today: an imperial global state in the making' (2004) *European Journal of International Law* 15(1) 1–37.
[606] RM Anderson 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 *Washburn Law Journal* 399–425.
[607] O De Schutter, 'The accountability of multinationals for human rights violations in European law' (2004) 1 *Working Paper Series of the Center for Human Rights and Global Justice*
< https://dialnet.unirioja.es/descarga/articulo/3685091.pdf>.
[608] J Verschuuren, & S Kuchta, 'Victims of Environmental Pollution in the Slipstream of Globalization' in R. Letschert &J. van Dijk (eds.) *The New Faces of Victimhood – Studies in Global Justice* (2011) 8 Springer Science and Business Media.

In European foreign direct liability claims, cases that may otherwise represent human rights violations linked to natural resource exploitation are framed under domestic tort law as personal injury cases associated with environmental damages.[609]

The IMCE will make it mandatory for MNCs to ensure that they do not harm the environment. The IMCE may be incorporated into the environmental laws of each country so that they can be applied domestically.

4.14.1. Climate Change and CSR

One of the challenges that companies face is climate change where they must redefine their current views on CSR from a voluntary luxury to being a necessity.[610] For example, the likelihood of limited clean water, expensive and unreliable energy force pose a high risk to communities and MNCs must ensure that in all their operations, resources are depleted to such an extent that clean water (as a result of pollution) and energy are not adversely affected.

The IMCE would hold MNCs liable to ensure that they comply with its environmental provisions to avoid the effect of climate change.

5. CONCLUSION

For the IMCE to be successful, there must be an extensive consultation process to ensure that the interest of members of the community, employees, employers and other focus groups are taken into consideration. The consultation process will be done through questionnaires both electronic and manual to ascertain the interests of each group of people that will be affected by the IMCE.

Once the consultation process has been completed and the necessary information has been collected, the drafting process will commence. The drafting of the IMCE will be done by members of IMCERB. The members of the IMCERB will consist of CSR experts (both individuals and organizations), members or employees of several NGOs, legislative drafters and representatives from each economic industry.

The IMCE will address several issues which other voluntary codes on CSR have been unable to address. This includes but is not limited to the sanctions for failure to participate in CSR activities, quantum for CSR spending; compulsory ethical issues for each MNC; liability of

[609] Larsen (note 621 above).

[610] MW Allen and CA Craig 'Rethinking corporate social responsibility in the age of climate change: a communication perspective' (2016) *International Journal of Corporate Social Responsibility* 1-11 at 1.

directors, shareholders etc.; and environmental and climate change amongst other things. Although there will be several challenges in its implementation in different countries, these challenges will be overcome with time as there will be a representative in each country that will form part of the IMCERB.

These representatives will know which aspects or areas of their national laws the IMCE will have to comply with so that the IMCE can easily be implemented in their country. To further mitigate the challenges that the IMCE will face, the expert knowledge of various members of the IMCERB will be extensively utilized.

Like every instrument, law or regulation ever drafted and subsequently passed, the IMCE will be no exception in that the first few years of its existence may not be the smoothest, but it certainly promises to improve with time. The IMCE will be the first of its kind therefore it is expected that there will be challenges in its success both at national and international level.

One way to ensure the success of the IMCE is to interpret words, rules and principles in the manner intended by the IMCE and no other interpretation will be given other than that which the IMCE intended to give it. This will make it easy to apply it to MNCs, to national laws and in courts.

To ensure that the IMCE is continuously effective, several measures must be put in place like maintaining the IMCERB financially and ensuring that they fulfil their functions.

CHAPTER FOUR

IMPLEMENTATION OF THE IMCE IN UK, NIGERIA AND USA

1. INTRODUCTION

Where international law is concerned, the question is often how such an international instrument will can be enforced in various countries. The assumption is that international law cannot be enforced because of lack of enforcement mechanisms and the fact that there is currently no standing body of international law enforcement officers, nor is there strong political support for creating such a body. This is the sole purpose of the IMCE.

Currently, there is no enforceable international instrument to hold MNCs accountable for their unethical practices as ascertained in Chapter one. Though the OECD Guidelines for MNEs, the ISO 14000Series and the UN Global Compact are in existence, but they are all voluntary. These instruments have been accused of being weak and unable to hold MNCs accountable. They are said to be for the sole purpose of public awareness and are used to ease consumers' consciences.

Thus, for the IMCE to fill these gaps, MNCs will have to be recognized as legal persons. Chapter two discusses the recognition of MNCs as legal persons. Granting them the recognition of legal personalities will make it possible for the IMCE to hold them accountable for violations of any unethical practices.

Having established that MNCs can be grated recognition as legal personalities, the contents of the IMCE are discussed in Chapter three and the provisions that deal with various aspects of ethics and CSR are discussed for example, various enforcement mechanisms, breach and ways to sustain the IMCE.

The IMCE will be implemented in several countries but its compatibility with the regulatory framework in each country is so important. Five major legal systems in the world will be used to test the implementation of the IMCE. The IMCE will have to be compatible in its application to the countries in these different legal systems.

This thesis uses Nigeria, United Kingdom and the United States as case studies to analyse how the IMCE could be applicable in these three countries. The Nigerian Legal System is based on the English Common Law. The United Kingdom of Great Britain (UK) consists of four

countries: England, Wales, Scotland and Northern Ireland[611] each with its own separate legal system.

The US legal system is based on federal law, augmented by laws enacted by state legislatures and local laws passed by counties and cities.[612] There is a legal system for the federal government (i.e. for the United States at the national level), and there is a separate system for each of the fifty states, for the District of Columbia (the nation's capital) and for each of the American territories. For the most part, these systems fall within the common law tradition, though there are significant civil law influences in some of the jurisdictions (most notably, Louisiana) that are located in territory that was once under French, Spanish or Mexican rule.[613]

This chapter discusses the various legal systems and the application of the IMCE to countries in these systems. Nigeria, UK and the USA will be used as case study for detailed analysis for countries in the various legal systems. The chapter seeks to ascertain if the IMCE can function, be applicable or implemented in various countries.

2. THE IMCE AND THE DIFFERENT LEGAL SYSTEMS

As indicated above the IMCE will have to be implemented in the different countries that consists of the various legal systems. It is important that the five (5) major legal systems and the aspects of these legal systems that the IMCE will have to consider be discussed to give a context. The focus will be on the differences between the systems; aspects of each system that will have to be conquered for the IMCE to operate; and the important principles of each system that the IMCE will contain.

This chapter examines the legal systems in the US, Nigeria and the UK and discusses how the IMCE can be implemented. The legal system is important because mandatory regulation can be enforced through the courts, which companies sometimes prefer.

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[611] Chattered Institute of Legal Executives (CILEX) 'The Legal System of the United Kingdom' https://www.cilex.org.uk/about_cilex/about-cilex-lawyers/what-cilex-lawyers-do/the-uk-legal-system>; Insights 'Enforcing International Law' <https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law

[612] Just Landed 'Legal System Laws and Courts in the US' available at: <https://www.justlanded.com/english/United-States/Articles/Culture/Legal-System>.

[613] 'United States: legal resources: Legal system <https://libguides.bodleian.ox.ac.uk/c.php?g=422817&p=2887103>; JS Knudsen 'Government Regulation of International Corporate Social Responsibility in the US and the UK: How Domestic Institutions Shape Mandatory and Supportive Initiatives' (2004) 1080 *British Journal of Industrial Relations* 164, 168.

2.1 Civil law Legal System

The Civil law system is followed by countries that were former French, Dutch, German, Spanish or Portuguese colonies or protectorates, including much of Central and South America.[614] Most of the Central and Eastern European and East Asian countries also follow a civil law structure.

The civil law system is a codified system of law. It takes its origins from Roman law. Its features include:[615]

a. A written constitution based on specific codes (e.g., civil code, codes covering corporate law, administrative law, tax law and constitutional law) enshrining basic rights and duties; administrative law is however usually less codified and administrative court judges tend to behave more like common law judges;
b. Only legislative enactments are considered binding for all. There is little scope for judge-made law in civil, criminal and commercial courts, although in practice judges tend to follow previous judicial decisions; constitutional and administrative courts can nullify laws and regulations and their decisions in such cases are binding for all.

c. In some civil law systems, e.g., Germany, writings of legal scholars have significant influence on the courts.

d. Courts specific to the underlying codes – there are therefore usually separate constitutional court, administrative court and civil court systems that opine on consistency of legislation and administrative acts with and interpret that specific code.

e. Less freedom of contract - many provisions are implied into a contract by law and parties cannot contract out of certain provisions.

