The Prominence of Anti-Corruption Initiatives in the Global CSR Agenda

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Introduction

Corruption strikes ‘at society, moral order and justice, as well as at the comprehensive development of peoples.’ Corruption is a threat to the principle of the rule of law, the stability of democratic institutions, human rights as well as social and economic progress. Grand scale corruption involves ‘vast quantities of assets, which may constitute a substantial proportion of the resources of states.’ Corruption exacerbates poverty and inequality and jeopardizes the future of the younger generation. The recipients of the harmful effects of corruption are peoples and societies.

Corporations are impacting on the fight against corruption as anti-corruption strategy is increasingly becoming ‘hard wired’ into a corporation’s internal systems. The widespread emergence of Compliance Departments in multinational corporations across the globe reflects the acceptance of anti-corruption initiatives as a crucial aspect of the performance of corporations.

Three developments have been critical in this respect. Firstly, the emergence of an international

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3 Para. 1 Explanatory Report, Civil Law Convention 174 CETS.
4 Grand corruption is described as: ‘corruption that pervades the highest levels of government, engendering major abuses of power. A broad erosion of the rule of law, economic stability and confidence in good governance quickly follow. Sometimes it is referred to as “state capture,” which is where external interests illegally distort the highest levels of a political system to private ends. See The UN Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, Vienna, September 2004, pp. 23-24.
5 Id.
6 The World Bank recognizes corruption as ‘the greatest obstacle to economic and social development’ whose harmful effects are ‘especially severe on the poor. See World Bank Website on Corruption http://www1.worldbank.org/publicsector/anticorrupt/index.cfm. The 140 members of the United Nations Convention against Corruption acknowledge the ‘seriousness of the problems and threats posed by corruption to the stability and security of societies. See para. 2 Preamble UNCC id., Note 12 above.
7 A central characteristic of corporate social responsibility (CSR) is the idea that responsibilities towards society are ‘voluntarily’ adopted by corporations. Corruption as a CSR issue can be said to have achieved a certain prominence in the extent to which it is selected as an area of focus for CSR planning and strategy by corporations.
standard repudiating corruption that is applicable to all corporations regardless of jurisdiction. 9 Secondly, the exposure of multinational corporations to a US-driven process of sanction that relies not only on state-centered mechanisms but also, and very importantly, directly engages the corporation in the fight against corruption by rewarding voluntary self-policing, self-reporting and co-operation with authorities. 10 Thirdly, the increasing vulnerability of corporations to the negative consequences of a lack of corporate anti-corruption strategy.

This paper argues that a changed transacting environment makes compliance with anti-corruption rules the prudent choice for corporations. This is a radical departure from the environment fashioned by traditional state-centered and fairly predictable, processes of punishment. In this new environment, the corporation has no choice but to manage new risk by engaging more directly in the fight against corruption. Having an effective anti-corruption strategy has become an issue of good management for corporations. This process results in a form of public/private partnering in the fight against corruption with the corporation working hand in hand with state authorities in the detection and reporting of corrupt activity. A broader lesson that emerges from the interaction between business and FCPA regulators is the development of a governance mechanism that is global in scope and addresses a central issue of social development. This paper describes these developments and how they have has given anti-corruption initiatives greater prominence on the global CSR agenda.

**Corruption and the Global CSR Agenda.**

Corruption is one of the most pressing social issues of our times. Yet until relatively recently, bribery in international commerce used to be commonplace and an acceptable business practice. 11 Under such a climate, positioning corruption in business transactions as an issue of corporate social responsibility (CSR) would have been questionable.

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11 Until relatively recently, bribes were treated as tax deductible expenses in many countries. In 1996 the OECD passed the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, which calls on ‘member countries that allowed the tax deductibility of bribes to foreign public officials to re-examine this treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal with a view to denying the tax deductibility of such bribes.’ See OECD ‘Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials’, (adopted by the Council on 11 April 1996 at its 87 3rd session [C/M (96)8(PRIV) C (96)27/FINAL. http://www.oecd.org/document/46/0,2340,en_2649_34551_2048174_119672_1_1_37447,00.html.
Today things are much different. There has been a change in the regulatory environment that has given anti-corruption initiatives greater prominence in the global CSR agenda. The UN 2011 Global Compact Implementation Survey for example reports that anti-corruption efforts have increased steadily for two consecutive years. The report notes that notable gains were observed for explicit anti-corruption policies (+4%), supplier policies (+4%) and limiting gift values (+3%) and that publicly-traded corporations are more likely to have policies in place, doing so at twice the rate of private corporations related to suppliers, charitable and political donations, and having a specialized unit.

The first step towards positioning corruption as a corporate social responsibility issue was a shift in attitude. A shift was made from viewing corruption primarily as a developing country issue involving petty bribes and corrupt agencies to an issue of international trade, where the big bribe givers were corporations, engaging in corrupt activities on a scale that could distort free competition, the market and social institutions. This is commonly referred to as a change of focus from the demand-side to the supply-side of corruption. In other words, this change of focus could be likened to seeking to turn off the source of corrupt money at its source by turning off the tap rather than by trying to mop up the bribes that have already flowed into the system.

