TOBACCO REGULATION IN NIGERIA AND CORPORATE SOCIAL RESPONSIBILITY

A thesis submitted for the degree of Doctor of Philosophy

by

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Declaration Statement

Declaration

I hereby declare that the thesis is based on my original work, except for quotations and citations which have been duly acknowledged. I also declare that it has not been previously or concurrently submitted for any other degree at Brunel University or other institutions.

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Abstract

Corporate social responsibility has become an increasingly significant concept. The rising number of literature has sought to provide an understanding of CSR from various industrial and theoretical perspectives. However, CSR in contentious industries from a legal and African context remains limited. The research augments this position by resting on the argument that one way of solving the governance gap or institutional void is to embrace a regulatory framework by government and business. To this end, the research examines the adequacy of the tobacco regulatory framework at regulating the activities of transnational tobacco corporations (TTCs), and to establish what role, if any, CSR could serve to mitigate any potential gap in the regulatory framework. The approach taken is an analysis of relevant legal instruments regulating the tobacco industry and CSR engagement in the tobacco industry in Nigeria. The findings reveal the limitations of the regulatory framework, including the issue of enforcement and corruption. It underscores the complementary role of CSR as a useful tool in the tobacco control framework so far TTCs consider a recommitment to the 'social contract' of corporate social responsibility. The findings and recommendations could enable the tobacco control framework, contribute to the CSR discourse, inform practice, and improve policy decision-making.

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Table of Cases

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Table of Abbreviations

AC	Appeal Cases (Law Reports)
ACHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
ALL ER	All England Law Reports
BAT	British American Tobacco
BBC	British Broadcasting Corporation
CAMA	Companies and Allied Matters Act
CEDWA	Convention on the Elimination of All Forms of Discrimination Against Women
Ch D	Chancery Division (Law Reports)
Cr App R	Criminal Appeal Reports
CRC	Convention on the Rights of the Child
CSR	Corporate Social Responsibility
CUP	Cambridge University Press
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
EFCC	Economic and Financial Crimes Commission
EHRR	European Human Rights Reports
EIA	Environmental Impact Assessment
EU	European Union
EWHC (Admin)	England and Wales High Court (Administrative Court)
FRN	Federal Republic of Nigeria
FSC	Federal Supreme Court Reports (Nigeria)
FTSE	Financial Times and Stock Exchange
FWLR	Federation Weekly Law Report (Nigeria)

HCA	High Court of Australia
HRLRA	Human Rights Law Reports of Africa
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPC	Independent Corrupt Practices Commission
ICSID	International Centre for Settlement of Investment Disputes
ILM	International Law Reports
ILO	International Labour Organization
JTI	Japan Tobacco International
LFN	Laws of the Federation of Nigeria
NCLR	Nigerian Constitutional Law Reports
NCP	National Contact Point
NGO	Non-governmental Organisation
NRNLR	Northern Region of Nigeria Law Reports
NTCA	National Tobacco Control Act 2015
NWLR	Nigerian Weekly Law Report
OECD	Organization for Economic Co-operation and Development
OUP	Oxford University Press
PMI	Philip Morris International
PLOS med	Public Library of Science Medicine
QB	Queen's Bench
RSLR	Rivers State Law Reports (Nigeria)
SC	Supreme Court
TTCs	Transnational Tobacco Corporations
UDHR	Universal Declaration of Human Rights
UKFTT	United Kingdom First-Tier Tribunal

UKHL	United Kingdom House of Lords Decisions
UKSC	United Kingdom Supreme Court
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
WHO FCTC	World Health Organization Framework Convention on Tobacco Control
WRN	Weekly Reports of Nigeria
WTO	World Trade Organization

Chapter One. Introduction

1.1 Background

Transnational tobacco corporations (TTCs) have expanded into new markets based on the liberal global trade.[1] These new frontiers—Asia, Africa, and the Middle East—have witnessed a rise in tobacco consumption, mainly attributed to intense lobbying,[2] weak tobacco control, and the reduction of tobacco prevalence in developed countries.[3] Although transnational activities contribute to the social and economic development,[4] the cost to health, however, erodes such potential benefits. For instance, the World Health Organization's factsheet reveals tobacco kills up to half of its users or nearly 6 million people each year, of which more than 5 million are users and ex-users.[5] In addition, treating smoking-related illnesses is a costly business. The overall financial burden of tobacco use in the UK is estimated at £13.74 billion a year.[6] Similarly, the Nigerian economy lost an estimated $591 million in the form of medical treatments and loss of productivity from tobacco-related diseases.[7] Such extreme revelations have bolstered the call for stringent tobacco regulatory framework in Nigeria.[8] As a result, Nigeria introduced a tobacco regulatory framework, comprising government agents, institutions, and a national tobacco legislation, with the aim of reducing tobacco prevalence. The framework, in general, is part of a wider solution that protects citizens and the environment against the negative impact of transnational tobacco corporations, but how adequate is the regulatory framework against the well-resourced transnational tobacco corporations? Scherer & Palazzo, for instance,

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[1] D Yach, 'Globalisation of tobacco industry influence and new global responses' (2000) 9 Tobacco Control 206.
[2] R Masironi, 'Smoking control strategies in developing countries: Report of a WHO expert committee, (1984) 9(1) World Smoking Health 4; JL Mackay, 'The fight against tobacco in developing countries' (1994) 75(1) Tuber Lung Dis 8-24.
[3] Action on Smoking and Health, 'ASH fact sheet: tobacco and the developing world' (Ash.org.uk, July 2019) <http://ash.org.uk/wp-content/uploads/2019/07/ASH-Factsheet_Developing-World_v3.pdf> accessed 31 December 2012.
[4] J Michie (ed), *The hand book of globalisation* (3rd edn, Edward Edgar 2019).
[5] World Health Organization, 'WHO Fact sheet No.339' (WHO, 27 May 2020) <http://www.who.int/mediacentre/factsheets/fs339/en/index.html> accessed 23 May 2021.
[6] UK Dept of Health, '3rd UK implementation Report to WHO FCTC', (dh.gov.uk, October 2010) <http://www.who.int/fctc/reporting/party_reports/gbr/en/index.html> accessed 4 January 2012.
[7] Centre for the Study of the Economies of Africa (CSEA), *A Scoping Study of Nigeria's Tobacco Market and Policy Space* (CSEA 2019) <https://www.africaportal.org/publications/scoping-study-nigerias-tobacco-market-and-policy-space/> accessed 21 October 2019.
[8] ASH factsheet (note 3).

contend that global regulatory frameworks are sometimes fragile and incomplete.[9] Ruggie claims that national laws where transnational corporations operate are sometimes weak, poorly enforced or non-existent.[10] He argues, nonetheless, that there is a solution to this governance gap or institutional void through a regulatory partnership between government and business.[11] This partnership posited by Ruggie creates a regulatory framework consisting of two sides: one side comprises non-state regulatory process, which involves organisations governing[12] and coordinating their actions, including professional codes of ethics and corporate social responsibility; the second side is the state regulatory process, which requires government entities, under their primary duty to protect, to regulate the activities of businesses, including through legislation, regulations, and administrative rules issued by government entities.

In the context of Ruggie's regulatory partnership between government and business, the research will focus on state and non-state regulatory actions. The state regulatory action will include legislations relevant to the research, while the non-state regulatory action will include corporate social responsibility (CSR),[13] given that CSR is an internal regulatory process or control, where an organisation elects to act responsibly, eschew negative practises, and reduce any negative impact on society.

[9] AG Scherer & G Palazzo, 'Globalisation and corporate social responsibility'. In A Crane et al., *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 413 – 431.
[10] John G Ruggie, 'Multinational as global institution: power, authority and relative autonomy' (2018) 12(3) Regulation and Governance 317.
[11] *Ibid.*
[12] Examples include voluntary agreements and peer pressure.
[13] More details in chapter two.

1.2 Research Focus and Relevance

Nigeria maintains the position as one of the most important countries in Africa, taking leadership on many public health issues.[14] It is the most populous state in Africa and remains at the forefront on many African issues, with some of its achievements translating into 'soft' influence on other African countries.[15] As Africa's economic centre, Nigeria is projected to be the 20th largest economy in the world by 2030, a projection favoured by transnational tobacco corporations.[16]

Transnational Tobacco Corporations regard developing countries as the new frontier for tobacco trade due to declining tobacco prevalence in Western countries.[17] As a result, major transnational tobacco companies (TTCs) have gained presence in Nigeria, including British American Tobacco (BAT), the predominant tobacco corporation in Nigeria;[18] Scandinavian Tobacco; Phillip Morris Limited; and Japan Tobacco International (known locally as Habanera Limited).

Nigeria consumes large amount of tobacco products. In 2015, 110 million cigarettes were consumed daily, accounting for over 40 billion cigarettes per year.[19] These figures are expected to rise, with the increasing exposure of the younger population to smoking.[20] More than 25000 children (10 – 14 years old) and about 7.5 million adults (15+ years) continue to use tobacco each day,[21] leading to an estimated death of 246 men per week.[22]

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[14] President Barack Obama, 'Remarks by President Obama and President Buhari of Nigeria Before Bilateral Meeting' (White House Office of the Press Secretary, 20 July 2015).
[15] John Campbell & Matthew T Page, *Nigeria: what everyone needs to know* (Oxford University Press 2018). See also the World Bank data on Nigeria.
[16] *Ibid.*
[17] WHO FCTC, 'DECISION: International cooperation for the implementation of the WHO FCTC, including Human Rights' (FCTC/COP7(26), 7th session, India, 7-12 Nov 2016); see also, J Mackay and J Crofton, 'Tobacco and the Developing World' (1996) 52(1) British Medical Bulletin 206.
[18] CSEA (note 7) 6.
[19] D Adeloye and others, 'Current prevalence pattern of tobacco smoking in Nigeria: a systematic review and meta-analysis' (2019) 19(1) BMC Public Health 1719.
[20] *Ibid.* See also BO Adeniyi and others, Knowledge of the health consequences of tobacco smoking among Nigerians smokers: a secondary analysis of the Global Tobacco Survey' (2017) 23(4) African Journal of Thoracic and Critical Care Medicine 113.
[21] Tobacco Atlas, 'fact sheet: Nigeria' (tobacco atlas, 2021) <tobaccoatlas.org/country/nigeria> accessed 2 March 2021.
[22] *Ibid.*

As with most sub-Saharan African nations, Nigeria perceives itself as a democratic, multicultural, free-market economy, albeit with its own unique circumstances, and research findings in Nigeria could benefit other sub-Saharan African countries. In addition, Nigeria is a member of the World Health Organization and a signatory to the conventions of the World Health Assembly (WHA). One of these conventions is the WHO Framework Convention on Tobacco Control 2003 (WHO FCTC), the first international treaty that promotes public health through tobacco control. The Convention serves as a new legal dimension for international health cooperation,[23] shaping Nigeria's legal and non-legal (for instance, tax rises on tobacco products) tobacco regulatory solutions.