In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code. Though the judge often brings the formal charges, investigates the matter, and decides on the case, he or she works within a framework established by a comprehensive, codified set of laws. The judge's decision is consequently less crucial in

[614]Guide to International and Foreign Law Research 'A Quick Primer on the World's Legal Systems' <https://guides.law.sc.edu/c.php?g=315476&p=2108388>; R Brouwer, 'On the Meaning of 'System' in the Common and Civil Law Traditions: Two Approaches to Legal Unity' (2018) 34(1) *Utrecht Journal of International and European Law* 45, 47-48; CB Picker 'International Law's Mixed Heritage: A Common/Civil Law Jurisdiction' (2008)41 *Vanderbilt Journal of Transnational Law* 1071, 1083.

[615] The World Bank Group 'Key Features of Common Law or Civil Law Systems' available at: <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law>.

shaping civil law than the decisions of legislators and legal scholars who draft and interpret the code.[616]

2.2 Common law Legal System

The common law tradition emerged in England during the middle ages and was applied within British colonies across continents.[617]

The common law system is still followed by many countries such as the former British Colonies and some protectorates, including the United States.[618] Some of the important aspect of the common law legal system are:[619]

a. Most countries in the common law system do not always have a written constitution or codified laws.
b. Once judicial decisions are made, they become binding and the decisions of the highest court can generally only be overturned by that same court or through legislation.
c. Extensive freedom of contract - few provisions are implied into the contract by law (although provisions seeking to protect private consumers may be implied).
d. Generally, everything is permitted that is not expressly prohibited by law.

Common law functions as an adversarial system, is a contest between two opposing parties before a judge who moderates.[620]

2.3 Religious law Legal System

Religious law refers to the concept of a religious system or document being used as a legal resource, refers to the concept that the word of God is law.[621] The use of religion for public law has a static and permanent quality, preventing improvement during legislative acts of government or development during judicial antecedent.[622]

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[616] Berkeley 'The Common Law and Civil Law Traditions <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>.
[617] Ibid.

[618] The Wordbank Group 'Key Features of Common Law or Civil Law Systems' <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law>.
[619] Ibid.
[620] Berkeley (Note 576 above).

[621] 'Religious Law' <http://www.aboutlawschools.org/legalsystems/religiouslaw/>
[622] Ibid.

The most important kinds of religious laws are Halakha in Judaism, Sharia in Islam, both of which denote the "path to follow", and Canon law in some Christian groups. The Halakha is followed by traditional and conservative Jews in both ecclesiastical and civil relations.[623] No country is completely governed by Halakha, but two Jewish people may decide, because of personal belief, to have an argument heard by a Jewish court, and be limited by its rulings.[624]

2.4 Customary Law Legal System

The legitimacy of customary law as a legal system derives from the notion that it has existed from time immemorial and manifests itself in the day-to-day cultural traditions of a people (Bennett, 1995).[625] Customary law is therefore dynamic in nature, and its form can vary between different groups of people and across time.[626] However, by focusing on the customary law of a relatively small region, or by identifying commonalities belonging to a certain type of customary law, one can narrow the scope of customary law because these approaches allow for a more specific line of inquiry.[627]

2.5 Mixed law Legal System

A mixed legal system is made up of countries with a combination the different legal systems discussed above. It is one in which the law in force is derived from more than one legal tradition or legal family.[628] For example, in the Québec legal system, the basic private law is derived partly from the civil law tradition and partly from the common law tradition.[629] Another example is the Egyptian legal system, in which the basic private law is derived partly from the civil law tradition and partly from Moslem or other religiously-based legal traditions. It can be a mixed system of civil law with common law; religious law and common law; or civil law, customary law and religious law.[630] Mixed jurisdictions traditionally combine common and civil law elements in an obvious way. Usually common law takes charge of public law, while

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[623] 'Note 581 above.
[624] Ibid.
[625] TW Bennett '*Human Rights and African Customary Law under the South African Constitution'* (1995) 178.
[626] D Wall 'Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights' <https://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-women%E2%80%99s-righ>.
[627] Ibid.
[628] CISG 'Mixed jurisdictions: Common Law *vs* Civil Law (codified and uncodified)' <https://www.cisg.law.pace.edu/cisg/biblio/tetley.html> (accessed 7 July 2018).
[629] J Du Plessis '*Comparative Law and the Study of Mixed Legal Systems*' (2006) 95; V Palmer 'Mixed Jurisdictions Worldwide: The Third Legal Family' (2001) 124.
M Werneer '*Comparative Law in a Global context: The Legal Systems of Asia and Africa*' 2ed (2006) 156.
[630] S Neudorfer & C Werning 'The Implementation of International Treaties into National Legal Orders: The Protection of the Rights of the Child within the Austrian Legal System' (2010) 14 *Max Patrick Yearbook of United Nations Law* 409, 414.

civil law governs the private law side.[631] Nigeria is an example of a country with a mixed system of common law, Muslim law and customary law.

Each of the selected countries have different legal system and there is need to assess the IMCE's compatibility with the different legal systems once implemented.

3. IMPLEMENTING THE IMCE IN COUNTRIES WITHIN DIFFERENT LEGAL SYSTEM

Currently, the status quo is to draft instruments which are not enforceable or cannot be implemented. The IMCE will be an exception as it will be implemented in various different legal systems. National institutions, especially courts, play a central role in implementing international law obligations. Other national actor includes the executive, administrative agencies, and legal advisers also play an important role in interpreting and applying international law.[632]

These domestic legal actors follow a set of public law rules generally well-developed in each national legal system, that govern how various forms of international law are received, how they interact with other sources of domestic law, and what institutions are responsible for implementing them. The modes of domestic incorporation of international law cut across multiple stages of the governance process and across governance systems.[633] While most studies focus on the process by which exogenously-given international law rules are made effective domestically—thus on the "interpretation," "decision-making" and "implementation" stages—the legal framework for this translation is closely tied to the rules that govern the state's participation in rulemaking and normative change.

For the IMCE to be implemented it would be subject to the domestic legal order of that particular country.[634] For one to ascertain the ways in which the IMCE will be implemented in countries with different legal systems, it is important to discuss the relationship between international law and national law.[635] This is because the IMCE is an international legal

[631] Comparelex 'Mixed Legal Systems in a Cultural-Traditional Context' <*https://comparelex.org/tag/mixed-legal-systems/*>.
[632] PH Verdier 'Modes of Domestic Incorporation of International Law' (2016) *Handbook on the Politics* of Public International Law 1, 17.
[633] Ibid.
[634] Note 591 above.
[635] Ibid.

instrument that will have to be implemented in national law so that it can be part of the domestic legal regime of that country and as such will be applicable in that country.

Without an understanding of how international law is made part of national law, the IMCE will face several challenges. In chapter three we outlined the provisions in the IMCE that provides guidelines on how countries in various legal systems will implement the obligations of the IMCE within their domestic legal orders. This chapter discusses the relationship between national law and international law using the monism and the dualism theories; and analyses the different approaches to implement international law.

The starting point will have to be through the national Constitution using two approaches: the traditional approach for countries following the dualist theory and the incorporation approach for countries following the theory of monism.[636]

3.1 The relationship between international law and national law: Monism and Dualism Theory

The relationship between international law and national law is determined through two traditional theories: monism and dualism.[637] Monism and dualism are the two systems of receipt of international law in domestic legal systems. The monist-dualist distinction will help to ascertain the relationship between international law and domestic legal systems.

3.1.1 The Monist theory

The monist system regards international law and national law as two parts of a single system in which international law automatically passes into the state's legal system so that when the state ratifies a treaty, that treaty is automatically and fully incorporated into national law.[638] Monism looks to directly incorporate ratified international law treaties in a state's domestic legal system.[639]

Therefore in a pure monist system, national law is seen as ultimately deriving its authority from international law which stands higher in the hierarchy of legal norms.[640] According to Morina, the monist model considers there to be just one legal order and thus international law and

[636] MD *Evans International Law* (2006) 428; JL Dunoff, SR Ratner & D Wippman *International Law Norms, Actors, Process. A Problem Oriented Approach* (2006) 267.
[637] Ibid.
[638] LF Damrosch & SD Murphy *International Law: Cases & Materials* 6ed (2014) 621.
[639] NW Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in Kenyan domestic legal system: A Comparative perspective' (2013) 13(2) *African Human Rights Journal* 415, 415.
[640] Ibid.

national law are not part of a single legal order.[641] The monist view generally asserts that international law prevails over domestic law.[642]

Therefore, international law is directly incorporated into domestic law once it becomes binding.[643] When a state has contracted valid international obligations, it is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.[644] Also once a state has ratified a treaty, it cannot successfully amend its domestic legislation with a view to evading obligations incumbent upon it under international law. In such a situation, international law prevails over municipal law. This means that if it fails to modify its legislation and it breaks a rule of international law it cannot justify itself by referring to its municipal law.[645] Thus, a state is under the duty to honour its international obligations even if it means changing its municipal law.[646] As stated in the United Nations Headquarters opinion on the international legal plane, national law cannot derogate from international law.[647]