This change in focus was supported by the links were made between corruption and the threat it poses to the ‘stability and security of societies.’ The causative link between grand corruption and

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12 The Global CSR agenda, may suggest that there is a unified system that can be described as a ‘CSR agenda.’ This is not the case. There is no single definition of CSR, no single description of its content. Neither is there any overarching mechanism of implementation. Key to any description of CSR is its voluntary nature. Dahlsrud identified ‘voluntariness’ as one of the five dimensions are used consistently used in the definition of corporate social responsibility. How corporate social responsibility is defined: an analysis of 37 definitions, Corporate Social Responsibility and Environmental Management, Vol. 15, Issue 1, pages 1–13, January/February 2008, pp.5 – 7.

13 1,325 corporations from over 100 countries responded to the 2011 Global Compact Implementation Survey – making it the among the largest annual studies conducted on implementation of corporate responsibility policies and practices by business globally. See the UN Global Compact Annual Review of Business Policies and Actions to advance Sustainability, available at http://www.unglobalcompact.org/docs/news_events/8.1/2011_Global_Compact_Implementation_Survey.pdf

14 The United Nations Global Compact is an initiative to assist corporations to voluntarily align their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption, and to take action in support of UN goals and issues. The UN Global Compact is a leadership platform for the development, implementation, and disclosure of responsible corporate policies and practices.

15 Id., p. 12

slowed economic and social development is better understood today. Furthermore, basic rights and security of citizens are often compromised by acts of international bribery that distort free market conditions, compromise the provision of goods and services, and deter social development. All this has served to change the discourse corruption corruption from a ‘moral issue’ to a ‘money issue’.

The International Consensus against Corruption

In defining a responsibility not to engage in corrupt acts that are detrimental to society it is important to find a solution to the problem that one man’s corruption may well be another man’s gift. While most societies reject corruption, it is a culturally complex phenomenon that embraces different standards and values. For a global CSR agenda to emerge social, economic and cultural differences had to be overcome to provide a common baseline of legality. Without the demarcation of such a legal boundary there could be no basis for the allocation of responsibility. In a global market, a boundary demarcating responsible corporate behavior, if it was to be any use at all, had to be one that superseded domestic interpretation, imposing, as it were, and one common rule.

The emergence of such a hyper-rule has since occurred. Nichols can rightly remark that there is now a ‘hyper norm’ repudiating corruption that ‘transcends national boundaries.’ Grand corruption, associated with international commerce is now legally prohibited in a crisscross of

18 A. Makinwa, Private Remedies for Corruption, Note 1 above, p. 301
19 Economists such as Susan Rose-Ackerman have provided economic data that point to the fact that corruption impedes economic, political and social growth as well as general security. An impressive compilation of this data is found in the recent S. Rose-Ackerman (Ed.), International Handbook on the Economics of Corruption, Edward Elgar, Cheltenham, England, 2006. These studies also show a link between levels of corruption and liberal open democracies. On the political stage, a link is made to society and human rights.
21 A. Makinwa, Private Remedies for Corruption, Note 1 above, pp.35 – 40.
international, regional and non-governmental agreements. The first of these was the *Inter-American Convention against Corruption (IACAC) of the Organization of American States.* In 1997 the Organization of Economic Co-operation and Development adopted a *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.* Also in 1997, the Council of the European Union adopted the *Convention on the Fight against Corruption involving Officials of the European Communities or Member States of the European Union.* In 2003, this prohibition was extended to private sector bribery with the Council Framework Decision on combating bribery in the private sector. In 1999 the council of Europe adopted its *Criminal Law Convention on Corruption* as well as its *Civil Law Convention on Corruption.* In 2000 the United Nations adopted a *Convention against Transnational Organized Crime.* In 2003, the African Union adopted the *African Union Convention on Preventing and Combating Corruption* and finally in 2003 United Nations adopted the *United Nations Convention against Corruption.* These instruments put together have worldwide reach. While they vary in scope they all contain similar provisions prohibiting corruption in international business transactions.

23 A. Makinwa, 'The rules regulating transnational bribery: achieving a common standard?' Note 9 above.
26 Convention drawn up on the basis of Art. K.3(2)(c) Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Official Journal C 195, 25 June 1997, p. 0002-0011, not yet in force. Developing effective sanctioning mechanisms is a central element of anti-corruption strategy of EU Member States who have an obligation to develop 'effective, proportionate and dissuasive criminal penalties' in the protection of the financial interests of the EU. (See Art 2 Convention on the protection of the European Communities' financial interests - PIF). Member States are also required to take the necessary measures to ensure that participation in or the instigation of acts of active and passive corruption are punishable by effective, proportionate and dissuasive criminal penalties. (See Art 5 of the Protocol drawn up on the basis of the PIF).
The prohibition of grand scale corruption involving government officials, the elite and multinational corporations has positioned bribery in international commerce as a premier issue facing not just societies but also corporations. The international consensus has served as a driver for the adoption of more responsible business practices by corporations. The payment of bribes in the pursuit of contracts is now universally condemned. With the emergence of a global standard, the responsibility of corporations not to engage in corruption has become more definable. Compliance within this regulatory framework, as well as an increasingly active consumer makes corruption in international business a principal issue of corporate responsibility.