However, these solutions are one-sided: they are government's response to tobacco control. Contrary to this unilateral approach, Ruggie argues that a bilateral approach—that is, a regulatory partnership between government and business—enhances the regulatory framework.[24] Building on Ruggie's claim, the research will focus on evaluating both governmental response (tobacco regulations) and business response (CSR) to tobacco control. From the evaluation, the research will proffer solutions in the form of recommendations, with the ultimate aim to enable the tobacco regulatory framework. The suggested recommendations could inform policies and, consequently, reduce the numerous deaths and illnesses associated with tobacco prevalence.

CSR research in Nigeria is mainly associated with the oil and gas industry, and few are associated with the tobacco industry. Instances of the few CSR tobacco-related research include Egbe *et al*.[25] and Jakpor,[26] whose research are based on the attempts of tobacco companies to undermine tobacco control policies; and Ojo[27] and Ihugbao,[28] whose work involve normative CSR approach in the tobacco industry.

[23] O Oladepo et al., 'Analysis of tobacco control policies in Nigeria: historical development and application of multi-sectoral action' (2018) 18(1) British Medical Council Public Health 78.
[24] Ruggie (note 10).
[25] CO Egbe, 'Role of stakeholders in Nigeria's tobacco control journey after the FCTC: lessons for tobacco control advocacy in low-income and middle-income countries' (2019) 28 Tobacco Control 386.
[26] P Jakpor, 'How BAT undermines the WHO FCTC through agricultural initiatives' (2012) 21(2) Tobacco control 220.
[27] O Ojo (2019) 'Nigeria: CSR as a vehicle for economic development'. In SO Idowu & WL Filho (eds), *Global Practices of CSR* (Springer-Verlag 2009) 393.
[28] B Ihugbao, 'CSR stakeholder engagement and Nigerian tobacco manufacturing sub-sector' (2012) 3(1) African Journal of Economics and management studies 42.

Thus, researchers' understanding of the current tobacco regulatory framework remains incomplete, because previous work has not examined the regulatory framework using this bilateral approach. This research aims to fill that gap by contributing several novel industry-specific context, benefiting not only Nigeria but also sub-Saharan Africa and other nations with comparable situation.

1.3 Methodology

The approach will involve— (1) analysing three major elements: tobacco control legislation, tobacco control institution, and other laws that could serve as an auxiliary benefit to the overall tobacco regulatory framework; (2) analysing CSR policy framework of the dominant transnational tobacco corporations in Nigeria; and (3) drawing conclusions and recommendations to provide answers to the research questions.

The research will rely on primary sources, including the Nigerian Constitution, national legislation, judicial decisions, regional and international instruments, as well as an extensive review of secondary sources such as books, journal articles, newspapers, internet documents, and internal documents of the tobacco industry. The Truth Tobacco Industry Documents (TTID) will provide data on the internal operations of transnational tobacco corporations. The TTID is an online archive containing permanent access to tobacco industry internal corporate documents produced during litigation between U.S. States and the seven major tobacco industry organisations and other sources. These internal documents give insights into the operations of the tobacco industry, including transnational tobacco corporations present in Nigeria.[29] International guidelines and principles, including domestic laws, will set a benchmark to prevent 'subjectivity' associated with the CSR agenda.[30]

[29] UCSF Library, 'About The Truth Tobacco Industry Documents' (UCSF.edu, year unknown) <https://www.industrydocumentslibrary.ucsf.edu/tobacco/about/history/> accessed 22 Jan 2018.
[30] European Commission, 'A renewed EU strategy 2011-14 for corporate social responsibility, COM (2011) 681 final, 25 Nov 2011, at [3.4].

Primary and secondary law data were sourced from the following libraries: Brunel University, Institute of Advanced Legal Studies London, and the British Library.

1.4 Research Outline

Chapter 1

This chapter provides a background for an enhanced tobacco regulatory framework, including the reason to combine tobacco industry and corporate social responsibility, which appears to be paradoxical at first glance. The research questions and the focus of the research are discussed and justified. In addition, the overall research aim, and individual research objectives are identified. The chapter discusses the research methodology, adopting a strategy that entails a content-analysis of CSR statements of transnational tobacco corporations and primary legal sources concerning tobacco regulation.

Chapter 2

This chapter examines the concept of CSR, focusing on the theories and various related themes. It discusses the drivers of CSR and clarifies the elements of CSR adopted in the research, therefore, providing scope to a dynamic concept. To promote a broader understanding to the reader, the chapter focuses on the contending issues of CSR, such as the shareholder versus stakeholder primacy, and voluntary approach versus mandatory approach to CSR. The chapter explores the relationship between CSR and law, demonstrating how they both advance each other. It considers the analysis of corporate legal theories so as to appreciate the constraints placed on corporate law itself, which prevents the comprehensive application of CSR. Then, it analysed the CSR framework of the main transnational tobacco corporations operating in Nigeria, and it explores the position of the law on CSR and its effect on the tobacco industry.

Chapter 3

This chapter analyses the foremost tobacco control legislation in Nigeria: National Tobacco Control Act 2005 (NTCA). It reviews the adequacy of the Act by evaluating its provisions with that of the World Health Organization Framework

Convention for Tobacco Control, a treaty that it purports to domesticate. It then provides suggestions to enable the Act.

Chapter 4

This chapter explores other national laws that could be 'promoted' to benefit the NTCA. It provides an analysis of the laws in order to assess its adequacy in fulfilling the objectives of the NTCA. In addition, the chapter analysed the tobacco control institutions to determine their adequacy to satisfy their objectives.

Chapter 5

This chapter centres on corruption, anti-corruption measures, and the impact of corruption on the tobacco regulatory framework. It establishes the nexus between corruption and the adequacy of tobacco control. The chapter highlights unethical practices conducted by transnational tobacco corporations and considers relevant foreign case laws that reveals such acts. It then examines national and international anti-corruption instruments in regulating international businesses, as well as the international efforts to combat corruption in Nigeria.

Chapter 6

This chapter examines the relationship between human rights and tobacco control, demonstrating that Nigeria could apply a human-rights based approach to regulating the industry. It then draws attention to the human rights violations arising out of the activities of the tobacco industry. Furthermore, it clarifies the position of human rights responsibilities and obligations under the Nigerian constitution and under international instruments. Then, it assesses the adequacy of international human rights instruments in holding transnational tobacco companies accountable, as well as the effect of international initiatives developed to stimulate corporate responsibility.

Chapter 7

This chapter concludes the research. It begins by answering the research questions. The chapter also revisits the overall aim and objectives of this research study. The findings thereof are summarised and are related to the research objectives. The conclusions from this research are derived and linked to the research objectives,

and based on these conclusions, recommendations are made. Lastly, the contribution of this research to knowledge and its implication is clarified.

1.5 Research Question

It is often the case society perceives the tobacco trade as a 'sin industry'[31], considering the negative health impact on society. For this reason, tobacco control advocates have demanded for reforms, ranging from proscribing tobacco products to shaping public perception, as well as protecting the public against the industry, primarily, through stringent legislative instruments.[32] Nigeria, under treaty obligation, have bolstered tobacco control legislation, thereby enhancing its tobacco regulatory framework. However, how adequate is this framework against the activities of well-resourced transnational tobacco corporations? This question is what the research seeks to answer, and to establish what role, if any, CSR has in the regulatory framework. As such, the research aims to answer the following questions:

1) How adequate is Nigeria's legal framework at regulating the activities of transnational tobacco corporations?
2) What role corporate social responsibility has in the regulatory framework?

To provide clarity to question one, the legal framework would include the major law regulating the tobacco industry and the institutions and agencies established thereof.

By examining the above research questions, this study seeks to make significant contributions to augment the literature on CSR and tobacco control in Nigeria, which can also benefit sub-Saharan Africa. The intended outcome of the research questions is to create a novel research, enrich discussions and inform policy.

[31] L Craig et al, 'Impact of the WHO FCTC on tobacco control: perspectives from stakeholders in 12 countries' (2019) 28(2)Tobacco Control 129; CM Johnson & KJ Meiser, 'The Wages of Sin: Taxing America's Legal Vices' (1990) 43(3) Western Political Quarterly 577.

[32] World Health Organisation, *Protection from exposure to second-hand tobacco smoke: policy recommendations* (World Health Organisation 2007); RD Hurt *et al.,* 'Roadmap to a tobacco epidemic: transnational tobacco companies invade Indonesia' (2012) 21 Tobacco Control 306.

1.6 Overall Aim and Objectives of the Research

a) The overall aim of the research is to enhance the tobacco regulatory framework in Nigeria.
b) Identify legislation and institution that constitute the tobacco regulatory framework.
c) Critically evaluate the adequacy of the regulatory framework to which they protect Nigerians against the adverse impact of transnational tobacco corporations.
d) Explore solutions to enhance the regulation of transnational tobacco corporations, including through corporate social responsibility.
e) Formulate recommendations based on the inconsistencies identified, so as to improve the regulatory framework.
f) Present an original intellectual research.

Chapter Two. Corporate Social Responsibility: a general overview

2.1 Introduction

CSR means 'something but not always the same thing to everybody'.[33] For this reason, this chapter does not define CSR. Instead, it identifies the central themes associated with CSR.[34] The chapter recognises the various concepts of CSR and draws out the main theories, issues, and contrasting debates with the aim of providing a greater understanding and scope to an otherwise fluid notion,[35] given that a concept without a scope in meaning does not lend itself easily to defined agendas.[36] The identification of the central theme therefore justifies the ability to present a legal perspective of CSR relevant to the research agenda. By capturing the symbiotic relationship between law—in the context of tobacco regulations—and CSR, the research demonstrates how they could both advance each other. Afterwards, it reveals the position of the law on how CSR should be practised within the tobacco industry, creating an industry-specific form of CSR. In drawing from these experiences, the chapter concludes that CSR could drive the context of obligations and responsibilities of transnational tobacco corporations, especially in situations where legislative or governmental gaps arises.