A case in hand is the British in the Alabama Claims Arbitration[648] which sought to rely on lack of domestic legislation to avoid liability. The argument was dismissed on the ground that the British government could not justify itself for failure in due diligence on the plea of insufficiency of the legal means of action it possessed. The general rule of international law is that in relations between states who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty[649] even if that municipal law is the State's own constitution.[650]

3.1.2 The Dualist theory

The dualist system regards international law and national law as separate legal systems wherein a rule of international law binding upon the state does not automatically become part of national law.[651] It only does so when it has been transformed or incorporated into national law by an

[641] Note 599 above.
[642] V Morina, F Korenica & D Doli 'The Relationship between international law and national law in the case of Kossovo: A Constitutional perspective' (2011) *International Journal of Constitutional Law* 9(1) 274, 290.
[643] Ibid.
[644] J Obitre-Gama 'The Application of International Law into National Law, Policy and Practice' Paper presented at the WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control. New Delhi, India 1-23 at 7; *The Exchange of Greek & Turkish Population Cases* 1925 PCIJ Reports Series B No. 10.
[645] Article 27 of the Vienna Convention on the Law of Treaties 1969
[646] This is known as the principle of *pacta sunt servanda,* states that
[647] *Judge Schwebel* 1988 ICJ Reports 11.
[648] *Alabama Claims Arbitration* (1872) 1 International Arbitration 495.
[649] *The Greco-Bulgarian Communities Case* (1930) PCIJ series B. No. 17.
[650] *The Polish Nationals in Danzing case* (1931) PCIJ series A/B No. 44.
[651] P Malanczuk *Akehurst's Modern Introduction to International Law* 7th ed (1997) 143.

Act of the national level, such as an implementing statute for a treaty.[652] Dualism entails the transformation of international law into domestic legal system through the domestication of ratified international law treaties by means of the enactment of parliamentary legislation.[653]

The East African countries forming part of the British Commonwealth, lean towards dualism. Some examples include Kenya, Uganda and Tanzania.[654] To apply international law in a dualist legal system one has to begin at the municipal legal regime on the transformation of such treaties into national legislation.[655] Thereafter, the principles enunciated in the treaty would be justiciable in the country. However, this may differ in countries where the Constitution is silent on the status of treaties.

However, it has been argued that these monist-dualist approaches cannot be used because of their limitations.[656] One such important limitations is that they derive from theoretical debate of the nature of international law as opposed to actual classification of legal systems and neither theory offers an adequate account of the practice of international and national courts whose role in articulating the positions of the various legal systems is crucial.[657] As such, most national system do not adopt a monolithic approach to international law; most of them combine aspects of monist and dualist approaches. For example, in the UK, treaties do not become part of domestic law unless implemented by Parliament while courts may directly apply international custom.[658]

The choices a national system makes when adopting and applying each of these doctrines (monist/dualist) might have significant implications both for the effectiveness of treaties and for the democratic accountability and legitimacy of international law.[659] On the aspect of effectiveness of treaties, this may increase the credibility of a state's commitments and the

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[652] Ibid; H Charlesworth, M Chiam & D Hovell (eds) et.al. *Introduction in the fluid State: International Law and National Legal System* (2005) 89.

[653] RF Oppong 'Re-Imagining International law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2006) 30(2) *Fordham International Journal* 296, 297.

[654] J Obitre-Gama 'The Application of International Law into National La, Policy and Practice' Paper presented at the WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control. New Delhi, India 1,3.

[655] G Ferreira & A Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' 2014 17(4) *Potchefstroom Electronic Law Journal* 1470,1481.

[656] JM Berecz 'Towards a Monist Philosophy of Man' <https://www.andrews.edu/library/car/cardigital/Periodicals/AUSS/1976-2/1976-2-02.pdf>; DAJ Telman 'A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law' <https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1300&context=law_fac_pubs>

[657] J Crawford *Brownlie's Principles of Public International Law* 8ed (2012) 50.

[658] Ibid.

[659] Crawford (note 617 above).

effectiveness of the relevant international regime but this could also reduce the ability of domestic institutions to serve as a check on international law and international institutions and to act as intermediaries in adopting treaties to the national legal order.[660]

Because different countries use different approaches to implementing international law into their domestic legal systems, thus the IMCERB will conduct a research on how most countries incorporate international law into their domestic legal system and the IMCE will be drafted in such a manner that will make it easy for them to incorporate it into their domestic legal system.

Although international law does not allow countries' once they have ratified international law or if they use the monist approach to derogate from complying to its international law obligations, many countries still take due cognisance of their constitution. There is need to discuss the relationship between domestic law and international law by examining countries' constitutional rules.

3.1.3 Constitutional Rules

Ginsburg and his co-authors document how constitutions stipulate rules for making and applying international law, and explore the causes of these different constitutional design choices.[661] They find that both domestic political forces and transnational diffusion explain the manner in which states deal with international law in their constitution.[662]

Sandholtz likewise focuses on whether the constitution gives treaties direct effect and superior or equal status to domestic law. He finds that these constitutional rules affect compliance: countries have better human rights records when they have constitutional provisions that make treaties directly available to courts.[663]

Hathaway codes and explores the formal constitutional rules relating to the making of treaties.[664]There are good reasons for considering constitutional provisions relating to international law. Constitutions are often meant to serve as credible commitment devices because they raise the cost of deviating from the constitution's commitments ex post.[665]

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[660] Ibid.
[661] T Ginsburg, S Chernykh & Z Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) *U Illinois LR* 201.
[662] Ibid.
[663] W Sandholtz 'Treaties, Constitutions, Courts, and Human Rights' (2012) 11 *Journal of Human Rights* 1, 17.
[664] OA Hathaway 'Treaties' End: The Past, Present, and Future of International Lawmaking in the United States' (2008) 117 *Yale Law Journal* 1230, 1236.
[665] DC North & BR Weingast 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England' (1989) 49 Journal of Economic History 778, 803.

Making the rules that govern a state's relationship with international law constitutional in nature therefore makes it more likely that these rules will be followed in practice, which in turn sends a signal to potential treaty partners.[666]

Indeed, the fact that constitutions are harder to amend than ordinary legislation,[667] establish conventions that become harder to change,[668] and are usually justiciable,[669] all serve as a signal to potential treaty partners that the government is willing to incur the potential costs of following these formal rules in order to reap benefits of improving international cooperation.[670] Thus, when constitutions explicitly state that treaties shall be the supreme law of the land, for example, they suggest that it will be costly for executives or legislatures to simply set aside these treaties, which might make countries with such constitutional provisions more credible treaty partners.

Thus, the question which of these rules are constitutional in nature might thus be of interest in and of itself. The downside of looking at constitutional provisions alone, however, is that many constitutions are silent on many of the dimensions along which domestic legal rules govern a states' relationship with international law. For instance, while constitutions often explicitly allocate responsibility and articulate procedural rules for making treaties, they are often silent on the status of international agreements and custom in the domestic legal system.[671]

Yet, even when the constitution is silent, domestic legal systems still have rules for receiving international treaties and custom; these rules just happen to be contained in ordinary legislation or judicial interpretations rather than in the constitution itself. Thus, in many instances, researchers interested in the domestic rules that govern states' relationship with international law should not look at the constitution alone, which can paint an incomplete or misleading picture.[672]

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[666] Ibid.
[667] DS Lutz 'Toward a Theory of Constitutional Amendment' (1994) 88 *American Political Science Review* 332, 355.
[668] R Hardin 'Why a Constitution?' in Dennis Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (2013) 98.
[669] Ginsburg (note 621 above)
[670] DS Law 'Globalization and the Future of Constitutional Rights' (2008) 102 *Northwestern University Law Review* 1270, 1277; DA Farber 'Rights as Signals' (2002) 31 *Journal of Legal Studies* 83.
[671] Ginsburg (note 621 above) 201
[672] Verdier (note 592 above).

3.2 The Methods of implementing International Law or Treaties

There are three methods of implementing international law:[673]

a. Adoption;
b. Incorporation; and
c. Transformation.

These theories are associated with the monist and dualist theories.

3.2.1 Adoption approach

The adoption approach is also known as the traditional approach. It is in accordance with the monist theory and it is the automatic incorporation of international law as part of domestic law as provided for by the Constitution.[674] However, some Constitutions require legislative implementation for certain treaties to be applicable e.g. France, Belgium, Spain, Netherlands and the United States of America (USA).

This means that there is need for prior legislative approval often referred to as quasi- automatic incorporation, which authorises the government to commit to treaty obligations and incorporating or transforming the treaty into the domestic legal system.[675] The IMCERB will be responsible for obtaining this prior legislative approval.