In addition to hard rules, there are numerous soft law initiatives encouraging the voluntary adoption of anti-corruption policies by corporations. A principal example is the *OECD Guidelines for Multinational Enterprises*. This provides voluntary principles and standards from the state members of the OECD to multinational corporations. Principle 7 deals specifically with corruption. In addition to an admonition to comply with hard law provisions, corporations are advised to develop adequate internal controls, ethics and compliance programs or measures to prevent and detect bribery and to ensure fair and accurate books and financial records. Furthermore, corporations are encouraged not to engage in political corruption and to enhance the transparency of their activities in the fight against bribery and to foster openness and dialogue with the public so as to promote its awareness of and cooperation with the fight against bribery. Enterprises are also to engage in training programs and adopt disciplinary procedures to fight corruption.

This soft law dimension is further supported in the 2009 with the *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions*. This Recommendation includes as an annex the *Good Practice Guidance on Internal Controls, Ethics and Compliance*. The Good Practice Guidance is a voluntary non-binding guidance to assist corporations with developing effective internal controls, ethics and compliance programs or measures for preventing and detecting foreign bribery. The Good Practice Guidance also requires corporations to take steps to ensure that ethics and compliance programs are applicable to third

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34 See generally the OECD Guidelines for Multinational Enterprises http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1_1,00.html.

35 See http://www.oecd.org/document/13/0,3746,en_2649_34859_39884109_1_1_1_1,00.html for further details.
parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners. Corporations are also encouraged to develop effective internal controls to ensure the maintenance of fair and accurate books and records to ensure that they cannot be used for the purpose of hiding foreign bribery payments.\footnote{36}

Another important shaper of the global CSR agenda regarding corruption is the United Nations Global Compact that calls on corporations to voluntarily align their activities around a core of 10 principles. Principle 10, dealing with corruption, states that ‘[b]usinesses should work against corruption in all its forms, including extortion and bribery.’\footnote{37} The International Chamber of Commerce (ICC) Rules of Conduct on Extortion and Bribery in International Business Transactions also provide guidelines to corporations formulating an anti-bribery code of conduct and corporate compliance programs. The Rules of Conduct are ‘intended as a method of self-regulation’ for businesses against the background of applicable domestic laws.\footnote{38} The Rules call on enterprises to prohibit bribery (offering a bribe) and extortion (demanding a bribe) at all time and in any form whether directly or indirectly through agents and other intermediaries.\footnote{39} The Rules call on corporations to implement comprehensive policies or codes reflecting the ICC Rules of Conduct and include four key elements to be incorporated into such company codes or policies.

More recent is the Partnering against Corruption Initiative (PACI) is an initiative of the World Economic Forum along with Transparency International and the Basel Institute of Governance. It is a self-regulatory effort by corporations to take a stand against corruption in a peer-reviewed, mutual evaluation process.\footnote{40} The PACI initiative uses the basis of the World Economic Forum to bring corporations together to fight corruption. The PACI Principles prohibit bribery in any form and covers areas such as political contributions, facilitation payments, gifts, hospitality and expenses. It sets out the minimum requirements that a company should meet when implementing the program. The principles emphasize the need for effective internal controls and audit as well as self-assessment and review.\footnote{41}

\footnotesize{\textsuperscript{36} See generally, ‘Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions’, 26 November 2009 (With amendments adopted by Council 18 February 2010 to reflect the inclusion of Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance).} \footnotesize{\textsuperscript{37} See Website of the Global Compact at http://www.unglobalcompact.org/.} \footnotesize{\textsuperscript{38} See Introduction Part 1: ICC Rules of Conduct to Combat Extortion and Bribery. (Hereinafter ICC Rules).} \footnotesize{\textsuperscript{39} Art. 1 ICC Rules.} \footnotesize{\textsuperscript{40} See http://www.weforum.org/issues/partnering-against-corruption-initiative for more information.} \footnotesize{\textsuperscript{41} Id.}
It is important to note that all these hard and soft rules have been catalyzed by a domestic US Law, the 1977 Foreign Corrupt Practices Act (FCPA). By creating a modality where a domestic standard condemning corruption would have worldwide application, the FCPA triggered the internationalisation of a standard condemning corruption in business affairs that is applicable to corporations across the world. This has changed the face of the fight against corruption. The ambit of the fight in no longer simply domestic corruption, but includes the regulation of corruption occurring in other countries. This implies the emergence of corporate values, practices and policies that span the globe, not only because of global operations but also due to this shift in the modalities of the fight against corruption. Corruption is no longer simply a public sector issue but also a premier private sector business practice issue.

The FCPA casts a long shadow over the direction and methodology of the fight against corruption. Its profound effect on the operations of multinational corporations means that not only the rules of the FCPA but its sanctioning mechanisms have direct impact on corporate strategy and planning. As the next section shows, the implementation of the FCPA has had and continues to have a strong influence on the positioning of corruption as a premier CSR issue for corporations.