2.2 The Concept of CSR

Corporate social responsibility (CSR) has continued to gain prominence.[37] It is no longer considered as a business subject alone, but equally as a subject for

[33] D Votaw, 'Genius becomes rare: A comment on the Doctrine of Social Responsibility Pt.1' (1972) 15(2) California Management Review 25.
[34] Burchell J, 'Understanding the Concept of CSR'. In J Burchell, *The Corporate Social Responsibility Reader,* (Routledge 2008) 79.
[35] M Marrewijk, 'Concepts and definitions of CSR and corporate sustainability: Between agency and communion' (2003) 44(2) Journal of Business Ethics 95.
[36] N Boeger, R Murray and C Villiers (eds), *Perspectives on Corporate Social Responsibility* (Edward Elgar 2008)1.
[37] A Crane *et al.*, *Corporate social responsibility: readings and cases in a global context* (Routledge 2013).

government, civil society, academia, and NGOs. Having transformed over the years,[38] CSR has had significant impact on society, economy, and on the environment. On corporate impact, for instance, CSR has 'evolved from how businesses spend their money to how they earn it'.[39] This expansive nature of CSR, however, serves as both a benefit and a burden, a benefit considering that it continues to grow as a positive social construct and a burden arising out of, but not limited to, scope and definitional issues. On the issue of scope, CSR may have started as a business management concept, its tentacles, however, are now rooted in different specialities, ranging from psychology[40] to legal conceptions. Each constituent actor has redefined the definition and reshaped its scope. For instance, climate change, which now forms an integral part of CSR, has expanded the scope in the form of a new CSR agenda: corporation should aim to minimise their environmental impact. With this expansive nature, the scope of CSR now includes water and waste management, alleviating poverty, supply chain standard, human rights, philanthropy, employee satisfaction, ethical behaviour, transparency, community involvement, sustainable development, and still increasing.[41] All of these various shades of CSR have had an influence on the flexible approach to the language and acronym of CSR, portrayed when representatives of small and medium-sized enterprises (SMEs) in the UK indicated that the term 'corporate responsibility' is unfriendly to small and medium-sized enterprises (SMEs), preferring a more inclusive term—responsible business.[42] Other references to CSR are sustainability, corporate accountability, citizenship, amongst other references.[43]

As for definitional issues, this could be demonstrated when the European Commission (EC), faced with such a challenge, had to reframe CSR to reflect recent changes, as the term continued to evolve. The EC first defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business

[38] For instance, from being a single bottom line to a triple bottom line—that is, from profit to people, planet, and profit.
[39] UK Department for Business Innovation & Skills, *Corporate Responsibility, Good for Business & Society: government response to call for views on corporate responsibility*, (BIS, April 2014).
[40] Y Yoon *et al.*, 'The Effect of CSR Activities on Companies with Bad Reputation' (2006) 16(4) Journal of Consumer Psychology 377.
[41] ISO, 'ISO 26000:2010, Guidance on Social Responsibility' (iso.org, Nov 2010) <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en> accessed 25 April 2014.
[42] The UK Department for Business Innovation and Skills refers to the concept as 'Corporate Responsibility' at (note39); whilst the ISO refers to the concept as 'Social Responsibility'.
[43] Corporate responsibility, sustainable development, social responsibility, corporate social responsiveness, among others.

operations and their interaction with their stakeholders on a voluntary basis'.[44] Ten years after the first definition, the EC depicts CSR as 'the responsibility of enterprises for their impacts on society'.[45] This new representation of CSR demonstrates two major developments: first, whilst the old definition reflects a rigid form of CSR, the new strategic approach captures the fluidity of the concept by focusing on its core elements—corporate responsibilities and corporate impact. Supporting this kind of approach, Burchell argues that it is beneficial to identify the core elements of CSR rather than seeking an all-encompassing definition.[46] On the second major development, the EC notably excluded the 'voluntary' element of CSR from its new depiction, an element that has been contentious within the CSR discourse. On the one hand, certain countries, including Sweden, have adopted a voluntary approach to CSR;[47] on the other hand, countries such as India and Mauritius have legislated to compel companies to engage in CSR.[48]

Positioned between the two opposing approaches is a quasi-mandatory and -voluntary approach; that is, an approach where CSR remains voluntary but with various degrees of industry-specific or content-specific legislation, aimed at shaping corporate behaviour. Denmark, Germany and Canada are examples of countries that have employed this approach.[49] Jones argues that the voluntary approach to CSR is a better option, for it allows market forces or consumers to possess the ultimate power and influence to make or break an organisation,[50] but scholars such as Baldwin *et al.* view this voluntary approach to CSR as inadequate.[51] Villiers has similar concerns that when corporate actors regulate their corporation through CSR, it has the effect of increasing their power; thus, to harness corporate power effectively, external regulation is necessary.[52] Nonetheless, the research adopts and aligns scope with the

[44] Commission, 'Promoting a European framework for Corporate Social Responsibility', (Green Paper) COM (2001) 366 final, 18 July 2001.
[45] European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', COM (2011) 681 final, 25 October 2011.
[46] J Burchell, 'Understanding the Concept of CSR' in J Burchell, *The Corporate Social Responsibility Reader,* (Routledge 2008) 79.
[47] R Schmidpeter *et al.* (eds), *International dimensions of sustainable management* (Springer 2019).
[48] *Ibid.*
[49] *Ibid.*
[50] D Jones, *Who Cares Wins: why good business is better business* (Pearson Education Ltd 2012) 106.
[51] R Baldwin and M Cave, *Understanding Regulation* (Oxford University Press 1999); J Black, 'Decentralising regulation: the role of regulation and self-regulation in a post-regulatory world', (2001) 54 Current Legal Problems 103-146.
[52] N Boeger *et al.*, *Perspectives on Corporate Social Responsibility* (Edward Edgar 2008) 3.

EC's representation of CSR which is based on two major characteristics: corporate responsibilities and corporate impact. Having approached CSR in this unambiguous manner, the EC's depiction is simple without being simplistic, a reflection of the current trends, and flexible enough to advance this research agenda. To elect an extensive meaning of CSR would be too broad and self-defeating to the aims and objectives of the research.

Another underlining question with the concept of CSR is how do you measure ethical behaviour in organisations without being subjective?[53] Research suggests that both business sector codes[54] and multisector codes, such as OECD Guidelines, UN Global Compact and Global Reporting Initiative, are not comprehensive enough.[55] Accordingly, business sector codes are conscientious about the economic health of the organisation, protecting the company's assets, and employees' relationship with the corporate entity, amongst other corporate interests; in contrast, multisector codes are mostly silent on such matters but focuses instead on responsibilities to investors and relevant stakeholders.[56] However, this legal research would evaluate responsibilities by seeking, as a point of reference, guidance from legal instruments and international initiatives relevant to the research, and would also recognise CSR statements by transnational tobacco companies.[57]

Having given scope and meaning to an otherwise fluid concept, the research will now move on to discuss theories and related themes associated with the CSR discourse, aimed to provide academic rigour and an in-depth perspective of the CSR landscape.

[53] Aviva Geva, 'Three models of corporate social responsibility: interrelationships between theory, research, and practice' (2008) 113(1) Business and Society Review 1-41 at p27: one can argue that the notion of the 'good of society' is too abstract to serve as a benchmark for assessing CSR.
[54] CSR codes written by individual companies.
[55] Lynn Paine *et al.*, 'Up to Code: Does Your Company's Conduct Meet World Class Standards?' (2005) 83(12) Harvard Business Review 122-133*:* The research suggests that there is a 'fault line between codes' written by businesses and those written by non-businesses.
[56] *Ibid.*
[57] Aviva Geva, 'Three models of corporate social responsibility: interrelationships between theory, research, and practice' (2008) 113(1) Business and Society Review 1-41.

2.3 Analytical Theories, Related Themes and the CSR Paradigm.

CSR theories are not unified; they are, rather, fragmented theories that are generally descriptive or normative.[58] A descriptive theory describes what CSR practice is or ought to be, while a normative theory examine the rationale for corporations to adopt CSR. To wit, a normative theory holds that corporations must adopt CSR because it is the morally right thing to do.[59] Despite the differences, a fundamental CSR consensus among the theories is the idea that organisations have an obligation to work for the benefit of society.[60] The research will now focus on the CSR theories expounded by Garriga and Mele[61], and Moir[62].

Garriga and Mele identified four main types of CSR theories: instrumental, political, integrative, and ethical theories. ***Instrumental theories—***Under this theory, the corporation uses CSR as an instrument for wealth creation, and its social activities are only a means to achieve such economic results. Instrumental theory embraces the maximisation of shareholder value.[63] Modern instrumental theorist advocate for an 'enlightened value maximisation'[64], accepting that specific social activity may contribute to the long-term shareholder value and existence of the corporation. This group also includes theories that express corporate social activities in terms of competitive advantage, either within a competitive context[65] or through an expansion into a new market[66] It also covers theories placing CSR as a marketing tool and integral to the brand perception that translates to corporate profit.

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[58] A Okoye, *Legal Approaches and Corporate Social Responsibility: Towards a Llewellyn's Law-Jobs Approach* (Routledge 2017) 47.
[59] Aviva Geva (note 57) 12.
[60] T Campbell, 'The Normative Ground of Corporate Social Responsibility: A human rights approach in D McBarnet *et al* (eds), *The New Corporate Accountability: CSR and the Law* (Cambridge University Press 2007) 530.
[61] E Garriga and D Mele, 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) 53(1-2) Journal of Business Ethics 51-71.
[62] L Moir, 'What do we mean by corporate social responsibility?' (2001) 1(2) Corporate Governance: The international journal of business in society 16.
[63] This concept refers to the increase in monetary value or other forms of asset appreciation, of shareholders' investment in an organisation.
[64] H Ward, 'Corporate Social Responsibility in Law and Policy'. In N Boeger *et al.* (eds)*, Perspectives on Corporate Social Responsibilities* (Edward Elgar 2008) 8-38.
[65] R Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and development in context – the case of Mauritius* (Routledge 2015) 10-21.
[66] J Bendell, *The Corporate Responsibility Movement* (GreenLeaf Publishing 2009) 216.

Political theories are concerned with the power of corporations in society and the responsible use of this power in the political arena***.*** Political theorists highlight the notion of corporate power and its relationship with the responsibility within society. The relationship between corporations and the political system is fragmented and somewhat multifaceted. On the one hand, the political system defines the institutional context in which corporations are embedded and also incentivises or restricts corporate behaviour.[67] On the other hand, corporations influence the institutional context by various means; thus, becoming political actors themselves.[68] Reich's narrative is that corporations have become increasingly involved in politics and are now taking a keen role in the political arena by hiring a plethora of lobbyists, lawyers, and public-relations specialists to shape government regulations to their advantage or to the disadvantage of their competition.[69] According to Reich, this is now the status quo because many politicians need financial resources from the corporate sector to sustain or achieve political power (e.g. electioneering) and when 'top corporate executives… want something from politicians they have backed, those politicians are likely to respond positively'.[70]

Focusing on the tobacco industry, TTCs have engaged in CSR activities to gain access to policymakers, enabling them to realign industrial issues in their favour.[71] Documents made available following the public litigation against TTCs have established how the industry deliberately used CSR in a way that has obstructed health-related policies and legislation, which would have otherwise restricted financial

[67] G Jackson and R Deeg, 'Comparing capitalisms: institutional diversity and its implications for international business' (2008) 39 Journal of International Business Studies 540.
[68]AJ Hillman *et al.,* 'Corporate political activity: a review and research agenda' (2004) 30 Journal of Management 837.
[69] RB Reich, *Supercapitalism: the battle for democracy in an age of big business* (Icon Books Ltd 2009). Reich is a professor of public policy. He served in the administration of three US presidents and was Secretary of Labour (1993- 1997) under President Bill Clinton. His observations also rein true in other similar democratic, capitalist States including Nigeria. See also, CO Egbe *et al.,* 'Avoiding "a massive spin-off in West Africa and beyond": the tobacco industry stymies tobacco control in Nigeria' (2017) 19(7) Nicotine Tobacco Research 877, the article concludes that tobacco lobbyist and front groups successfully blocked and weaken Nigeria's tobacco control especially the Tobacco Smoking (Control) Decree 20 of 1990 and efforts to strengthen it in 1995.
[70] RB Reich, *Beyond Outrage: what has gone wrong with our economy and our democracy, and how to fix it* (Vintage Books 2012) xiv. See also Reich, *Ibid.* at 223-5.
[71] G Palazzo and U Richter, 'CSR Business as Usual? The case of the tobacco industry' (2005) 61(4) Journal of Business Ethics 387.