3.2.2 Incorporation approach

This approach is mostly used by dualist countries.[676] Incorporation involves enacting or implementing legislation and appending to the text of the Act or its accompanying schedule, the relevant treaty.[677] Once incorporated, international treaties are accorded a higher status than domestic law superseded only by the Constitution.

However, in countries like Nigeria, the superiority of incorporated treaties is still not clear. For example, in the *Abacha* v *Fowehinmi*[678] the Supreme Court of Nigeria held that where there is a conflict between the African Charter and any other statute, the Charter will prevail because it is presumed that the legislature did not intend to breach an international obligation, thus the Charter possess a greater vigour and strength than any other domestic statute. Similarly, in

[673] M Kirby 'Domestic courts and international human rights law: The ongoing judicial conversation' *Utrecht Law Review* 168,177.
[674] OO Shyllon 'Monism/ Dualism or Self Executory: The Application of Human Rights Treaties by Domestic Courts in Africa Institute for Human Rights' (2009) *ABO Akademi University* 1,7.
[675] Ibid.
[676] Shyllon (note 634 above) 7.
[677] Ibid.
[678] *Abacha v Fowehinmi* (2006) 6 NWLR part 660.

Oshevire v *British Caledon Airways*,[679] the Court of Appeal held that any domestic legislation in conflict with international conventions is void.

In a later decision in *Registered Trustees of Constitutional Rights Project* v *President of the Federal Republic of Nigeria and Two Others*,[680] the court declared invalid a decree ousting the jurisdiction of the courts to entertain matters on the grounds that the African Charter which preserved the jurisdiction of courts prevailed over the decrees of the then Federal military government. The place of international law in Nigerian after incorporation is yet to be clarified.

Morina states that Stein acknowledges that most Eastern European countries have accepted that the doctrine of incorporation of treaties into the legal domestic legal order, which suggests that the post-communist European countries have followed a logic that accepts the monist model.[681]

3.2.3 Transformation Approach

Transformation involves amending, supplementing an existing legislation or without referring to the Treaty. Although section 12 of the Constitution of Nigeria explicitly requires implementation of treaties by incorporation, it is only the African Charter on Human and People's Rights that has thus far been incorporated. The practice has been to enact or amend existing legislation without reference to human rights obligation. Therefore, the Nigerian legal system is more leaned towards the transformation approach.

The only difference between incorporation, adoption and the transformation approach is the form that it takes in domestic law, the substance being the same human right. Thus, adoption which allows automatic application of the treaties by monist countries is heavily reliant on the attitude of courts.

In the same vein, incorporation and transformation which inevitably lead to enactment of legislation is not necessarily devoid of obstacles as it is the willingness of the court to apply principles of international law and not merely its enactment into domestic law that determines its enforcement at domestic level.[682]

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[679] Ibid part 163, 519-520.

[680] *ERAP v. Nigeria*, Judgment, ECW/CCJ/APP/0808 (ECOWAS, Oct. 27, 2009)

[681] E Stein 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions' (1994) in V Morina F Korenica & D Doli 'The Relationship between international law and national law in the case of Kossovo: A Constitutional perspective' *International Journal of Constitutional Law* 9(1) 2011 274,287.

[682] JAR Nafziger 'Reviewed Work: *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* by Dinah Shelton' *(*2013) 61(4) The *American Journal of Comparative Law*

Thus, adherence to the monist or dualist theories makes little difference for the individual seeking to enforce non self-executing provisions of a human rights treaty. Once a treaty is non-self-executing, it must be accompanied by implementing legislation otherwise it cannot be invoked by any court of law. Regardless of the approach which each country employs, the IMCE will follow a uniform approach. Thus, the IMCE will be self-executing which means that it becomes judicially enforceable upon ratification. Its self-executing nature is not limited to the existence of a constitution or any legislation.

4. APPLICATION OF THE IMCE IN NIGERIA, UNITED KINGDOM (UK) AND UNITED STATES OF AMERICA (USA)

The IMCE will have to be applied in various countries and its ability to work in all those countries is so important. Three countries: Nigeria (developing country), USA (developed country) and the UK (developed country) are used as case study to represent all the other countries. The purpose of selecting these countries is to ensure that the interest of both developed and developing countries are well reflected in the IMCE.

Second, to learn the different ways in which international instruments are implemented in these countries and to analyse the ability of the IMCE to be domesticated in these three countries. Finally, each developed and developing country has its own legal systems like common law, sharia law and traditional law. The application of the IMCE in these three legal systems (Nigeria, UK and USA) will be discussed in this section taking into consideration the applicable sources of law.

As stated in the previous chapters, the purpose of the IMCE and its intended objective in each country and for MNCs are as follows:

a. To make it mandatory for MNCs to act in an ethical manner in their businesses and to hold them liable for violations through sanctions.

b. To develop binding global universal moral values for all MNCs that ties MNCs compliance to the IMCE with its profit-making ability.

901, 902; DL Shelton 'International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (Introduction)' <https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1389&context=faculty_publications>; DT Björgvinsson *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis* (2015) 69.

c. To ensure that MNCs carry out their CSR obligations in terms of the IMCE.

Having established the legal system of each country and their method of implementing international law, this section discusses the regulatory framework in each country, the methods and challenges of implementing the IMCE in a uniform manner within their various regulatory framework.

4.1 Regulatory Framework (RF) for treaty implementation

In chapter one, the international regulatory framework of corporate governance and CSR through code of ethics was discussed. The focus was on the international regulatory frameworks (IRF) adopted and applied by governments to their national laws, this section discusses the international and national regulatory framework in place in the U.S., Nigeria and the UK. These regulatory frameworks are principles, rules, policies or laws (regulations)[683] that are applicable in each country or are used as guidelines.

It is important to understand the regulatory framework in each country so that the existing gap and the place of the IMCE, if any, can be identified. The regulatory frameworks discussed here are in relation to ethics and CSR in as far as they affect MNCs or corporates in general.

4.2 United States of America (USA)

The USA does not have many laws, policies or rules on ethics and CSR. Most companies have their own corporate code of conducts and company policies that deal with CSR. However, companies rely on the Foreign Corrupt Practices Act of 1977 in their ethical dealings. This Act is a States federal law that addresses accounting transparency requirements under the Securities Exchange Act of 1934 and another concerning bribery of foreign officials.

It makes it illegal for companies operating in the US to bribe foreign officials. It has been argued that the Act seemingly left U.S. companies at a competitive disadvantage because their foreign competitors remained free to continue securing business through bribery. With respect to CSR, most MNCs in the USA adopt principles from the international instruments discussed in chapter one.

The Foreign Corrupt Practices Act is binding on companies in the US. However, the international instruments are just guiding principles and are not enforceable on companies in

[683] L Viegas 'Corporate Governance-related Regulatory Framework for non-listed Companies in Brazil' <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/37329861.pdf>.

the US. The IMCE will be mandatory and enforceable and will also cover issues on corporate ethics and CSR.

The USA has a mixed legal system of monism and dualism.[684] This means that international law applies directly in the U.S. courts in some instances but not in others. Domestication happens through registration for non-self-executing treaties and direct implementation for self-executing treaties.[685] In the USA both statutes and treaties are considered to be supreme law of the land [686] but there are different practices of their administration and enforcement.[687]

Treaty law has binding force in the American court system and in order for the U.S. to fulfill its obligations under international law, it must sign and ratify treaties, particularly ones that are a reflection of the practice of most states.[688]

However, ratification is not enough. In the U.S., many international treaties are ratified, but victims of treaty violations have no recourse in the judicial system, and it is almost as if treaty provisions are a suggestion, as there are no repercussions when they are violated.[689]

To understand whether the IMCE will successfully be implemented in the USA, it is important to discuss the process of domesticating or implementing international law in the US, the role of the courts and congress, some of the challenges that may be faced and how the IMCE will address these challenges.