The ‘Spider in the Web’: The FCPA

The FCPA, is singularly responsible for the ‘hard wiring’ of anti-corruption mechanisms into the operating processes of corporations and the growing prominence of anti-corruption initiatives in the global CSR agenda. The FCPA was a ‘unique occurrence’ that redirected domestic efforts to fight corruption into global strategy. As Justice Noonan once stated:

‘For the first time in the history of the world a measure for bribery was introduced into law that was universal as far as those subjected to the law were concerned. For the first time, a country made it criminal to corrupt the officials of another country.’

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42 The Foreign Corrupt Practices Act, 15 USC Sec. 78dd-1, et seq., 1977. (Hereinafter, the ‘FCPA’).
45 J. Noonan Jr., Bribe, id., Note 1 above, at p. 680.
The FCPA makes bribery an illegal act a by criminalising the bribery of foreign officials for the purpose of obtaining a concession, business or other advantage. This prohibition against the use of bribery in international transactions is applicable not only to US corporations and nationals but also to corporations dealing with US corporations, nationals, or any other corporation that commits an act, or an act in furtherance of bribery in the territory of the US.\(^{46}\) The criminalisation of bribery payments has direct consequences for the reputation of corporations who would now be engaging in criminal activity by offering bribes in the acquisition of business.

However, stigmatising bribery is one thing. Detecting and prosecuting acts of bribery on the part of a corporation that is operating globally is quite another. In this sense while rule-making establishes the normative space that establishes a global standard criminalising corruption in international business this is a distinct process from the implementation of those rules. In order to be able to effectively implement anti-corruption rules there has to be the means to detect and prosecute the act of bribery to the level required to satisfy a criminal burden of proof, i.e. ‘beyond reasonable doubt.’

The FCPA’s response to this problem was to require that corporations provide the required information to establish that acts of bribery had taken place. Bribe-giving by corporations was usually disguised as legitimate business expenses in corporation’s books. To counter this the FCPA contains what is referred to as the Books and Records provisions that prohibit false accounting practices and requires the establishment of books and records, as well as internal and accounting controls that provide reasonable assurance that financial reports are accurate.\(^{47}\) As such, the FCPA criminalizes two types of conduct: firstly, acts of bribery that distort honest competition, and secondly, false accounting practices that can be utilized to cover up corrupt activities of corporations.\(^{48}\) This two-pronged approach distinguishes between the normative act of criminalisation and the process of implementing the criminal laws. This reformulation of the fight against corruption in terms of the activity of corporations makes the fight against corruption a central issue of corporate compliance and strategy.

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\(^{46}\) The FCPA applies to public companies quoted on the US stock exchange, (15 USC Sec. 78dd-1(a)); private companies, citizens, nationals or residents of the US,( 15 USC Sec. 78dd-2(h)); as well as to any other person who commits an FCPA violation while in the territory of the US (15 USC Sec. 78dd-3(f)(1))

\(^{47}\) 15 USC Sec. 78m.

It is important to note that the FCPA has created a platform for anti-corruption control that is global in reach. By design the FCPA is intended to reach corruption occurring in other countries. In implementation, the responsibility of the corporation for activities linked to foreign subsidiaries and branches means that the process of implementing the FCPA has the capacity to influence corporate behaviour world-wide. By making corruption a business issue, the FCPA acts as a nexus between society and business.

The US Department of Justice (DOJ) enforces the anti-bribery prohibition while the Securities and Exchange Commission (SEC) enforces the Books and Records prohibition. This has been described as a ‘unified approach’ that allows the requirements for ‘accurate accounting by corporations to be part of a statutory policy that enables an effective approach toward corporate bribery.’\(^{49}\) The US Senate emphasized the importance of SEC involvement in enforcement, stating that ‘the bribery of foreign officials often violated our securities laws to the extent the payment was not disclosed to investors’.\(^{50}\)

To implement the requirements of the FCPA, the SEC has adopted two regulations under the Code of Federal Regulations (CFR).\(^{51}\) Rule 13b2-1 deals with the ‘Falsification of Accounting Records’ and provides that ‘No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Sec. 13(b) (2) (A) of the Securities Exchange Act.’\(^{52}\) The responsibility is placed on the issuer to ensure that the system of internal and accounting controls is sufficiently robust to provide the assurance that transactions that are undertaken by the issuer are executed in accordance with the general or specific authorization of management.\(^{53}\) This places the onus on the corporation. Where a corporation is found to be in violation of the FCPA by the authorities, the responsibility to ensure sufficiently robust internal controls to prevent corrupt transactions has not been fulfilled in violation of the SCE rules.

The second rule 13b2-2(a) of the CFR deals with ‘Representations and Conduct in Connection with the Preparation of Required Reports and Documents.’ It prohibits the making of misleading or false statements to the company’s internal auditors or accountants. Disguising a bribery payment as a commission or consultancy fee would constitute such a false or misleading statement. Rule

\(^{49}\) Senate Report, id., Note 29 above. at p. 7.

\(^{50}\) Id., at p. 11.