freedom and profitability.[72] This strategic use of CSR to influence political power is the account of 'political CSR' postulated by Fooks *et al*.[73]

Generally, corporations do not operate in isolation. Instead, they can become an intrinsic part of the political system, if they assume a political role.[74] The exercise of this 'unelected' political role through influencing the polity, if not regulated, may lead to exploitation and tobacco company interference. This political role of corporations has been discussed in various subsets of management studies, including corporate political activity[75], political CSR[76] and corporate citizenship[77], and they all have a varied position on the political role of corporations. The latter two, according to Scherer, are more recent CSR conceptions, concentrating on the role of corporations in providing public goods, defining public rules, and enforcing such rules.[78]The analysis of these two concepts involves corporation satisfying governmental gaps in providing public goods and service, where state agencies are unwilling or unable to provide public goods. The concepts emphasize the state-like role of multinational corporations distinguishable from the instrumental approaches that focus on the business case of CSR.[79] The two theoretical conceptions are rooted in political theories and are both normative theories because they incorporate values, and these values are explicit for critical reflection (they propose how research should change social reality and why).[80] Political CSR scholarship developed a critical research agenda on the responsibilities of business and dissociated itself from the instrumental approach to CSR.[81] Frynas and Stephens define political CSR as 'activities where

[72] T Coombs, 'Origin Stories in CSR: genesis of CSR at British American Tobacco' (2017) 22(2) Corporate Communications 178.
[73] G Fooks *et al*., 'Corporate Social Responsibility and Access to Policy Elites: An Analysis of Tobacco Industry Documents' (2011) 8(8) PLoS Medicine 1-12: The findings suggest that tobacco company's CSR strategies enables access to and dialogue with policymakers and provide opportunities for issue definition; see also World Health Organisation, WHO *FCTF: 10 years of implementation in the African region* (WHO Region Office for Africa 2015) 9,43-4.
[74] AG Scherer *et al.*, 'The Business Firm as a Political Actor: a new theory of the firm for a globalised world' (2014) 53 Business and Society 143.
[75] AJ Hillman (note 68).
[76] AG Scherer and G Palazzo, 'The new political role of business in a globalized world: a review of a new perspective on CSR and its implications for the firm, governance and democracy' (2011) 48 Journal of Management Studies 899–931.
[77] D Matten and A Crane, 'Corporate citizenship: toward an extended theoretical conceptualization' (2005) 30 Academy of Management Review 166–179.
[78] AG Scherer, 'Theory assessment and agenda setting in political CSR' (2017) 20(2) International Journal of Management Reviews 1-27.
[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid.*

CSR has an intended or unintended political impact, or where intended or unintended political impacts on CSR exist', and the impacts defined are about the functioning of the state as a sphere of activity that is distinctive from business activity.[82] However, Frynas and Stephens did not give an explicit account of the meaning of 'political' and its normative implications. Scherer stated that Frynas and Stephens way of a definition does not help to clarify the notion of 'political'.[83] This lack of clarity further adds to the complexity of political CSR .

Corporate citizenship (CC) as a type of political theory is sometimes used synonymously with CSR and has therefore taken on various meanings. However, its foundation is rooted in the perception of a corporation as a citizen in society with rights and responsibilities.[84] Literature suggests three views of CC:[85] one that equates corporate citizen with corporate philanthropy[86]; another equates CC with CSR.[87] The third one extends the concept of CC by defining the role of the corporation with the administration of citizens' rights for the individual,[88] which has been criticised as 'an idea whose time has not yet come',[89] given the lack of 'credible accountability mechanisms'.[90] In summary, two approaches to political theories are identified: one as an organisation fulfilling the role of government, and the second as an organisation influencing the political class to advance their cause.

Integrated theories: This group of theories expresses how business integrates social demands. It contends that business depends on society for its existence, continuity, and growth. Social demands are generally considered to be how society interacts with business, and how society gives it legitimacy.[91] Corporate management, therefore, considers social demands and integrates them in such a way that the business operates by social values**.** The theories of this group focus on the detection of, and response to, the social demands that achieve social legitimacy and greater

[82] JG Frynas and S Stephens, 'Political corporate social responsibility: reviewing theories and setting new agendas (2015) 17 International Journal of Management Reviews 483, 485.
[83] AG Scherer (note 78).
[84] WB Gallie, 'Essential contested concepts' (1958) 56 Proceedings of the Aristotelian Society 167-198. In M Black (ed), *The Importance of Language* (Prentice-Hall 1962) 121-146.
[85] *Ibid.* at p123.
[86] *Ibid.* at p125 and p136.
[87] Gallie (note 84) 135.
[88] WE Connolly, *The Terms of Political Discourse* (3rd ed., Blackwell, 1993) 29.
[89] M Freeden, *Ideologies and Political Theory – A Conceptual Approach* (Oxford University Press 1998) 56.
[90] A Okoye, *Legal Approaches and CSR: towards a Llewellyn's Law-Jobs Approach* (Routledge 2017) 49.
[91] Garriga and Mele (note 61) 57-8.

social acceptance. The theory embodies public responsibility[92], corporate social performance, stakeholder management and descriptive theories that focus on the corporate response to CSR. In addition, Freeman[93] and other stakeholder theorists, such as Moir,[94] expound an approach where management takes cognisance of stakeholders who affect, or are affected by, the corporation policies and practices. Furthermore, corporate social performance as an embodiment of integrated theory adopts the principle of CSR and the processes of corporate social responsiveness together with the outcomes of corporate behaviour.[95] Integrative theories, therefore, represent a synthesis of other categories of theories to provide a framework for assessing corporate response, analysis, and corporate policy development.[96]

Ethical theories are based on the principles of an organisation 'doing good' in its triple bottom line approach—people, planet, and profit.[97] That is, what is right for society. The different approach under the ethical theory includes normative stakeholder theory, universal human rights, sustainable development[98] and 'the common good approach';[99] however, the approaches are susceptible to various forms of interpretations, as with most CSR theories.[100]

Moir identified three theories to explain active CSR: (1) stakeholder theory to explain how; (2) social contract theory, which is closely aligned with (3) legitimacy theory, to explain why.[101] A summary of these theories is presented below.

Stakeholder theory contends that business can be understood as a set of relationships among groups that have a stake in the activities of a business

[92] Gallie (note 84) 135.
[93] Moir (note 101).
[94] Freeman (note 102).
[95] Gallie (note 84) 136.
[96] Okoye (note 90) 50.
[97] JJ Graafland *et al., '*Benchmarking of Corporate Social Responsibility: Methodological Problems and Robustness' (2004) 53(1-2) Journal of Business Ethics 137, 138.
[98] The World Business Council for Sustainable Development defines the trend towards sustainability as 'forms of progress that meets the needs of the presence without compromising the ability of future generations to meet their needs.' Cited in John Manners-Bell, *Supply chain ethics: using CSR and sustainability to create competitive advantage* (Kogan Page 2017) 12.
[99] The Common good approach holds the common good of society as the referential value for CSR and maintains that business, as with any other social group or individual in society, should contribute to the common good, because it is a part of society, see Garriga and Mele (note 61) 62.
[100] See Graafland *et al.* (note 97).
[101] Lance Moir, 'What do we mean by corporate social responsibility?' (2001) 1(2) Corporate Governance: The international journal of business in society 16-22. These are theories to analyse and expound CSR.

organisation. Stakeholders are individuals or groups that can affect or be affected by the core purpose of an organisation, given that a business is successful insofar as it creates value for, and satisfies, key stakeholders continually over time.[102] According to Freeman, a stakeholder affects, or is affected, by the firm's objectives or activities.[103] With this perception, stakeholders include shareholders, creditors, employees, public interest groups and government. Stakeholders are typically divided into primary and secondary stakeholders.[104] Primary stakeholders, according to Clarkson, are those whose participation directly affects the survival of an organisation as a going concern.[105] This group includes shareholders and investors, employees and customers, and what Clarkson refers to as the public stakeholder group: the governments and communities that provide infrastructures, markets, and the enabling legal framework.[106] The secondary groups are those who affect or are affected by the corporation, but the central characterisation of the group is that they are not engaged in transactions with the corporation nor essential for its survival.[107]

Stakeholder theorists are divided on whether to consider the theory as normative, which is mostly based on ethical propositions, or as empirical/instrumental/ descriptive theory.[108] Inquiries that have shaped the debate on CSR theories in this area is twofold: first, the determination to consider whether stakeholder theory is part of the motivation for businesses to act responsibly; secondly, the identification of relevant stakeholders to be taken into consideration by business managers. Regarding the latter, Mitchell *et al.* developed a model of stakeholder identification based on stakeholders possessing one or more of the attributes of power, legitimacy, and urgency.[109] We might therefore anticipate that firms would pay most attention to those legitimate stakeholders who have power and urgency. In practice, this may mean that firms with problems over employee retention would attend to employee issues

[102] Edward Freeman and Bidhan Parmar, 'Stakeholder Theory'. In Wayne Visser *et al.* (eds), *The A to Z of Corporate Social Responsibility* (John Wiley 2007).
[103] Cited in RW Roberts, 'Determinants of Corporate Social Responsibility Disclosure: An application of Stakeholder Theory' (1992) 17(6) Accounting Organisations and Society 595.
[104] MBE Clarkeson, 'A Stakeholder Framework for Analysing and evaluating Corporate Social Performance' (1995) 20 Academy of Management Review 92.
[105] *Ibid.* at p106.
[106] *Ibid.*
[107] L Moir, 'What do we mean by corporate social responsibility?' (2001) 1(2) Corporate Governance 16.
[108] *Ibid.*
[109] RK Mitchell *et al.,* 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of who and what really counts' (1997) 22 Academy of Management Review 853.

(urgency) and those in consumer markets would have regard to matters that affect reputation (power and legitimacy). Within the stakeholder framework, the difference between the social and economic goals of a corporation is no longer relevant because the core issue is the survival of the corporation affected not only by shareholders but also by stakeholders, including employees, governments, and customers.[110]

In addition, an empirical study by Berman *et al.* articulate two distinct perspectives in stakeholder theory: the *strategic* stakeholder model and the *intrinsic* stakeholder model.[111] Their findings suggest that the strategic stakeholder model, which is based on the business case logic of CSR, have more empirical support than the intrinsic stakeholder model, which emphasised the moral aspect of CSR.[112] Similarly, Hino and Zennyo acknowledged two broad categories of CSR in literature reviews: the *constitutive* approach (intrinsic stakeholder model) and *instrumental* approach (strategic stakeholder model).[113] Under the constitutive approach, CSR is an element of corporate governance based on the stakeholder theory. In this instance, CSR is regarded as a social norm[114] or endogenous to the company; hence, reliance is placed on the determination to create fiduciary relationships and satisfy the interests of all stakeholders. According to this view, CSR is not an instrument for a separate goal but, rather, a part of the firm's goals established from the social contract between all stakeholders.[115] In contrast, the instrumental approach regards CSR as an instrument of the firm's strategy to maximise profits.