4.2.1 Process of implementing international agreements in the USA

The Constitution of the United States stipulates that treaties 'shall be the supreme Law of the Land.'[690] The Constitution allocates primary responsibility for entering into treaties to the executive branch (President and Senate), but Congress also plays an essential role.[691] First, in order for a treaty (but not an executive agreement) to become binding upon the United States,

[684] Ibid.
[685] Björgvinsson (note 642 above).
[686] US Constitution article VI, cl.2.
[687] J Galbraith 'Making Treaty Implementation More like Statutory Implementation' (2017) 15 *Michigan Law Review* 1309, 1309.
[688] M Tellawi 'U.S. must recognize International Law' <https://mic.com/articles/1793/u-s-must-recognize-international-law#.fbT3KbVKu>.
[689] Ibid.
[690] Article 6 section 2 of the U.S. Constitution.
[691] *United States v. Stuart* 489 U.S. 353, 365-68 (1989) (considering, but deeming inconclusive, a treaty's ratification history); Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 531 (1987) (discussing Secretary of State's analysis of the purposes of a treaty that was provided to the Senate).

the Senate must provide its advice and consent to treaty ratification by a two-thirds majority.[692] Secondly, Congress may authorize congressional-executive agreements.[693] Thirdly, many treaties and executive agreements are not self-executing, meaning that implementing legislation is required to render the agreement's provisions judicially enforceable in the United States.[694]

The Senate may, and frequently does, condition its consent on a requirement that the United States interpret a treaty in a particular fashion.[695] But after the Senate provides its consent and the President ratifies a treaty, resolutions passed by the Senate that purport to interpret the treaty are 'without legal significance' according to the Supreme Court.[696]

The effects that international legal agreements entered into by the U.S. have upon U.S. domestic law are dependent upon the nature of the agreement; namely, whether the agreement (or a provision within an agreement) is self-executing or non-self-executing, and possibly whether the commitment was made pursuant to a treaty or an executive agreement.

a. Self-Executing vs. Non-Self-Executing Agreements

Some provisions of international treaties or executive agreements are considered 'self-executing,' meaning that they have the force of domestic law without the need for subsequent congressional action.[697] Provisions that are not considered self-executing are understood to require implementing legislation to provide U.S. agencies with legal authority to carry out the functions and obligations contemplated by the agreement or to make them enforceable in court and treaties that are non-self-executing require a legislation to be enforceable in the U.S. courts.[698]

4.2.1.1 The role of the U.S. courts

When analysing an international agreement for purposes of its domestic application, US courts have final authority to interpret the agreement's meaning.[699] As a general matter, the Supreme

[692] International Law and Agreements: Their Effect upon U.S. Law
[693] Ibid.
[694] SP Mulligan 'International Law and Agreements: Their Effect upon U.S. Law' <https://fas.org/sgp/crs/misc/RL32528.pdf>.
[695] Ibid.
[696] *Fourteen Diamond Rings v United States* (1901) 183 U.S. at 180 (describing a Senate resolution purporting to interpret an earlier, Senate-approved treaty as "absolutely without legal significance").
[697] Mulligan (note 654 above).
[698] Ibid.
[699] *See Sanchez-Llamas v Oregon*, 548 U.S. 331, 353–54 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department . . . .'" (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

Court has stated that its goal in interpreting an agreement is to discern the intent of the nations that are parties to it.[700] The interpretation process begins by examining the text of the treaty and the context in which the written words are used.[701] When an agreement provides that it is to be concluded in multiple languages, the Supreme Court has analysed foreign language versions to assist in understanding the agreement's terms.[702]

The Court also considers the broader 'object and purpose' of an international agreement.[703] In some cases, the Supreme Court has examined extra textual materials, such as drafting history,[704] the views of other state parties,[705] and the post-ratification practices of other nations.[706]

In *Sei Fujii v State of California,*[707] for example, the California Supreme Court held that the United Nations Charter was not self-executing because its relevant principles concerning human rights lacked the mandatory quality and certainty required to create justiciable rights for private persons upon its ratification; since then the ruling has been consistently applied by other courts in the U.S.[708]

The courts routinely apply doctrines that are designed to harmonize domestic law with the state's international treaty obligations. However, the courts also apply other doctrines that have the opposite effect: they shield government actors from judicial review of governmental compliance with treaty-based norms, thereby creating a free space in which executive officers can violate treaty obligations, if they so choose, without fear of judicial sanction.[709] In practice, courts apply the doctrine of non-self-execution and the presumption against individually

[700] *BG Grp., PLC v. Republic of Argentin*, 134 S. Ct. 1198, 1208 (2014); *Lozano v. Montoya Alvarez* 134 S. Ct. 1224, 1232 (2014); *Sumitomo Shoji Am, Inc. v Avagliano* 457 U.S. 176, 183 (1982); Wright v. Henkel, 190 U.S. 40, 57 (1903).
[701] *Water Splash Inc. v Menon* 137 S. Ct. 1504, 1509 (2017) (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988)); Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 534 (1987); *Air France v Sak* 470 U.S. 392, 397 (1985).
[702] In one case, the Supreme Court changed its conclusion about the self-executing effect of a provision in an 1819 treaty with Spain after analyzing an authenticated Spanish-language version of the text. Compare Foster v. Neilson, 27 (2 Pet.) U.S. 253, 314-15 (1829) (construing English language version of 1819 treaty between the United States and Spain and deeming a provision stating that certain land grants "shall be ratified and confirmed" to be non-self-executing) (emphasis added), with *United States v Percheman* 32 U.S. (7 Pet.) 51, 88–89 (1833) (concluding that the land grant provision at issue was self-executing after interpreting the Spanish language version, which was translated to state that the land grants "shall remain ratified and confirmed") (emphasis added).
[703] *Abbott v. Abbott* 560 U.S. 1, 20 (2010); *E Airlines Inc. v Floyd* 499 U.S. 530, 552 (1991).
[704] *Water Splash Inc* 137 S. Ct. at 1511.
[705] *Water Splash, Inc.*, 137 S. Ct. at 1511-12; *Lozano v Montoya Alvarez* 134 S. Ct. 1224, 1233 (2014); *Air France* 470 U.S. at 404.
[706] *TWA v. Franklin Mint Corp* 466 U.S. 243, 259 (1984)
[707] *Sei Fujii* v *State of California* (1952) L. A. No. 21149
[708] Ibid.
[709] Sloss (note 558 above).

enforceable rights almost exclusively in circumstances where individuals seek to hold government actors accountable for treaty violations.[710] By applying these doctrines, courts avoid ruling on the merits of treaty-based claims, thereby enabling government actors to escape accountability for treaty violations.[711]

While the Supreme Court has final authority to interpret a treaty for purposes of applying it as domestic law in the United States, some questions of interpretation may involve exercise of presidential discretion or otherwise may be deemed 'political questions' more appropriately resolved in the political branches. In *Charlton v Kelly,*[712] for example, the Supreme Court declined to decide whether Italy violated its extradition treaty with the United States, reasoning that, even if a violation occurred, the President "elected to waive any right" to respond to the breach by voiding the treaty.[713]

Even when a question of interpretation is to be resolved by the judicial branch, the Supreme Court has stated that the executive branch's views are entitled to 'great weight'[714] although the Court has not adopted the executive branch's interpretation in every case.[715]

Regulatory treaties are not directly enforceable by courts and the need for congressional action makes it difficult and sometimes impossible for their provisions to be implemented[716] especially if they contradict the laws of the United States such that enforcement would create a domestic law violation.[717]

4.2.1.2 The role of Congress

When an international agreement requires implementing legislation or appropriation of funds to carry out the US obligations, the task of providing that legislation falls to Congress.[718] In the early years of constitutional practice, debate arose over whether Congress was obligate rather

[710] D Sloss 'Non-Self-Executing Treaties: Exposing a Constitutional Fallacy' (2002) 36(1) *U.C. Davis Law Review 1*.
[711] Ibid.
[712] *Charlton v Kelly* 229 U.S. 447 (1913).
[713] See 229 U.S. 447, 475 (1913)
[714] *Water Splash, In v Menon* 137 S. Ct. 1504, 1512 (2017) (quoting Abbott v. Abbott, 560 U.S. 1, 15 (2010)); *Sumitomo Shoji Am Inc. v. Avagliano* 457 U.S. 176, 184–85 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).
[715] *BG Grp PLC v Republic of Argentina* 134 S. Ct. 1198, 1208 (2014) (construing a dispute resolution provision in an investment treaty between the United Kingdom and Argentina and concluding "[w]e do not accept the Solicitor General's view as applied to the treaty before us"); *Hamdan v Rumsfeld*, 548 U.S. 557, 629-30 (2006) (declining to adopt the executive branch's interpretation of Common Article 3 of the 1949 Geneva Conventions).
[716] HG Legal Resources 'Does America Have to Follow International Laws?' <https://www.hg.org/legal-articles/does-america-have-to-follow-international-laws-35594>.
[717] Ibid.
[718] Muligan (note 654 above); RA Kagan 'The "non-Americanisation" of European Law' (2008) 7 *European Political Science* 21, 22

than simply empowered to enact legislation implementing non-self-executing provisions into domestic law.[719] But the issue has not been resolved in any definitive way as it has not been addressed in a judicial opinion and continues to be the subject of debate occasionally.[720]

By contrast, the Supreme Court has addressed the scope of Congress's power to enact legislation implementing non-self-executing treaty provisions. In a 1920 case, *Missouri v Holland*,[721] the Supreme Court addressed a constitutional challenge to a federal statute that implemented a treaty prohibiting the killing, capturing, or selling of certain birds that travelled between the United States and Canada. In the preceding decade, two federal district courts had held that similar statutes enacted prior to the treaty violated the Tenth Amendment because they infringed on the reserved powers of the states to control natural resources within their borders. But the Holland Court concluded that, even if those district court decisions were correct, their reasoning no longer applied once the United States concluded a valid migratory bird treaty.