\(^{52}\) 17 CFR 240.13b2-1 is codified as 15 USC Sec. 78m (b) (2) (i).

\(^{53}\) Id.
13b2-2(b) CFR prohibits the making of misleading or false statements to any independent public or certified public accountant engaged in the performance of an audit or review of the financial statements of that issuer that are required to be filed with the SEC.\textsuperscript{54} Since any bribery payment will have to be recorded in some form in a corporation's books, these rules compel the corporation to accurately list such payments as bribes or be liable for the offense of filing materially misleading information that is important to potential investors and shareholders. The FCPA also holds parent public companies responsible for ensuring that the accounting books and records of foreign subsidiaries comply with FCPA requirements.\textsuperscript{55}

**Creation of a Carrot and Stick Mechanism**

The combination of a baseline of legality, extraterritorial jurisdiction and mandated reporting set the stage for one last element that has catapulted anti-corruption initiatives into a principal area of focus by corporations. The strategy adopted for the implementation of the FCPA was driven by a pragmatic acceptance of the difficulties of enforcing anti-bribery legislation involving complex transactions in an international trading environment. Rules alone are not enough. Effective enforcement is critical to realizing the desired deterrent effect of criminal laws. This is a particularly important issue because the primary actors in grand scale corruption are multinational corporations and governments. Domestic efforts would be insufficient to police bribery occurring in foreign countries or involving foreign government officials.\textsuperscript{56} Apart from this, conflicts of interest and lack of political will can make enforcement problematic. Furthermore access to the level of evidence that is necessary to establish a criminal standard of proof can be challenging where the transactions involved are complex and transnational in nature.

There are important lessons to be learnt from how process of implementing the FCPA is an effective response to these challenges. The sanctioning process of the FCPA has evolved into a

\textsuperscript{54} 17 CFR 240.13b2-2(b).
\textsuperscript{55} 15 USC Sec. 78m (b) (2). An example is the 2003 case of SEC v. Schering-Plough Corporation, where Schering-Plough was found liable for violations of the FCPA books and records and internal controls provisions resulting from the actions of its Polish subsidiary. See SEC v. Schering-Plough Corporation, Case No. 1:04CV00945 (D.D.C. 9 June 2004), available at http://www.sec.gov/litigation/complaints/comp18330.htm.
\textsuperscript{56} The House Report quotes the reservation of the Secretary of the Treasury Blumenthal who stated:

‘I have always felt a criminal statute such as this one will not be easy to enforce, particularly because it does involve acts that take place in other countries, the whole question of extra territoriality and gets you into questions of availability of witnesses, gets you into the question of acts taken in other jurisdictions in which the laws are different ... we must not underestimate the difficulties of enforcement that in any case will result from this kind of legislation.’ See Minority Views to H.R. 3815, Unlawful Corporate Payments Act, House Report, id., Note 3 above, at p. 19.
carrot and stick mechanism that encourages compliance by allowing evidence of compliance to play a role in the final determination of punishment. The resulting FCPA model of enforcement can be characterized as a process of public/private partnering where corporations are encouraged to voluntarily participate in the detection, investigation and sanctioning processes for corruption. This has been done by inviting corporations faced with the severe penalties for FCPA violations to the negotiating table. The decision whether or not to prosecute a corporation for an FCPA violation can be influenced by actions that a corporation has voluntarily undertaken prior to the violation. From a CSR perspective this translates to actions voluntarily undertaken by a corporation to fight corruption occurring in its business activities.

The key to this is the exercise of prosecutorial discretion by the Attorney General. Several factors are considered in a determination whether to prosecute, defer prosecution or not to prosecute a company. This discretion is influenced by choices the corporation has made prior to the occurrence of the violation. This requires verifiable mechanisms of integrated corporate responsibility programs, internal controls and compliance mechanisms that pre-date the incident triggering the enforcement of anti-bribery rules.

Under Sec. 21 of the Securities Exchange Act of 1934 the SEC has discretion whether or not to investigate whether a person has violated the provisions of the Act. In return for such voluntary disclosure and co-operation, corporations may benefit from deferred prosecution, no prosecution or other plea bargain arrangements. The factors that the SEC will take into consideration in making this determination are listed in the Securities and Exchange Commission’s (SEC) Report of Investigation Pursuant to Sec. 21 (a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, 23 October 2001. This involved a case where the SEC decided not to take enforcement action against a parent company, the Seaboard Corporation, for accounting violations by one of its divisions. The report lists self-policing, self-reporting, remediation and cooperation among the factors that will be taken into consideration in deciding whether or not to take enforcement action, or to bring reduced charges, impose lighter sanctions, or to use mitigating language in documents used to announce and resolve enforcement actions.

This model of fighting corruption uses corporate culture in the process of prevention, detection and sanctioning of corruption in a private-public partnership. The focus of sanction is not just the
particular offender but the environment that produces the offender. The creation of a compliance-conducive environment is further supported by the effects of other US laws and provisions that encourage such public-private partnering such as the Sarbanes-Oxley Act, Memoranda of US Attorney Generals and the Federal Sentencing Guidelines.