However, stakeholder theories have been classified as a system of ideas not clearly defined. This unclear definition is because it partly lacks in scope as it matches the discourse of being descriptive, instrumental and normative.[116] Scherer also points out that there are different and sometimes incoherent assumptions and approaches

[110] M-DP Lee, 'A review of the theories of corporate social responsibility: Its evolutionary path and the road ahead' (2008) 10 (1) International Journal of Management Reviews 53.
[111] SL Berman *et al,* 'Does stakeholder orientation matter? The relationship between stakeholder management models and firm financial performance' (1999) 42 Academy of Management Journal 488–506 cited in M-DP Lee, *ibid.* at p62.
[112] M-DP Lee (note 89)*:* intrinsic stakeholder model is the moral obligation of a company to place the interests of the stakeholders above all others while executing its corporate strategy.
[113] Y Hino & Y Zennyo, 'Corporate Social Responsibility and Strategic Relationships' (2017) 64(3) International Review of Economics 231.
[114] *Ibid.*
[115] *Ibid.*
[116] T Donaldson and LE Preston, 'The stakeholder theory of the corporation: concepts, evidence, and implications' (1995) 20 Academy of Management Review 65–91.

that compete with one another.[117] Thus, there is a considerable fragmentation within the stakeholder discourse that prevails leading to Freeman to concede that '[t]here is no such thing as the stakeholder theory […] it is a genre of stories about how we could live.'[118] Further analysis of shareholder and stakeholder primacy will be discussed in the next section.

Legitimacy Theory. According to Suchman, legitimacy theory is 'a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions.'[119] The primary argument of legitimacy theory is that external factors influence corporate management to seek to legitimise activities. Suchman also identified three critical challenges of legitimacy management faced by organisations: gaining legitimacy, maintaining legitimacy and repairing legitimacy.[120] It has been observed that legitimacy is not necessarily a good process for organisations to obtain legitimacy from society.[121] When faced with a legitimacy threat, an organisation has the option of four legitimation strategy: it may choose to educate its stakeholders about its intention to improve the organisation's performance; it may seek to change the organisation's perception of the event without changing performance; it may divert attention from the event, or it may choose to change external expectations of its performance.[122] As such, legitimacy may be seen as a critical reason, but not the only reason, for undertaking corporate social responsibility.[123]

It has also been argued that because society grants power to business organisations, society expects that power to be used responsibly,[124] given that business organisations are regarded as resource-dependent.[125] Such a view builds on

[117] AG Scherer, 'Theory Assessment and Agenda Setting in Political CSR: A Critical Theory Perspective' (2018) 20(2) International Journal of Management Reviews 387.
[118] RE Freeman, 'The politics of stakeholder theory: some future directions' (1994) 4 Business Ethics Quarterly 409, 413.
[119] MC Suchman, 'Managing Legitimacy: strategic and institutional approaches' (1995) 20(3) Academy of Management Review 571.
[120] *Ibid.*
[121] L Moir, 'What do we mean by corporate social responsibility?' (2001) 1(2) Corporate Governance: The International Journal of Business in Society 16, 20.
[122] *Ibid.*
[123] *Ibid.*
[124] O Amao, *CSR, Human Rights and the Law* (Routledge 2011) 79.
[125] RL Heath & D Waymer, 'Unlocking corporate social responsibility: Minimalism, maximization, and neo-institutionalist resource dependency keys' (2017) 22(2) Corporate Communications 192: stakeholders use CSR standards to evaluate whether, when and how to grant tangible and intangible resources to organisations.

Phillips' distinction between **normative legitimacy** and **derivative legitimacy,** which are significantly distinct from one another.[126] Normative legitimacy, on the one hand, hinges on the moral obligation owed to other (normative) stakeholders; on the other hand, derivative legitimacy transpires when stakeholders exercise 'the ability to affect the organisation' as legitimate. Derivative legitimacy results from the influence that specific stakeholders can levy against the organisation.[127] For instance, normatively, the tobacco industry's CSR is rooted in the moral obligation to provide products with minimal or no health impact on consumer stakeholders. Derivatively, the tobacco industry's environmental impact is imposed by the government's regulation.

Social Contract Theory is a series of interaction between members of society and society itself.[128] In this context of CSR, business carries out their activities in a responsible manner, not because of commercial interest but by being part of how society expects business to operate. It is acknowledged that organisations do not exist in a vacuum. Therefore, they will have to interact with the surrounding society and to incorporate environmental and social approaches into their business operations, thus, ensuring long term organisational sustainability rather than seeking profit maximisation alone.[129]

Building on the integrated social contracts theory, Donaldson and Dunfee differentiated between *macrosocial contracts* and *microsocial contracts*.[130] A macrosocial contract in the context of communities, for example, would be an expectation that business provides some support to its local community and the specific form of involvement would be the microsocial contract. As a result, companies who adopt a view of social contracts would describe their involvement as an integral part of societal expectation or a 'license to operate'[131]. From this perspective, CSR is described as the obligation entrenched from the implicit 'social contract' between

[126] R Phillips, 'Stakeholder legitimacy' (2003) 13(1) Business Ethics Quarterly 25, 26 cited in Heath and Waymer, *ibid.*

[127] Heath and Waymer, *ibid.* at p199.

[128] R Gray *et al., Accounting and Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (Prentice-Hall Europe 1996). Further reading on social contract see DL Swanson, *CSR Discovery Leadership* (Palgrave Macmillan 2017) 28-35.

[129] G Capece & R Costa, 'The new neighbourhood in the internet era: Network communities serving local communities' (2013) 32(5) Behaviour & Information Technology 438–448.

[130] T Donaldson and TW Dunfee, *Ties That Bind* (Harvard Business School Press 1999).

[131] S Livesey, 'Eco-identify as discursive struggle: Royal Dutch/Shell, Brent Spar, and Nigeria' (2001) 39(1) Journal of Business Communication 58–91.

business and society. It is business responsiveness to society's long-term needs and wants by optimising the positive effects and minimising its adverse effects on society.[132] However, Lantos criticised the social contract theory, among others, for being vague, given that it is an unwritten social contract that varies from location to location.[133]

***ISO 2600:2010 Guidance on* social responsibility** (SR) is not a CSR theory. It serves to guide how business and organisations can operate in a socially responsible way through the display of ethical and transparent behaviour that contributes to the health and welfare of society.[134] SR is not intended to certify but, instead, to assist organisations in contributing to sustainable development and encouraging activities that go beyond legal compliance.[135] It is built on the foundation of best practices developed by an international consortium of different stakeholder groups focused on defining the meaning of social responsibility with universal clarity.[136] It recognises that compliance with the law is a fundamental duty of any organisation as an essential part of CSR. The standard seeks to promote a common understanding of social responsibility while complementing – but not replacing – other existing tools and initiatives. The ISO 26000 states that organisations should integrate societal, environmental, legal, cultural, political, and organisational diversity as well as differences in economic conditions while being consistent with international norms of behaviour. SR can be applied in conjunction with other CSR programs, including OECD Guidelines for Multinational Enterprises (2011) and the Global Reporting Initiative (GRI);[137] conversely, it has been criticised for being too broad in scope, time-consuming and costly.[138]

SR identifies three stakeholder[139] relationships as part of the CSR approach: Business and Society relationship, involves organisations identifying how its decisions

[132] GP Lantos, 'The Boundaries of Strategic Corporate Social Responsibility' (2001) 18 Journal of Consumer Marketing 599.
[133] *Ibid.*
[134] ISO (note 41).
[135] *Ibid.*
[136] *Ibid.*
[137] ISO (note 41).
[138] Hemphill (note 141).
[139] ISO (note 41) defined 'stakeholder' as "individual or group that has an interest in any decision or activity of an organisation", ISO 26000:2010 clause 2. See also clause 5.

and activities impact on society and the environment or its 'sphere of influence';[140] Business and Stakeholder relationship, the awareness of its various stakeholders, including individuals or groups whose interests could be affected by the decisions and activities of the business organisation; and Stakeholder and Society relationship, which entails understanding the relationship between the stakeholders' interests that are affected by the enterprise, on the one hand, and the expectations of society, on the other. Even though stakeholders are part of society, stakeholders may have an interest that is conflicting with the expectations of society.[141]Additionally, SR recognises seven fundamental principles of social responsibility: accountability, transparency, ethical behaviour, the respect for stakeholder's interest, human rights, the rule of law, and international norms of behaviour. Furthermore, SR acknowledges seven core subjects of social responsibility: fair operating practices, human rights, the environment, consumer issues, business governance, labour practices and community involvement and development.[142] The core subjects are embedded with their associated issues under clause 6 of the SR guidance. These core subjects are involved with the quality and characteristics of relationships between the organisation and other stakeholders that generate satisfactory results, especially ethics. The core subjects address actions, such as to prevent corruption, encourage transparency and fair competition, respect associated rights and obligations, so that interactions between the organisation and other stakeholders are legitimate and productive.

Reoccurring characteristics of CSR is identifiable at this stage of the research. An examination of literature, including the characteristics of the classified theories, ISO SR and the EU revised strategy of CSR,[143] reveals contemporary indigenous themes that will benefit the research. At its core, there is a consistency with CSR even though this may sound paradoxical: in its inconsistency, there is a thread of consistency. The foundational element of CSR is the drive for legitimacy via organisational 'good'

[140] ISO (note 41) ISO 2600: 2010, 2.19 defined 'sphere of influence' as the 'range/extent of political, contractual, economic or other relationships through which an organisation has the ability to affect the decisions or activities of individuals or organisations'. See also ISO 26000:2010, clause 5.
[141] T Hemphill, 'The ISO 26000 guidance on social responsibility international standard: what are the business governance implications?' (2013) 13(3) Corporate Governance: The international journal of business in society 305, 307. See also ISO 26000:2010, clause 5.
[142] ISO (note 41) ISO 26000:2010, clause 6; see also ISO, 'Discovering ISO 26000', available at https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/discovering_iso_26000.pdf accessed 22 Dec 2017; see also Hemphill (note 141).
[143] EU COM (note 30). It is highlighted in section 2.2 of this chapter.

responsibilities towards stakeholders.[144] Essentially, CSR could be summarised under the subjects and issues of the SR to include Human rights (most of the associated issues under human rights include civil & political rights and economic, social & cultural rights); Labour Practices (associated issues on health and safety issue); Environment (associated issues including environmental protection, biodiversity and preventing pollution); Fair operating practices (associated issues will focus on anti-corruption including responsible political involvement and promoting social responsibility in value chain issues); Consumer Issues (the focus issue on protecting consumer's health); and Community Involvement and Development (associated issue will focus on health). In addition, the research will apply international guidelines and domestic laws with the relevant core subjects and issues to evaluate TTCs performances and policies. According to the EU, there is a resounding acceptance to benchmark a company's performance against principles and guidelines supported by public authorities;[145] besides, to benchmark is to prevent 'subjectivity' associated within the CSR agenda.[146]