The US is not the only country in the world where the implementing of a treaty is dependent on whether it is self-executing or non-self-executing. One of the ways to remedy it is to have a representative from the courts and one from the congress as members of the IMCERB to represent the interests of many other countries that have the same practice as the U.S. It must be borne in mind that the IMCE will be two-fold in nature: self-executing and non-self-executing to cater for such countries.

4.3 United Kingdom (UK)

Most MNCs in the UK are involved in unethical issues such as corruption, bribery and facilitation payments; safety and security issues; environmental impacts due to business functioning; information security problems; human rights issues; and supply chain management issues.[722] However, the unethical practices by MNCs in the UK is not as prominent as in Nigeria because MNCs are well regulated.[723]

UK Bribery Act 2010 regulates the unethical practices of most companies in the UK and they amended their corporate policies to conform to this Act. As discussed above, the UK is partly

[719] Muligan (note 654 above).
[720] Ibid.
[721] *Missouri v Holland* 252 U.S. 416.
[722] I Qualify UK 'Business ethics from a UK cultural perspective' <http://www.iqualifyuk.com/library/business-management-section/business-ethics-from-a-uk-cultural-perspective/> (accessed 15 July 2018).
[723] Ibid.

a monist and dualist country and it uses the incorporation approach to implement treaties. This means that treaties are part of the domestic law if they are implemented by Parliament though the courts may directly apply international law.

4.3.1 The process of implementing international law in the UK

In the UK, treaties create rights and obligations for the government under international law as a dualist state.[724] However this rights and duties are only for the government because the treaty provision will have to be incorporated into the domestic law of the UK for it to become part of the domestic law.[725] This is done through incorporation by the relevant legislation.

The first step is the negotiating, signing and ratifying international treaties which is done by the UK government.[726] The treaty will then have to be ratified by Parliament. The Supreme Court recently ruled in the *Miller case*[727] that the UK government cannot make major changes to the UK's constitutional arrangements without Parliamentary authority. Though parliament's authority is required, parliament's role is said to be limited as their authority is limited to instances when the domestic law needs to be changed for a treaty to be implemented.[728]

In the process of ratification, the relevant political branches will endeavour to enact the legislation needed to implement the treaty obligations.[729] Like any other government, the British government before enacting a legislation will assess whether there is a need for such legislation and they will never ratify a treaty until such a legislation has been made.[730]

Incorporating treaties in the UK is not as simple because the UK has three separate legal systems: England & Wales; Scotland; and Northern Ireland. The implementation of treaties in these legal systems differ. This is because Article 19 in the Treaty of Union, which came into effect under the Acts of Union in 1707, with the establishment of the Kingdom of Great Britain

[724] A Lang 'Parliament's role in ratifying treaties' (2017) 5855 *Briefing Paper* 1, 6
[725] Ibid.
[726] Lang (note 684 above).
[727] *R (Miller)* v *Secretary of State for Exiting the European Union* (2017) UKSC para 5. This constitutional feature was central to the Supreme Court's January 2017 judgment in the Miller case (about whether the UK Government needed the prior authority of Parliament in order to trigger the UK's notification of withdrawal from the EU Treaties). The ruling made it clear that the Government cannot make or withdraw from a treaty that amounts to a 'major change to UK constitutional arrangements' without an Act of Parliament. Applying the principle to this case, the judgment held that the UK Government could withdraw from the EU Treaties only if Parliament 'positively created' the power for ministers to do so.
[728] Lang (note 684 above).
[729] Ibid.
[730] Lang (note 684 above).

ensured that Scotland, Northern Ireland and, to a degree, Wales would have a separate legal system from England.

England and Wales operate a common law system combining the need for legislation and reference to precedents through case law.[731] The laws are established by the passing of legislation by Parliament which consists of the Monarch, the House of Commons and the House of Lords.[732] In England and Wales, when a court makes a decision about a case, that decision becomes a part of the law of the country.[733]

Northern Ireland, like England, is a common law system with a combination of passing of legislations and case law as precedents.[734] The legislation is passed by the Northern Ireland Assembly or by the UK Parliament in some matters.[735] Scotland is not a pure common law system, but a mixed system with some similarities to the Roman Dutch Law.[736]

The Scotland Act 1998 ensures that laws passed by the Scottish Parliament can be challenged and overturned by the courts if they are not compatible with rights identified in the European Convention on Human Rights (ECHR).

It is clear that in the UK treaties do not automatically apply to domestic law and the British government would conduct a thorough examination to ascertain whether there is need for a legislation to be enacted to implement the treaty. This may slow down the process of implementing a treaty in the UK but it does not mean that they cannot be implemented.

4.4 Nigeria

Nigeria is a dualist legal system consisting of English common law, Sharia Law and Traditional Law and each industry has an Act that regulates their unethical practices.[737] There is no uniform

[731] S Rab 'Legal systems in UK (England and Wales): Overview' available at: <https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Def&ault=(sc.Default)&firstPage=true&comp=pluk&bhcp=1>; The English Legal System available at: <https://www.apprendre-le-droit.fr/anglais-juridique/the-english-legal-system/>.

[732] Oxford LibGuides available at: <https://ox.libguides.com/c.php?g=422832&p=2887374>(accessed 18 September 2018).

[733] The English Legal System available at: <https://www.apprendre-le-droit.fr/anglais-juridique/the-english-legal-system/> (accessed 20 June 2018).

[734] Rab (note 691 above)

[735] Ibid.

[736] Rab (note 691 above).

[737] CN Okeke 'The Use of International Law in the Domestic Courts of Ghana and Nigeria' (2015) 32(2) *Arizona Journal of International & Comparative Law* 371,399; CN Okeke 'International Law in the Nigerian Legal System' (1997) 217 *California Western International Law Journal* 311, 343-345.

law that governs the practices of companies in all industries. This means that when treaties are implemented in Nigeria, the domestication of the treaty may likely be industry specific.

4.4.1 The process of implementing international law in Nigeria

In Nigeria, for treaties to be implemented, they must be enacted into law by the National Assembly.[738] There are two methods of domesticating treaties into laws in Nigeria: domestication by re-enactment; and domestication by reference.[739]

According to Oyebode, domestication by re-enactment[740] is when the implementing statute directly enacts specific provision or the entire treaty usually in the form of a schedule to the Statute.[741] On the other hand, domestication by reference is the case where the implementing statute transform a treaty into the domestic law merely by reference either economic or generally.[742]

Section 12(1) [743]of the Constitution which states that 'no treaty …shall have the force of law except to the extent of which any such treaty has been enacted into law by the National Assembly.' This is in line with domestication by re-enactment.

The primary role player in the domestication of treaties in Nigeria is the National Assembly as they have bee empowered by section 12(1) of the Constitution.[744] This section thus legitimises the power of the National Assembly to enact treaties into law.[745]

It has been argued that though the constitution places this task on the National Assembly, the National Assembly seems to have little or no interest because most treaties which Nigeria is a party to have not been domesticated many years after ratification.[746]

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[738] Okeke (note 337b above).
[739] FA Onomrerhinor 'A Re-Examination of the Requirement of Domestication of Treaties in Nigeria' (2016) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* (*NAUJILJ)* 17,21; A Oyebode, 'Treaty Making and Treaty Implementation in Nigeria: An Appraisal' in B Atilola 'National Industrial Court and Jurisdiction over International Labour Treaties under the Third Alteration Act http//:www.nicn.gov.ng/…/ Accessed 28/05/2015>.
[740] Oyebode (note 699 above).
[741] Ibid.
[742] Oyebode (note 699 above). Reference to a treaty may sometimes be contained either in the long and short titles of the implementing statutes or its preamble or schedules. This is because having both the implementing statute and treaty itself in a single document is a very convenient practice.
[743] 1999 Constitution of the Federal Republic of Nigeria
[744] Section 12(1) states that 'no treaty between the Federation and any other country shall have the force of law (in Nigeria) except to the extent to which any such treaty has been enacted into law by the National Assembly.
[745] This section can be read with section 58 of the 1999 Constitution of the Federal Republic of Nigeria which empowers the National Assembly to enact an ordinary bill into law.
[746] CE Okeke & MI Anushem 'Implementation of Treaties in Nigeria: Issues, Challenges and the Way forward' (2018) 9(2) *NAUJILJ* 9(2) 216,216.