The Sarbanes-Oxley Act, requires corporations to establish effective internal controls and ensure that their accounts and financial statements accurately reflect the current financial status of the company. The onus is placed directly on chief executive (CEO) and chief financial officers (CFO) as well as company auditors to certify the accuracy of financial reports, including an annual statement regarding the status of internal company controls. The financial statement must identify any ‘material weaknesses’ that affects the internal controls (including findings of suspicious and illegal transactions) and must do so promptly. Severe criminal penalties are imposed on CEO’s and CFO’s of corporations that render false statements in the form of fines of up to $5 million and up to twenty years in prison. Furthermore, the personal liability of the CEO and CFO makes it important that any suspicious transactions are quickly investigated and disclosed.

The Department of Justice (DOJ) Thompson Memo on Principles of Federal Prosecution of Business Organizations, 20 January 2003 advises prosecutors to take the following factors into consideration when deciding on whether and how to prosecute corporations for FCPA violations. These factors include: the corporation’s timely and voluntary disclosure of wrongdoing; its willingness to co-operate in the investigation of its agents; the waiver, where necessary, of corporate attorney-client and work-product protection; the existence and adequacy of the corporation’s compliance program; the corporation’s remedial actions, including any efforts (i) to implement an effective corporate compliance program or to improve an existing one, (ii) to replace responsible management, (iii) to discipline or terminate wrongdoers, (iv) to pay restitution,

57 Cassin writes that the idea is to ‘punish, don’t kill.’ The FCPA framework offers corporations that want to co-operate alternatives in the form of negotiated settlements. The idea he states is that ‘no company is beyond redemption.’ See R. Cassin, Bribery Everywhere, Chronicles From the Foreign Corrupt Practices Act, 2009 (based on posts from the FCPA Blog) http://www.fcpablog.com/.
59 15 USC Sec. 7241 (civil provision) 18 USC Sec. 1350 (criminal provision).
and (v) to co-operate with the relevant government agencies. The Thompson Memo makes it clear that under certain circumstances, corporations may be able to avoid prosecution altogether.\(^{60}\)

The \textit{Federal Sentencing Guidelines for Organizations},\(^{61}\) issued by the U.S. Sentencing Commission and applicable to criminal violations of all federal statutes such as the FCPA, require federal courts handing down criminal sanctions to take into account the existence or absence of effective corporate compliance programs. The presence of an effective compliance program can significantly reduce a corporation’s sentence, in some cases by as much as 95\%, while the absence of such a program can increase the sentence. These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-policing its own conduct through an effective compliance and ethics program. The Sentencing Guidelines set out minimum criteria for a compliance program to be deemed effective: (1) Compliance standards and procedures must be established to deter crime; (2) High-level personnel must be involved in oversight; (3) Substantial discretionary authority must be carefully delegated; (4) Compliance standards and procedures must be communicated to employees; (5) Steps must be taken to achieve compliance in establishment of monitoring and auditing systems and of reporting systems with protective safeguards; (6) Standards must be consistently enforced; (7) Any violations require appropriate responses, which may include modification of compliance standards and procedures and other preventive measures.\(^{62}\)

This model of FCPA implementation is still very much US centred but is beginning to be replicated in other jurisdictions.\(^{63}\) The United Kingdom in the new UK Bribery Act\(^{64}\) makes provision for self-
reporting in the context of plea bargain agreements. The UK Serious Fraud Office (SFO) in its *Guidance on Self Reporting*\(^6^5\) emphasizes the benefit to companies that self-report in a process of negotiated settlement. These it lists as (1) a civil rather than a criminal outcome, (2) the opportunity to manage, with the SFO, the issues and any publicity proactively; (3) the fact that the corporation will be seen to have acted responsibly by the wider community in taking action to remedy what has happened in the past and to have moved on to a new and better corporate culture and (4) the fact that a negotiated settlement rather than a criminal prosecution means that the mandatory debarment provisions under Article 45 of the EU Public Sector Procurement Directive in 2004 will not apply\(^6^6\).

Failure to self-report would be regarded by the SFO as a ‘negative factor’ that raises the likelihood of criminal investigation, prosecution and a confiscation order.\(^6^7\) The plea bargain for corruption offences in the UK is still very much in its infancy and it is yet to be seen whether it will acquire the same status as the US FCPA process. However, the fact that such an opportunity exists at all means that corporations with links to the UK market have to take the recommendations of the SFO as regards self-reporting into account in the planning of anti-corruption strategy.

The combined effect of rules that raise the possibility of negotiated settlements in the world’s largest economy and the world’s commercial capital is the creation of a transacting environment that encourages corporations to co-operate with state authorities in the understanding that this co-operation may be rewarded with an exercise of prosecutorial discretion in favour of the company. The carrot that makes public/private partnering attractive to corporations is the opportunity to avoid a criminal prosecution and the possibility of debarment from government contracting.

This inspires corporations to self-police and self-report incidences of corruption. It also acts as an incentive for corporations to set up effective compliance and ethics programs, robust internal

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64 Bribery Act 2010 C. 23  
66 Id., Introduction.  
controls, good training programs, anti-corruption policy and company codes, and to involve all levels of company management and in particular the highest levels. In the implementation of the mandatory rules, corporations are encouraged to develop far-reaching voluntary schemes of cooperation.