External Factors influencing CSR. External factors could influence and shape the CSR activities of any organisation. According to Vashchenko, these three groups of external factors—government-related, business-related, and society-related—acknowledged organisational stakeholders and the institutional environment.[147]

The government-related factor highlights political aspects of the organisational context. These external factors influence organisational CSR-related behaviour through legal mechanisms. That is, through either hard law or soft law.[148] Under hard law, enforcement and regulations tend to influence organisations to act responsibly, avoiding bad publicity from contravening the law.[149] Hard law also acts as a sort of baseline from which a company can build on, by doing more and beyond the required

[144] M Bruhn and A Zimmermann, 'Integrated CSR Communications' in S Diehl *et al.* (eds)*, Handbook of Integrated CSR Communications* (Springer 2017) 4.
[145] EU COM (note 30) [3.4].
[146] A Okoye, (2012) 'Exploring the relationship between corporate social responsibility, law and development in an African context: Should government be responsible for ensuring corporate responsibility?' (2012) 54(5) International Journal of Law and Management 364, 367.
[147] Marina Vashchenko, 'An external perspective on CSR: What matters and what does not?' (2017) 26(4) Business Ethics: A European Review 396.
[148] *Ibid.*
[149] See also R Aguilera *et al.,* 'Putting the S back in CSR: A multi-level theory of social change in organisations' (2007) 32(3) Academy of Management Review 836–863.

standard set under the law or legislation. Soft laws, to a large extent, are a product of intergovernmental organisations capable of forcing companies to consider CSR as an essential issue, albeit voluntary.[150] For instance, the UN Guiding Principles on Business and Human Rights have been adopted by leading TTCs.[151] Moreover, some of the soft laws—international law—may become hard law if member states domesticate the international law, or other forms of soft law. Nigeria's adoption of the WHO Framework Convention on Tobacco Control (WHO FCTC) into municipal law under the auspices of the National Tobacco Control Act 2015 serves as an example.

The business-related factor describes the external organisational business context and represents market conditions and mechanisms.[152] These economic interests exercise market power to influence organisational CSR policymaking. As such, TTCs are less likely to act in socially responsible ways if they operate in a climate where, according to Campbell, 'inflation is high, productivity growth is low, consumer confidence is weak and, in sum, it appears that it will be relatively difficult for firms to turn a healthy profit in the near term'.[153] A country with weak law enforcement may probably restrain CSR outcomes. Examples of stakeholders with market power include institutional investors, professional associations, suppliers, and business partners. Under this factor, the company's consumer plays a crucial role. For instance, customers may boycott or promote products, so companies are likely to take consumers' concerns into account when making CSR decisions.[154] Competitor's CSR strategies and the level of competition are also among the forces that can influence organisational CSR choices. Companies monitor the competition, and when a competitor implements CSR principles, it may as well prompt other market players to follow suit. Further, Vashchenko argues that intense competition and weak competition are equally detrimental conditions for CSR development: the first one

[150] NA Dentchev *et al.,* 'On voluntarism and the role of governments in CSR: Towards a contingency approach' (2015) 24(4) Business Ethics: A European Review 378–397.
[151] See for instance the adoption of the UN Guiding Principles in Japan Tobacco International, 'JT Group Human Rights Policy' (JTI, September 2016) <https://www.jti.com/sites/default/files/JT_Group_Human_Rights_Policy.pdf> accessed 6 October 2017. BAT, PMI have adopted the UN Guiding Principles as part of the company's policy. See the company's websites.
[152] M Vashchenko, 'An external perspective on CSR: What matters and what does not?' (2017) 26(4) Business Ethics: A European Review 396.
[153] JL Campbell, 'Why would corporations behave in socially responsible ways? An institutional theory of corporate social responsibility' (2007) 32 (3) Academy of Management Review 946, 952.
[154] F Lépineux, 'Stakeholder theory, society and social cohesion' (2005) 5(2) Corporate Governance: The International Journal of Business in Society 99–110.

emerges when profit margins are too narrow and organisational survival is under risk, companies try to cut expenses wherever possible; the second one occurs when a lack of alternatives, organisational reputation and customer loyalty do not affect the success of the organisation.[155]

According to Vashchenko, the influencing factors from the third group, the society-related factors, represents a company's external social context. These factors evaluate CSR-related decisions and outcomes against certain norms, subsequently, providing or withdrawing 'social legitimacy'.[156] NGOs are considered within this group, especially as they have become politically significant and active in modern society.[157] The media is acknowledged to be another influential actor in the external environment that monitors and focuses on the 'spotlight' on organisations.[158] The media, in a free and fair society, can serve as a watchdog informing both government and the public about socially irresponsible corporate activities, which could inevitably lead to the withdrawal of social legitimacy.[159] Others in this category include business education and professional publications.

2.4 Stakeholder and Shareholder Primacy and its impact on the CSR Discourse.

The debate over the purpose of a public corporation appears to have begun in 1932 with opposing articles between Dodd[160] and Berle[161] in a Harvard Law Review Symposium titled, For Whom Are Corporate Trustees?*[162]* Berle held that the management of a corporation is to make maximum profits for its shareholders.[163]

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[155] M Vashchenko, 'An external perspective on CSR: What matters and what does not?' (2017) 26(4) Business Ethics: A European Review 396, 399.
[156] *Ibid.*
[157] *Ibid.* 'The influence of NGOs can be expressed in direct appeals to companies to behave in more socially responsible ways, demonstrations and boycotts, pressure on local governments to force companies to improve organisational practices, and so forth', at p399.
[158] JL Campbell, 'Why would corporations behave in socially responsible ways? An institutional theory of corporate social responsibility' (2007) 32(3) Academy of Management Review 946, 957.
[159] M Vashchenko, 'An external perspective on CSR: What matters and what does not?' (2017) 26(4) Business Ethics: A European Review 396.
[160] ME Dodd, 'For whom are corporate managers trustees?' (1932) 45(7) Harvard Law Review 1145.
[161] AA Berle, 'For whom corporate managers are trustees: a note' (1932) 45(8) Harvard Law Review 1365.
[162] Forest L. Reinhardt *et al*., 'Corporate Social Responsibility Through an Economics Lens' (2008), NBER Working Paper Series, vol. w13989. See *Dodd* (note 160) and Berle (note 161).
[163] *Berle* (note 161) 1372.

Although Berle agrees that corporate managers can legally recognise other interests than those of the shareholders, he argues that this does not give them the right to consider those interests, considering that managers only represent the interest of shareholders.[164] He asserts that the stakeholder principle runs counter to the fundamental principle of the law of business corporations.[165] Berle's perception is that directors and other agents are fiduciaries of the business.[166] In other words, the directors and managers are trustees of the corporation while the shareholders are the beneficiaries.[167] Similarly, Friedman, a prominent shareholder theorist, also argues that corporations should be managed solely for the benefit of its shareholders, which is to ultimately make profit.[168] For that reason, he relates CSR—perceived as a concept for the benefit of stakeholders rather than shareholders[169]—with socialism, and if unchecked, may undermine capitalism.[170]

Researchers have disapproved Friedman's concept of corporate social responsibility for being so narrow.[171] From another perspective, Friedman's position could be overly broad. It could mean that for a business to be considered socially responsible, it would need to respond to social problems that were beyond its responsibilities or capabilities;[172] that is, corporations would be trying to replace the government in their duties.[173] Friedman's assumptions of the corporation, according to Schrader, represents a naive view of the modern corporation because managers lead corporations without taking into account shareholders' approval, at least in the daily decision making.[174] Modern shareholders, argue Green[175] and Stone[176], are

[164] *Ibid.*
[165] *ibid*
[166] *Ibid.*
[167] *Ibid.*
[168] M Friedman, 'The social responsibility of a business is to increase its profits' *New York Times Magazine* (13 September 1970).
[169] Milton Friedman, *Capitalism and Freedom: fortieth anniversary edition* (University of Chicago Press 2002).
[170] LR Cima and T Schubeck, 'Self-interest, love and economic justice: a dialogue between classical economic liberalism and Catholic social teaching' (2001) 30(1) Journal of Business Ethics 213-231.
[171] T Mulligan, 'A Critique of Milton Friedman's Essay: The social responsibility of business' (1986) 5(4) Journal of Business Ethics 265-269.
[172] D O'Leary, 'Interpreting Friedman's View of Business' (2004) 4 Journal of Macrodynamic Analysis 40-52.
[173] Ferrero et al, 'Must Milton Friedman Embrace Stakeholder Theory' (Oct 2012), Universidad de Navarra, working paper no. 10/12.
[174] D Schrader, 'The Corporation and profits' (1987) 6(8) Journal of Business Ethics 589-601.
[175] RM Green, 'Shareholders as stakeholders: changing metaphors of corporate governance' (1993) 50(4) Washington and Lee Law Review 1409. C Stone, *Where the Law Ends: the social control of corporate behaviour* (Harper and Row 1975).
[176] C Stone, *Where the Law Ends: the social control of corporate behaviour* (Harper and Row 1975).

more like lenders rather than owners because they have their portfolios diversified, committing only a small portion of their wealth to any one firm.

Contrary to the shareholder supremacy, Freeman argues that contemporary managers should have a pro-active attitude necessary towards both primary and secondary stakeholder groups.[177] Likewise, Dodd argues that corporations are accountable to its stakeholders, such as its shareholders and the society.[178] Dodd's position is that corporations should have both a social service as well as a profit-making function.[179] To disregard stakeholders, corporations will emerge in successive upheavals, which may ultimately lead to its downfall.[180] For instance, the spotlight on Google, Amazon and Starbucks for tax avoidance, albeit not a criminal offence, led to extensive criticism by governments, press, and the public, with suggestions of boycotting and 'tax shaming' the organisations.[181] Another notable example is the case of Shell Nigeria, where its exploration was disrupted by the local community due to claims ranging from environmental degradation to failure to engage with the local community. This tension culminated in the arrest and execution of the environmental activist, Ken Saro Wiwa, by the then military government of Nigeria.[182] The chain of events conveyed a global outcry of Shell's environmental and human rights policies.[183]

Litigants have also dragged the judicial courts into the shareholder–stakeholder supremacy debate. In the US case between *Dodge v. Ford Motor*[184], Henry Ford and the directors of the Ford Motor Co. had decided not to pay a dividend despite substantial retained earnings in the company and substantial profits in the year in question. The reason for the decision, expressed by Henry Ford, was to expand the Ford industrial system for the benefit of society. The court, however, rejected Ford's argument and held that a business corporation is 'primarily for the profit of the

[177] Edward Freeman *et al*, 'Company Stakeholder Responsibility: A new approach to CSR' (2006), Bridge Paper, Business Roundtable Institute for Corporate Ethics.
[178] Dodd (note 160).
[179] Dodd (note 160) 1148.
[180] *Ibid.*
[181] V Barford and G Holt, 'Google, Amazon and Starbucks: the rise of tax shaming' (BBC News Magazine, 21 May 2013) <http://www.bbc.co.uk/news/magazine-20560359> accessed 5 May 2014.
[182] Richard Boele *et al.*, 'Shell, Nigeria and the Ogoni: a study in sustainable development' (2001) 49 Sustainable Development 74-86. Further reading, see also OO Amao, 'CSR, Multinational Corporations and the Law in Nigeria: controlling multinationals in host states' (2008) 52(1) Journal of African Law 89.
[183] *Ibid.*
[184] *Dodge v. Ford Motor* 170 N.W. 668, 684 (Mich. 1919).

stockholders'.[185] The court's expression was that a refusal to pay a dividend had to be based on the best interests of the corporation, and the decisions that are in the best interests of the corporation were assumed to be those that promoted future profits. Similarly, the UK case between *Hutton v West Cork Railway co*[186]*,* Bowen, L.J stated that 'charity has no business to sit at boards of directors'. This case concerns the limit of a director's discretion to spend company funds for the benefit of non-shareholders regarding insolvency proceedings. It appears the courts would have decided the case differently today due to the changes in the English company law. Section 172 of the Companies Act (CA) 2006, states that directors should have regard to other stakeholders, including employees, customers, and the environment, for the benefit of the company and its members. The section, therefore, favours the stakeholder theory. Section 247 CA empowers the director to consider employees when a company has gone insolvent.[187] This is similar to the position held by Berger, J. in the Canadian case between *Teck Corporation Ltd v Millar*[188]*,* where the advocated for an extensive definition of the 'interests of the company' to include both the employees and the community.[189]

So far, this section has focused on the shareholder-stakeholder primacy debate. Central to the debate is the understanding of the legal theories of a corporate personhood. Therefore, the part below will briefly focus on the legal theories of a corporation.