Okeke and Anushem further contend that the National Assembly's lack of interest has led to poor implementation of treaties in Nigeria and has rid the Nigerian legal system of the requisite support and complementarity it ought to derive from those ratified but undomesticated treaties.[747]

Though many treaties have not been domesticated in Nigeria, they are said to play a crucial role in the enthronement of available domestic legal system in Nigeria but they are of no force.[748] They only serve as persuasive force and are often referred to by domestic courts as guides, or aids, in the interpretation of domestic laws.[749]

The controversy on the place of undomesticated treaties has been addressed by several courts in Nigeria. First, the supreme court per Ogundare, J.S.C (as he then was) in the *Abacha* v *Fawehinmi*[750] held that undomesticated treaties have no force of law whatsoever in Nigeria. But the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010[751] later ratified undomesticated labour related treaties justiciable in Nigeria without any legislative intervention. But till today, it is still unresolved regardless of the Supreme Court decision in the *Abacha* case.

The place of domesticated treaties in Nigeria is certain and it is said that they supreme to domestic laws within in Nigeria.[752] This means that they form part of the legal system once they are enacted into law by the National Assembly. A case in reference is the case of *Chief J.E. Oshevire* v *British Caledonian Airway Limited*.[753]

The court of Appeal in the *Chief J.E. Oshevire* case held that: *'an international treaty, like the Warsaw Convention in the instant case, is an expression of agreed, compromise principles by the contracting states and is generally autonomous of domestic laws of contracting states as regards its application and construction. It is important to understand that an international agreement embodied in a Convention or treaty is autonomous, as the high contracting parties*

[747] Ibid.
[748] Okeke & Anushem (note 706 above) 221; Section 12(1) of the 1999 Constitution.
[749] CE Okeke & MI Anushem 'Implementation of Treaties in Nigeria: Issues, Challenges and the Way forward' 9(2) NAUJILJ in MI Anushem & EA Oji '*Termination of Contract Employment and Applicability of International Labour Standards on the Unfair Dismissal in Nigeria* (2018) 173; W Sandholtz 'How Domestic Courts Use International Law' (2015) 38 *Fordham International Law Journal* 598,599
[750] *Abacha* v *Fawehinmi* (2000) FWLR Pt.4 S53 at 586.
[751] Section 6(2) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010.
[752] *Chief J.E. Oshevire* v *British Caledonian Airway Limited (1990) 7 NWLR (pt.163) pg.507*
[753] *Chief J.E. Oshevire* v *British Caledonian Airway Limited* (1990) 7 NWLR (pt.163) pg.507

have submitted themselves to be bound by its provisions, which are therefore above domestic legislation. Thus, any domestic legislations in conflict with the convention is void.'

The court of Appeal decision in the *Chief J.E. Oshevire case was r*einforced by the Court of Appeal I the case of *Fawehinmi* v *Abacha* where Chief J.E held that:[754]

'The provisions of the Charter (African Charter on Human & Peoples Rights) are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in Labiyi v. Anretiola. It seems that the trial judge acted erroneously when he held that the African Charter contained in Cap 10 of the Laws of the federation of Nigeria 1990 is inferior to Decrees of the federal Military Govervent … .They are protected by the International law and the Federal Military government is not legally permitted to legislate out of its obligations.'

There have been controversies over this decision particularly on the relationship between domesticated treaties and other domestic statutes. For example, Okeke and Ashumenargue that there is no legal basis for a domesticated treaty to be given more power over domestic statute or in cases of a conflict between a domesticated treaty over a domestic legislation for domesticated treaties to be considered supreme.[755]

They argue that this is because a domesticated treaty does not operate in Nigeria by the force of international law but by virtue of statute enacted to implement it. Oyebode notes that it is the statute enacted to implement a treaty that normally serves as a source of law and not the treaty per se.[756]

The issue of superiority of the constitution over domesticated treaties was resolved by the Supreme Court when the *Fawehinmi's case* came on appeal before it. In his lead judgement in *Abacha* v. *Fawehinmi,*[757] Ogundare J.S.C (as he then was) held that it was erroneous on the part of the Court of Appeal to have held that African Charter on Human and Peoples' Rights was superior to the Constitution. Mohammed J.S.C (as he then was) also observed in the same judgement that the elevation of the African Charter on Human and Peoples' above the

[754] *Fawehinmi* v *Abacha* (1996) 9 NWLR (pt. 475) 710 at 747.
[755] Okeke & Anushem (note 706 above).
[756] Oyebode (note 699 above); DL Shelton 'Introduction' in DL Shelton (ed, *International law & Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011) 18-19.
[757] *Fawehinmi* v *Abacha* (1996) 9 NWLR (pt. 475) 747.

Constitution by the Court of Appeal amounted to 'a violation of provisions of the supremacy of the Constitution.

Achike JSC in his dissenting opinion in the *Abacha* case opposed the view that domesticated treaties are superior to the other domestic statutes.[758] According to him:

'The general rule is that a treaty which has been incorporated into the body of the domestic laws ranks at par with the domestic laws. It is rather startling that a law passed to give effect to a treaty should on a 'higher pedestal' above all domestic laws, without more in the absence of any express provision in the law that incorporated the treaty into the domestic law.'

The process of implementing a treaty in Nigeria is solely in the hands of the National Assembly. The Constitution is silent on the possibility of vetoing that power. This means that for any treaty to move beyond the government shelf to become law in Nigeria, the National Assembly must be brought on board from the initial stages of the negotiation of the treaty.

4.4.2 Implementing the IMCE within the current regulatory framework

Having discussed the process of implementing treaties in each country, the question is whether the IMCE can be implemented in these legal systems. The starting point is to look at the crux of the IMCE.

The main aim of the IMCE is to regulate the operations of MNCs in all countries across the globe: ensure that MNCs operate in an ethical manner. This means that regardless of how small a country is, their legal system or their process of implementing international law; they have one or two MNCs operating within their borders. It is irrelevant whether the MNCs in a particular country is acting ethically. The fact that there are some countries where the activities, of some MNCs are unethical, all MNCs will fall under the IMCE.

From the discussion above, none of these countries have a law that states that no treaty shall ever be implemented or no treaty that regulates private entities shall be implemented. Rather, most deal with various ways of implementing treaties and the enactment of legislation that will domesticate the treaty.

In a legal system like the U.S. where the implementation of a treaty is dependent on whether it is self-executing and non-self-executing, the IMCE will have provisions that will cater for both instances. In legal systems like the UK where treaties are implemented by the enactment of a

[758] Ibid.

legislation where needed, the IMCE will make provision for such. In legal systems like Nigeria where implementing treaties is dependent on a certain body (e.g. the National Assembly), the IMCERB will have to involve such body from the initial stages of negotiating the IMCE with Nigeria.

The issue with implementation is not limited to just the procedure but also entails aspects of capacity and liability. The issue of capacity and liability are discussed below.

5. FACTORS AFFECTING IMPLEMENTATION OF THE IMCE IN THE USA, UK AND NIGERIA

When discussing implementation of the IMCE in the USA, UK and Nigeria, issues of capacity and liability of these countries will have to be addressed. Regardless of a country's method of implementing a treat, if the country does not have the capacity to implement such treaty, it is futile to propose such treaty to them. Second, the liability of each country will also have to be addressed to ensure that these countries are aware that they are obligated to ensure that the MNCs operating in their countries act in an ethical manner and comply with the IMCE.

5.1 Capacity

Capacity means the ability to do a thing.[759] Capacity deals with the ability or inability to implement the IMCE versus the countries unwillingness to do so. A country or government that lacks the capacity to implement the IMCE will most likely not comply with it as opposed to governments that have the capacity.

Two types of capacities are discussed: bureaucratic, and infrastructural capacity. Bureaucratic capacity is the capacity of the government to implement political decisions in a logistical manner.[760] These decisions include decision to ratify treaties and establish relevant institutions that can empower the government to fulfil their human rights obligations under the ratified treaty.[761] The function of the established institution would include: to enhance the transparency and accountability of administrative systems, curbing corruption, institutionalizing oversight

[759] Cambridge dictionary 'Capacity' https://dictionary.cambridge.org/dictionary/english/capacity>.

[760] JD Huber 'Bureaucratic Capacity and Legislative Performance' <http://www.princeton.edu/~nmccarty/macro_mchub2.pdf>; M Mann 'The Autonomous Power of the State: Its Origins, Mechanisms and Results' (1984) 25(2) *European Journal of Sociology* 204; K Kasara & P Suryanarayan Pavithra 'Bureaucratic Capacity and Class Voting: Evidence From Across the World and the United States' <https://ssrn.com/abstract=3316320 or http://dx.doi.org/10.2139/ssrn.3316320>; WM Cole 'Mind the Gap: State Capacity and the Implementation (2015) 69(2) *International Organization* 404, 413.