**Anti-Corruption Policies as Good Corporate Management**

The correlation between the voluntary establishment of programs and processes that put the company in a positive position in the eventuality of an FCPA violation has created a transacting environment where the adoption of anti-corruption measures by corporations is an urgent matter of good corporate management. The possibility of negotiating sanction sets the stage for a partnership between public authorities and private corporations in the fight against corruption.

As I have noted elsewhere, there are several reasons that corporations benefit from managing the risks of corruption in a co-operative process. The financial penalties for FCPA anti-bribery violations are quite onerous. In addition, corporations may risk being barred from government support in the form of facilities and participation in government programs. This is quite apart from the financial fall-out of attendant bad publicity. Also of significance is the increased prosecution of individuals for anti-FCPA violations. The personal exposure including the risk of a jail term of individual directors and employees is much higher in today’s regulatory climate.

There is also greater international exposure to anti-bribery prosecution as several countries are increasing the implementation of their anti-corruption rules. Apart from US prosecution, there is a chain-reaction of anti-bribery prosecution that is moving across to Europe and other parts of the world. Reputational risk is also an indirect consequence of vigilant FCPA prosecution. The requirement of ‘real’ and not ‘cosmetic’ measures is demanded not just by the authorities but also by other stakeholders. The most direct stakeholders are (1) shareholders whose value in the corporation can be directly impacted by the effectiveness of CSR anti-corruption strategy both prior and post infringement and (2) consumers whose perception of a corporation is becoming an increasingly important factor in a technologically connected world.

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68 See generally, A. Makinwa, ‘Good Governance: Negotiated settlements for FCPA Violations as a Model Note 10 above.
69 A. Makinwa, Private Remedies for Corruption, Note 1 above, p. 100
The changing transacting environment is also serving as a catalyst for increased involvement of a broad spectrum of stakeholders in actions to hold corporations accountable for corruption in business transactions.\textsuperscript{71} Increasingly both shareholders and the public at large are willing to take actions against corporations that have engaged in corrupt activity.\textsuperscript{72} Shareholders and institutional investors are also more conscious about the history of a corporation particularly as regards corruption in the choice of new investment. Publicity about a corporation’s involvement in corrupt activities can have a negative effect on its shares.\textsuperscript{73} All of this adds up to a real incentive for corporations mitigate their risks by positioning themselves to be able to take advantage of negotiated settlements and to be able to show shareholders and investors that there are ‘on top of things’ as far as bribery related risks are concerned. The best course for a company that cannot predict the future or guarantee that the company will never be involved in a FCPA violation is to put in place all those elements that will work in its favour in the weighing process.

**Explaining the Prominence of Anti-Corruption initiatives**

Factors that influence a corporation’s choice of focus can be summarized in two words, ‘self-interest’. Very simply, the extent to which a social issue impacts on a corporation’s long term competitiveness, the greater its prominence on the global CSR agenda. Self interest can be viewed in different perspectives. Instrumentalists argue that there is a business case to be made for CSR. Studies have shown some positive benefit to corporations that engage in CSR practices. However, the evidence is not overwhelming. The rise to prominence of anti-corruption initiatives on the global CSR agenda corporate CSR strategy that is arguably due to something other than a verifiable causal link to increased competitiveness and profits.

\textsuperscript{71} Attempts by a growing group of diverse types of claimants show a willingness to challenge corrupt acts by officers of corporations. Examples include shareholders using class and derivative actions, succeeding governments, competitors who have lost a bid as a result of unethical practices, non-governmental organizations along with ordinary citizens who institute claims based on acts of bribery and corruption. For a typology of claimants see A. Makinwa, International Corruption and the Privatization of Security, in M. Hildebrandt, M. Makinwa, A. Oehmichen (Eds.), Controlling Security in a Culture of Fear, Boom Publishers, The Hague, 2010, p. 99, at pp. 112-119. See also A. Makinwa, Private Remedies for Corruption, Note 1 above, pp.389 - 414

\textsuperscript{72} See generally A. Makinwa, Private Remedies for Corruption, Note 1 above, pp. 365 - 435

\textsuperscript{73} Cases like \textit{In re Immucor Inc. Securities Litigation}, 2006 U.S. Dist. LEXIS 72335 (N.D. Ga. 4 October 2006 and \textit{In re Titan Securities Litigation}, No. 04-CV-0701-K (NLS) U.S. District Court for the Southern District of California are examples of instances where shareholders claimed damages for losses suffered after revelations about the corporations corrupt activities went public.
This paper argues that the perfect trio of the possibility of negotiated settlement, responsibility to shareholders and vulnerability to reputational damage make the selection of anti-corruption initiatives a prudent choice for corporations operating in a global community. This choice ultimately impacts on the long term profitability of a corporation. The incentives to engage in voluntary policing, regulation and reporting are however are arguably more clearly visible than are for example in other CSR issues such as environment, health, community development and in the workplace. Making compliance the prudent choice creates the momentum necessary to 'hardwire' anti-corruption initiatives into a corporation's internal operations.