Legal theories of corporations

Corporate legal theory influences the understanding of the role and purpose of a corporation.[190] Blumberg examines three traditional corporate personality theories: the corporation as an artificial person, with corporate rights and duties separate from those of its shareholders; the corporation as an aggregate of individuals, which played an essential role to expand constitutional protections of shareholder's economic

[185] *Ibid.* [684].
[186] *Hutton v West Cork Railway co* (1883) Ch D 654.
[187] See also s187 Insolvency Act 1986 (UK).
[188] *Teck Corporation Ltd v Millar* (1972) 33 DLR (3d) 288 at 313 cited in Shuangge Wen, *Shareholder Primacy and Corporate Governance* (Routledge 2013) 94.
[189] *Ibid*. Similarly, Re Horsley & Weight Ltd [1982] Ch 442, where the Court of Appeal held that a company's substantive objective may include making gifts.
[190] PI Blumberg, 'The Corporate Personality in American Law: a summary review' (1990) 38 American Journal of Comparative Law Supplement 49.

interest in the late nineteenth century; and the 'real entity', associated with the attribution of corporate constitutional rights, like those of natural persons in most cases.[191]

Artificial entity theory is synonymous to the artificial person or the grand doctrine of the corporation. The classic or foundational definition by Chief Justice Marshall, in the *Dartmouth College case*[192], is that an artificial corporation is an artificial being, intangible, and existing only in the contemplation of law. Its scope is expressly granted by its charter of creation or as an incidental to its very existence. Such existence depends on the action or legislative pronouncement of the state. In addition, Ewin adds that corporations, as an artificial entity, cannot be moral persons for they are constrained by their legal persona.[193] In contrast, French believes that a corporation can be a full-fledged moral person. He argues that for an entity to be subject of a moral obligation, it needed to be an intentional actor, and since corporations have internal decision-making structures, then, they are moral persons as a collective.[194] French argument is based on his belief that if corporations are not full members of society, they 'will avoid the scrutiny and control of moral sanction,' aimed to subject corporations to moral standards.[195]

Corporation as an aggregate of a natural person is also known as association or contract theory, favoured by shareholder supremacists. The justification of State regulation in the formation of a company was found to be incompatible with the emerging economic structuring of large corporations. The corporation is perceived as the constitution of natural persons in the sense of a partnership not detached from its members[196] or the property rights of an aggregated association. The major point in this argument is that corporations are not a person at all (artificial or otherwise) and should not be subjected to any special duties. Any regulation on the organisation should be justified to the individuals that own the corporation, and not an indeterminable concept of the corporation.[197] However, the analogy between

[191] *Ibid.* p49-51.
[192] *Trustees of Dartmouth College v Woodward* (1819) 17 US 518.
[193] RE Ewin, 'The Moral Status of the Corporation' (1991) 10 Journal of Business Ethics 749.
[194] P French, *Collective and Corporate Responsibilities* (Columbia university Press 1984).
[195] *Ibid.*
[196] D Million, 'Theories of the Corporation' (1990) Duke Law Journal 201.
[197] TA Smith, 'The Use and Abuse of Corporate personality' (2001) 2 Stamford Agora 69. See also *Bank of the United States v Deveaux* (1809) 9 US (5 Ranch) 61.

corporations and partnership presented a problem on its own,[198] leading to the emergence of the natural entity theory.

Under the natural entity or realism theory, the corporation is neither a legal fiction nor a contract partnership between individuals but a natural person with pre-legal existence.[199] In classifying a corporation this way, the state's role is restricted from establishing a corporation and attempting to single out a corporation for exclusive regulatory control.[200] One result of this conception is the ability of corporations to claim rights associated with natural persons. However, Friedman's opinion of the corporation is that they are the property of shareholders, and management are employees of the shareholders or trustees.[201] Reich also argues that corporations should not have the legal standing of a person, for a corporation ought not to be charged in criminal proceedings but subject only to corporate civil liability, considering that a corporation cannot act with criminal intent or *mens rea* as 'they have no human capacity for intent'.[202]

The Nigerian company law aligns itself with the natural entity theory, given that the foremost company law states that '…every company shall, for the furtherance of its authorised business or objects, have *all the powers of* a ***natural person*** *of full capacity'*.[203] The Nigerian company law therefore leans generously on the concept of corporations as natural persons, with the capacity to sue and be sued and enter into legally binding contractual agreements, amongst other rights.

2.5 The Interaction between Law and CSR

This section examines the relationship between law and CSR. It depicts the interaction between them by demonstrating how CSR advances the law and vice versa.

[198] For further reading of these issues see D Million (note 196) 5.
[199] A Gear, 'Human Rights – Human Bodies? Some reflections on Corporate Human Rights Distortion, The legal subject, embodiment and human rights theory' (2006) 17 Law Critique 171, 185.
[200] D Million, 'Theories of the Corporation' (1990) Duke Law Journal 201.
[201] M Friedman, *Capitalism and Freedom: fortieth anniversary edition* (University of Chicago Press 2002).
[202] RB Reich, *Supercapitalism: the battle for democracy in an age of big business* (Icon Books 2009) 219.
[203] Section 38(1) Companies and Allied Matters Act, Cap 59, LFRN 1990. Italics and bold emphasis by author.

The interaction between CSR and law[204] is interwoven. CSR are actions by the organisations above legal requirements. It is generally understood to be outside the ambit of the law or beyond legal compliance.[205] This position could be considered as a misnomer, considering that any action 'beyond the law' should be within legal confinement. Nonetheless, as the research will demonstrate, law and legal standards play a considerable role in relation to corporate responsibilities. However, critics have warned against using the law to influence CSR actions in corporations. Most prominent in the 'separation of CSR from law' discourse is the neo-classical school of law and economics, based on Adam's Smith's perception that a free trade unfettered by regulation is the most effective for a thriving society.[206] In contrast, is the Keynesian's school of thought which advocates for government intervention in stabilising society.[207] Much of the literature under the neo-classical school since the 1980s have inclined that companies should only engage in CSR activities where there is a "business case" for doing so.[208] This approach discouraged the introduction of regulation as a response to the issues raised in the CSR debate. Inversely, Ward argues that CSR is not atypical as projected; one of the several reasons is that 'law is a part of what surrounds us'.[209] Ward further argues that the failure to accept the legal dimensions of CSR would only lead to the progressive weakening of defined balance between government, business and civil society.[210]

Despite these opposing views between voluntary and mandatory CSR, it is relevant to underscore the position that CSR and law cannot be completely detached. Governments have become more involved in CSR programs either through traditional mandatory regulation of business or through soft law that encourages companies to pursue CSR initiatives [211] or co-regulatory initiatives.[212] According to Cominetti and

[204] The context of law in this text is used interchangeable to mean both the traditional meaning of law and other forms of law, such as soft law and regulations.
[205] K Buhmann, 'corporate social responsibility: what role for law? some aspects of law and CSR' (2006) 6(2) Corporate Governance 188 at 189.
[206] See O Amao, *CSR, Human Rights and the* Law (Routledge 2011) 70-74.
[207] M Keynes, *The General Theory of Employment, Interest and Money* (Macmillan 1936).
[208] Andrew Johnston, 'The Shrinking Scope of CSR in UK' (2017) 74(2) Washington and Lee Law Review 1001.
[209] H Ward, *Legal Issues in Corporate Citizenship* (Swedish Partnership for Global Responsibility, Feb 2003).
[210] *Ibid.*
[211] JS Knudsen, 'How Do Domestic Regulatory Traditions Shape CSR in Large International US and UK Firms?' (2017) 8(53) Global Policy 29; M Cominetti & P Seele, 'Hard soft law or soft hard law? A content analysis of CSR guidelines typologized along hybrid legal status' (2016) 24(2) Sustainability Management Forum 127.
[212] L Albareda, 'corporate responsibility, governance and accountability: from self-regulation to co-regulation' (2008) 8(4) Corporate Governance 430; see also JS Knudsen (note 211).