[761] WM Cole 'Mind the Gap: State Capacity and the Implementation (2015) 69(2) *International Organization* 404, 413.

of administrative operations, strengthening the rule of law, deepening democracy, and empowering civil society.[762]

Infrastructural capacity is the country's ability to enforce a treaty throughout the country. It includes the physical and organizational structures and facilities needed for implementing a treaty.[763]

From the discussion above, the U.S. and the UK have strong bureaucratic capacity to implement the IMCE. While in Nigeria, the bureaucratic capacity is flawed by the delays caused by the National Assembly. In the U.S. and the UK, the process of implementing a treaty is quite straight forward and once they are implemented and subsequently domesticated, they are applicable. The executive and the judiciary work together to see to it that the treaty if implemented becomes binding on the parties.

Meanwhile, in Nigeria, the National Assembly does not follow due process in terms of section 12(1) of the 1999 Constitution of Nigeria as the body that has to domesticate the treaty. This means that most treaties are not domesticated even after they have been ratified. This means that more work has to be done where Nigeria is concerned. There has to be an extensive consultation with representatives of the National Assembly during the consultation process to ensure that the IMCE is not just another treaty on the shelves of the Nigerian government or a ratified but undomesticated treaty.

In terms of infrastructural capacity, the UK and the U.S. have the most infrastructural capacity to implement treaties as developed countries. This means that they can ensure that MNCs comply with the IMCE if implemented in their countries.

Nigeria's infrastructural capacity is subject to its bureaucratic capacity. Therefore, with such a low bureaucratic capacity it is unlikely that the minimal infrastructural capacity in the country will be employed to ensure that treaties are implemented. Hence, once again emphasis that the Nigerian National Assembly must be part of the initial negotiation process of the IMCE with Nigeria.

[762] GS Drori, SY Jang & JW Meyer 'Sources of Rationalized Governance: Cross National Longitudinal Analyses' (2006) 51(2) *Administrative Science Quarterly* 205-29.
[763] Ibid.

5.2 Liability

As discussed in the previous chapters, once the IMCE has been implemented in these countries, each country together with the MNCs will be liable for any violations of the IMCE. Though states are reluctant to be held liable for the wrongs of companies operating in their countries, the only way to ensure that these countries will exercise their rights and ensure that MNCs act in an ethical manner is if they are liable for the unethical acts committed by MNCs operating in their countries.

A country's lack of capacity will not annul its liability under the IMCE. Therefore, the IMCERB will ensure that countries are made aware of this.

6. UNIFORM APPLICATION OF THE IMCE IN THE USA, UK AND NIGERIA

Though each country has a different legal system and different methods of implementing and domesticating treaties, the IMCE will be applied to all the countries in the same manner. It will be both self-executing and a non-self-executing instrument for countries such as the U.S. It will have provisions that can be implemented in various countries such as Nigeria if it is not domesticated. The rules and principles that apply in one country will apply in all countries.

The manner in which sanctions are applied in one country will be the same in other countries. Liability of member states will be uniform regardless of the country it is. The liability of MNCs will also be applied in a uniform manner to all MNCs.

7. CONCLUSION

Each country is of a different legal system and the method of implementing international law in these legal systems vary depending on whether it is a monist or dualist country. Each country employs either the adoption, incorporation or transformation approach in implementing international law.

Application and subsequently implementation of the IMCE in these legal systems may be challenging but not impossible. The starting point is to understand the various methods of implementing treaties in these countries and then ensure that there is sufficient representation from the relevant bodies during the negotiation process of the IMCE. This will help to incorporate the needs of each country into the IMCE.

Factors such as capacity can influence a government's ability to comply with a treaty that it has ratified and implemented. However, these factors cannot waive a country's liability once

it has ratified the IMCE to comply with it. The IMCERB will ensure that countries are notified of their liability regardless of their lack of capacity.

In countries like Nigeria, prior consultation will take place between the legislators in Nigeria and the drafters of the IMCE. The IMCE will not follow the same route that the African Charter did. Its implementation will be speedier than most international treaties that were implemented or to be implemented in Nigeria.

The uniform approach of the IMCE will obligate MNCs to be ethical in their dealings and once this happens, they will participate more in CSR activities thus help to develop the community in which they operate.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

The advantages of companies participating in CSR activities to the community in which these companies operate cannot be overemphasised. It is time that companies are mandated to participate in CSR activities.

One many ask: why mandate companies? It is because, currently, CSR is voluntary, and most companies carry out CSR activities for good reputation. The benefits of companies participating in CSR activities extensively is that it makes them become more ethical in their practices as focus will be shifted from the pursuit of a good image to actually ensuring that it has a good image whether it is noticed or not.

The focus is on multinational companies (MNCs) because they are the most unethical and mandating them to participate in CSR activities will make them more ethical in their practices. There are various international instruments that regulate the practices of MNCs such as the OECD Guidelines for MNEs, the ISO 14000 Series, the UN Guiding Principles and the UN Global Compact but these are all voluntary.

There are no mechanisms in these instruments to ensure that MNCs are compliant. Furthermore, most MNCs have their own voluntary codes of ethics that deal with different aspects of CSR and if they do not stick to it, there is certainly no way that they will stick to the OECD Guidelines, the UN Global Compact, the UN Guiding Principles and the ISO 14000 Series. Though the legally binding agreement proposed by South Africa and Ecuador to the United Nations is still in progress, this agreement has been criticised for being too broad by applying to all international human rights. The IMCE is more specific to ethical human rights issues.

Therefore, this thesis proposes for an international mandatory code of ethics (IMCE) that will hold MNCs accountable in an international legal framework because these instruments are not sufficient. The existing international instruments have created extensive gaps which the IMCE will fill.

For the IMCE to function accordingly and to be sustainable, MNCs must be granted legal personality under international law. The argument against the recognition of legal personalities

for MNCs is based on several factors some of which include that MNCs operate as autonomous legal entities; state sovereignty; and fears of a race to the bottom. States are concerned that if MNCs are granted legal personality, it will disempower them, stop or decrease the progress of international law where State consent is lacking or not imminent.

However, the ethical violations by MNCs is an infringement of the human rights of individuals and states seem to place their sovereignty over these rights MNCs can certainly be recognised under international law and be granted legal personality. Once this is done, MNCs can be held liable. This means that they will be bound to comply with the IMCE.

The development of the IMCE is in different stages: the consultation stage; drafting stage; application stage; and implementation stage. The consultation and drafting stages were discussed, and the application and implementation stages are subject to the outcome of the draft IMCE.

The consultation process involves extensive consultation with members of the community, employees, employers and other focus groups to ascertain their interests and to ensure that their interests are taken into consideration. The consultation process will be done through questionnaires both electronic and manual to ensure that the interests of each group of people that will be affected by the IMCE is factored into the IMCE.

After the consultation process, the drafting of the IMCE will ensue. The drafting will be done by the members of the international mandatory code of ethics regulation board (IMCERB). The members of the IMCERB will consist of CSR experts (both individuals and organizations), members or employees of several NGOs, legislative drafters and representatives from each economic industry.

The IMCE will address several issues which other voluntary codes on CSR have been unable to address. This includes but is not limited to the sanctions for failure to participate in CSR activities, quantum for CSR spending; and compulsory ethical issues for each MNC amongst other things. To ensure that the IMCE is continuously effective, several measures must be put in place like maintaining the IMCERB financially and ensuring that they fulfil their functions in each country.

There is still room for more research on this subject. First, on how to grant MNCs legal personality. Though this thesis argues that MNCs can be granted legal personality, the practical application of this legal personality needs further research. Furthermore, liability of directors,

shareholders etc. of an MNC versus that of its subsidiary must be ascertained. Issues related to liability of an MNC for environmental violation and climate change issues will require further research.

Second, there is also need for more scholarship on how to mandate MNCs to comply with CSR initiatives. Can there be a shift from voluntary to mandatory CSR? Yes! The question is how? One way is to tie ethics to CSR like this thesis attempted to do but there is need to delve more into mechanisms of ensuring that CSR is mandatory.

Third, MNCs are profit oriented and as such, they will avoid anything that will hinder their ability to make profits. The IMCERB will attempt to find ways to tie MNCs profit making ability to their compliance with the IMCE. This will compel MNCs to be ethical in their operations. There is need to involve business and economic experts to ascertain if this is possible. Further research can be done in this area.

Finally, Zorob listed two key tests that an effective treaty must pass, and these include:[764] first, it must apply to all transnational, national, and state-owned entities. This means that it should not be limited to one entity. Second, the treaty should strengthen access to an effective remedy at a national level and when this is insufficient, the treaty should guarantee extraterritorial obligations on states, so that companies can be held accountable in their home states.[765] Zorob's key tests could be areas for further research to ascertain if it is possible to have one treaty that would apply to all three entities and if the same treaty can guarantee extraterritorial obligation on states.

[764] M Zorob 'New business and human rights treaty takes shape' <https://www.openglobalrights.org/new-business-and-human-rights-treaty-takes-shape/>.
[765] Ibid. This means piercing the 'corporate veil' that subsidiaries use to avoid justice, and insisting on mutual cooperation and legal assistance across borders.

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