This 'hardwiring' has a ripple effect through the supply chain of the corporation raising the profile of anti-corruption initiatives throughout the corporation's sphere of influence. This selection of anti-corruption as a central CSR strategy has global effect because (1) in an integrated market, long term competitiveness can only be achieved with a level playing field. To stay competitive a corporation will seek to encourage the equilibrium of the level playing field. There is great pressure that conditions that apply to one corporation apply to all corporations.74 (2) The greater the potential impact on a corporation's competitiveness the more likely social responsibility becomes hardwired into a corporation's operations. (3) In a global operation, CSR soft instruments become the de facto guidelines that operate across jurisdictions, legal systems and cultures, thus creating a consistent normative space that overrides local rules and traditions. This 'knock-on' effect increases the importance and prominence of anti-corruption initiatives as a corporate social responsibility issue on a global scale.

It is interesting to note that in the 2013 Transparency International Global Barometer assessment of perceptions of the most corrupt institution in each country surveyed, among the 12 major institutions surveyed, the public perceived political parties as the most corrupt and the business/private sector (along with religious institutions) as the least corrupt.75 Of all the institutions surveyed it is noteworthy that all the public institutions were rated more corrupt than the private sector.76 This makes the role of corporations as private actors in the fight against corruption a very

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74 Indeed this is precisely how the FCPA became a global standard. American companies faced with competition against companies that did not have any rules prohibiting bribery in international transactions lobbied to have the FCPA either scrapped or adopted as a global standard. Fortunately for the world, the latter has been the case. See generally, A. Makinwa, Private Remedies for Corruption, Note 1 above, pp. 101 – 102.
76 The 12 major institutions surveyed in order of perceived corruption in each country are as follows: Political Parties (51 countries), the Police (36 countries); the Judiciary (20 countries); Public Officials (7 countries); Parliament/Legislature (7 countries)
significant one. Multinational corporations occupy a big space in the world economy and can impact greatly on the societies in which they operate. This fact alone makes their role as private actors in the fight against corruption important. Their participation in the co-operative mechanisms that characterize FCPA implementation gives corruption great prominence, and continues to shape the direction of the fight against corruption on the global CSR agenda. It is hoped that the gains achieved in internal control of corruption will also impact on public institutions and officers within the corporation’s sphere of influence.

Beyond the issue of corporate social responsibility, the process of implementing the FCPA is remarkable in its global scope. All multinational corporations regardless of jurisdiction are affected by it. This is a governance process that is able to affect the behavior of corporations in transnational space. Where governments are crippled by institutional corruption, it is important that such processes that can bypass compromised states are developed and encouraged.

**Conclusion**

The creation of a compliance conducive transacting environment has been a key factor in the rise and prominence of anti-corruption initiatives on the global corporate responsibility agenda. This ‘smart’ environment is characterized by a combination of soft and hard law rules. More importantly it also features a process of implementation that integrates anti-corruption strategy into the very operations of a company. Engaging the corporation as a partner in the detection, reporting and punishment of corruption is made possible by the reward offered for voluntary co-operation in the form of negotiated settlements. This ‘voluntariness’ facilitates a self-monitoring environment where corporations take the initiative and become creative in the management of corruption risk.

As a result, anti-corruption policies and strategy are of immediate import to all major corporations as well as all those that are involved their supply chains or spheres of influence. It also assumes a global dimension as measures taken by corporation extend across continents and legal jurisdictions in an integrated world market.

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countries): Medical and health services (6 countries); Media (4 countries); Religious Bodies (3 countries); Business/private sector (3 countries). Id at p.17.
This brings multinational corporations as private actors into the fight against corruption in a very concrete way. The process of implementing the FCPA is a co-operative process with the private sector. This has arguably contributed to pushing anti-corruption initiatives into a premier place on the global CSR agenda. Fighting corruption in international business can only be a collaborative effort. Not just between governments, but between governments and the multinational corporations whose operations span the globe.

The FCPA model of implementation provides valuable insights as to why anti-corruption initiatives have achieved a prominent position in the global CSR agenda. The corporation is a rational creature and will manage risk that threatens growth and profits. A riskier environment, not more rules or predictable state-centered enforcement is the trigger that unfolds the creativity of corporations in the fight against corruption. Bringing them alongside as partners profoundly changes the dynamics of the transacting environment. Managing risk in this environment ‘hardwires’ compliance with anti-corruption rules into a corporation's systems. By so doing corporations voluntarily adopt processes that impact positively on society and provide an important bulwark against corruption.

On the part of government authorities this is a win–win situation. Bribery occurs in the shadows and is difficult to expose and prosecute. Engaging corporations directly in fighting corruption helps governments to get an insider-view that may be otherwise beyond their reach. This acceptance of the limitations of government is a striking departure from the notion of the state as the principal provider of security. Accepting that the fight against corruption can only be truly effective where government and non-government actors work together is an important lesson to be learnt from this model of enforcement. The model of public/private partnering between corporations and state authorities is one that brings a ray of hope in the fight against the formidable problem of corruption.