Seele, government has three relevant roles in the CSR context: facilitating─ government facilitates CSR by advancing CSR policy initiatives; legitimising─ governmental legitimises and public recognises CSR; and modelling ─ government encourages governmental organs to act as good corporate citizens by applying CSR principles.[213] In short, for CSR to thrive, there has to be a conscientious effort by the government in creating an enabling environment, including through rules, regulations, and sanctions. As pointed out by Vashchenko, CSR is dysfunctional in weak societies, particularly, when the government, media and civil society do not promote CSR; in contrast, if regulations, social preferences and cultural norms favour CSR, companies operating within such externalities will more likely embrace CSR principles to obtain legitimacy.[214]

Furthermore, the role of CSR and the law is at best symbiotic. That is, the role of law in CSR[215] and the role of CSR in law. The former is law used to encourage or mandate CSR initiatives, while the latter is CSR (re) modelling the law, both of which advance CSR in one way or the other.[216] The role of CSR in law could be, for instance, law beginning its cycle as an informal law or as a corporate responsibility initiative and ends up as formal law or law promulgated by the State. That is informal law as pre-formal laws. This is the case when corporate norms at a later stage obtain the status of formal law.[217] For instance, the introduction of the legal requirement for non-financial disclosures in various States, including the EU,[218] started as a corporate responsibility initiative when 85 of the FTSE100 companies had published non-financial reports,[219] a practice that later influenced the law. Another illustration is the significance of international law (informal law) in the formulation of substantive CSR, such as the

[213] Cominetti & Seele (note 211).
[214] M Vashchenko, 'An external perspective on CSR: What matters and what does not?' (2017) 26(4) Business Ethics: A European Review 396.
[215] The research will also focus on the role of law in CSR.
[216] One of such advancement is the relevance of the legal tradition of a country having considerable influence on corporate governance systems and managerial decisions, in SP Sethi *et al.*, 'An Evaluation of the Quality of Corporate Social Responsibility Reports by Some of the World's Largest Financial Institutions' (2017) 140(4) Journal of Business Ethics 787-805.
[217] K Buhmann, 'Corporate social responsibility: what role for law? Some aspects of law and CSR' (2006) 6(2) Corporate Governance: The international journal of business in society 88-202. Buhmann described informal law as a set of normative ideas and patterns of behaviour and action that are not based on a sharp distinction between law and morals, or between law and fact. It is not formulated by a central, state or national authority. Its validity does not rely on state sanctions but on its actual observance that is obtained though means to the semi-autonomous area in which it functions. Its sanctions are of a moral or practical character, at p190.
[218] Buhmann (note 217) 194.
[219] McBarnet (note 246) 34.

international guidance for CSR self-regulation in reporting and benchmarking. Moreover, many CSR demands from stakeholders and corporate actors appear to be based exactly on assessments of compliance with international law, particularly human rights and labour law.[220]

Another vital aspect in the relationship between CSR and the law has been around legitimacy, most notably, legal legitimacy. Legitimacy referred to by Suchman, is a generalised perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions'.[221] Suddaby *et al.* believe that the application of the concept of legitimacy to numerous theoretical and empirical contexts has allowed it to be misapplied in many ways.[222] Thus, this thesis will adopt the usage of legitimacy, in the CSR context, as the acceptance or justification of the existence of an institution.[223] This definitional application to TTCs means that 'their executives must convince the general public they exercise power in a justified manner';[224] that is, an expression of adherence to both legal and societal values. Corporations are generally seen as legitimate institutions, and the justification of their existence can be found in its contribution to the common good in society. Such common good includes providing goods and services to meet societal needs, creating wealth, providing employment, and other societal needs. By and large, corporations receive support from society, and such support or legitimacy can be questioned by society in cases of certain unethical or illegal performance. Legitimacy, therefore, encapsulates the notion of justification and accountability from these different conceptions.

Legitimacy, in the CSR discourse, has embraced three inter-related conceptions: legal, sociological and moral conceptions.[225] The legal conception of legitimacy is concerned with the justification by reference to governing legal norms.[226] Similar to this view, Jones defines legitimacy as referring to 'a system of widely accepted rules and standards governing the way in which power is achieved and

[220] *Ibid.* at p193.
[221] MC Suchman, 'Managing Legitimacy: strategic and institutional approaches' (1995) 20(3) Academy of Management Review 571, 574.
[222] R Suddaby *et al.*, 'Legitimacy' (2017) 11(1) Academy of Management Annals 451.
[223] D Melé & J Armengou, 'Moral Legitimacy in Controversial Projects and Its Relationship with Social License to Operate: A Case Study' (2016) 136(4) Journal of Business Ethics 729.
[224] JJ Brummer, *Corporate responsibility and legitimacy: An interdisciplinary analysis* (Greenwood Press 1991) 73-74.
[225] R Fallon, *Legitimacy and the Constitution* (2005) 118 Harvard Law Review 1787.
[226] *Ibid.*

exercised.'[227] The sociological conception adopts the Weberian view of legitimacy, as deriving from people's belief in its legitimacy.[228] In this sense, the justificatory source is societal perception. In line with this perception, Mitchell asserts that legitimacy refers to 'the belief among groups…that the exercise of power is justified'.[229] Regarding the moral conception, Foldvary describes it as an act in accordance 'with the rules of an ethic' akin to a moral standard. Similarly, Mele and Armengou argree that the moral legitimacy of a business is based on sound ethical principles providing moral sense to executives and helping them to convince the firm's stakeholders and the general public of the ethical acceptability of their business activities or projects.[230] Such ethical principles should incorporate a minimum standard of justice, understood as the protection of fundamental human rights.[231]

For the most part, these three concepts are interconnected. For instance, most societal perception is often based on normative standards.[232] These normative standards are frequently embodied in laws in that given context. Often such normative standards must have a moral or ethical content if it is to appeal to people's obedience or beliefs. In other words, the obligation of a legal precept depends upon its conformity to moral perception.[233] This can be appreciated in the light of longstanding legal debates on the role of morality or, more recently, the integral nature of fundamental human rights to law.[234] This is why Doak *et al.*, pointed out that legitimacy that rests purely on the legal nature of a particular action can provide technical legality to performances that might otherwise be regarded as illegitimate.[235] Based on this argument by Doak *et al.,* it could be argued that legal legitimacy is critical to the existence of the tobacco industry, most notably given its hazardous credentials.[236] Any

[227] RH Jones, 'The Legitimacy of the Business Corporation' (1977) 20(4) Business Horizons 5-9.
[228] M Weber, *Economy and Society* (University of California Press 1968).
[229] N Mitchell 'Corporate Power, Legitimacy and Social Policy' (1986) 39(2) The Western Political Quarterly 197, 202.
[230] D Melé & J Armengou, 'Moral Legitimacy in Controversial Projects and Its Relationship with Social License to Operate: A Case Study' (2016) 136(4) Journal of Business Ethics 729, 730.
[231] A Simmons, *Justification and Legitimacy* (Cambridge University Press 2001).
[232] D Beetham, *The Legitimation of Power* (Palgrave 1991) 11.
[233] Roscoe Pound, 'Law and Morals- Jurisprudence and Ethics' (1945) 23(3) North Carolina Law Review 185.
[234] D Beetham, *The Legitimation of Power* (Palgrave 1991) 11; see also Roscoe Pound, *ibid.*
[235] J Doak *et al.*, 'In search of legitimacy: restorative youth conferencing in Northern Ireland' (2011) 31(2) Legal Studies 305, 307.
[236] WHO, 'fact sheet on tobacco' (WHO, May 2017) <http://www.who.int/mediacentre/factsheets/fs339/en/> accessed 16 December 2017.

other product causing so many deaths when consumed as supposed to, would most likely lack any form of legitimacy.

Legitimacy, when applied to CSR, becomes easy to understand why different interests, including marketing and public relations, all strive towards creating legitimacy for corporate power. The position in the tobacco industry is that the sociological aspect, which focuses on people's perception, has been on a downward curve. NGOs, media, and international organisations have all played a part in shaping societal perception by expounding the awareness of tobacco health hazards. With the UN, as an example, health has occupied a vital role under the United Nations Sustainable Development Goal (SDG). Target 3.a of the SDG urged all countries to proceed and strengthen the implementation of the WHO Framework Convention on Tobacco Control (FCTC), and given that legitimacy is substantially underpinned on legality, the WHO FCTC has urged for a legislative framework that prompts corporate responsibility and normative conformity. However, TTCs have reacted to the tobacco control policies through litigation and through the re-engineering of consumer products that are less harmful than conventional tobacco products.[237] TTCs have also worked in partnership with governments and, in the process, have influenced legislative work within the tobacco industry.[238] The legal tussle between TTCs and stakeholder activism is because, on the one hand, the law can be used as an instrument which can generate legitimacy for TTCs, and, on the other, it is also capable of providing valid expressions to anti-tobacco campaigners pushing for change.[239] While legality is not the self-sufficient criteria of legitimacy, but it is considered a primary criterion. The assertion is that law alone is limited to assist CSR achieve its legitimising function, but it is a fundamental aspect of the legitimating agenda. Law should, therefore, appear in its fully dynamic guise to embrace and assist the complexity of CSR.

Another relevant point to note in the interaction between law and CSR is the question, is CSR against the law? This question is not without controversy, and it

[237] PMI, 'Heated tobacco products' (PMI, 18 Oct 2019) <www.pmi.com> accessed 23 May 2021: according to Philip Morris International, because tobacco is heated and not burned (HNB), the levels of harmful chemicals are significantly reduced compared to cigarette smoke. Further discussion on HNB see, TL Caputi, 'Industry watch: heat-not-burn tobacco products are about to reach boiling point' (2017) 26 Tobacco Control 609.
[238] L Balwicki *et al.*, 'Tobacco industry interference with tobacco control policies in Poland: legal aspects and industry practices' (2016) 25(5) Tobacco Control 521-526.
[239] B De Sousa Santos (ed), *Law and Globalisation from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005) 31.

corresponds with the nature of CSR. The question is rooted in the description that CSR should only be about corporate actions over and above compliance, with legally defined minimum standards.[240] Typically, CSR policies involve a commitment by corporations to enhance environmental concern, human rights, fairness to suppliers and customers, and the disapproval towards bribery and corruption; however, the list is continually expanding due to the evolving nature of CSR. Stone believes that CSR is beyond legal rules.[241] He compares CSR to responsibility plays in humans, which guides a person to act in a certain way despite the lack of legislative prohibitions. He advocates for a legal system that should move towards an increasingly direct focus on the processes of corporate decision making, a sub-set of CSR.[242]

Accordingly, CSR as a whole should have a voluntary dimension.[243] Many of this argument stems from the classical view summed up by Milton Friedman that the social responsibility of business is to make a profit,[244] prompting business administrators that it is the shareholder's investment they are spending. Most of these critics are centred on corporate philanthropy and have been equated to stealing from the rich to give to the poor.[245] However, according to McBarnet, attacking 'CSR by attacking corporate philanthropy could be seen as a mishit, because the extent to which philanthropy detracts from profits tend to be exaggerated'.[246] For instance, corporate philanthropy by the UK's FTSE100 companies amounts to less than 1% per annum of the pre-tax profits.[247] Therefore, CSR should be viewed upon as how companies 'make profits rather than about how they give them away'.[248] A pre-requisite of CSR must be the organisational willingness to look beyond their legal requirement, commercial concentration and business appeal to take account of social and environmental factors in the communities in which they operate. That is, CSR is

[240] Christian Aid 'Behind the mask, the real face of corporate social responsibility' (eldis.org, Jan 2004) <http://www.eldis.org/go/home&id=14595&type=Document#.U42VsNEU9jo> accessed on 3 June 2014.
[241] C Stone, *Where the Law Ends* (Harpers and Row 1975).
[242] *Ibid*. at p120-121.
[243] A Dahlsrud, 'How corporate social responsibility is defined: an analysis of 37 definitions' (2008) 15(1) Corporate Social Responsibility and Environmental Management 1.
[244] Y Yoon (note 40).
[245] The Economist, 'CSR Survey supplement' *The Economist* (22 January 2008) p8.
[246] D McBarnet, 'Corporate social responsibility beyond law, through law, for law' (Uni. Of Edinburgh, School of law, working paper series, 2009/03) 18.
[247] Stone (note 241).
[248] A Dahlsrud (note 243) 18.

about going further than the law requires, rather than merely complying with it, and it is only a voluntary approach to CSR that will practically accommodate this principle.[249]

However, CSR 'going against the law' context is not so much as management going beyond their legal requirement as the traditional definition suggests but as management going beyond its legal powers or breaching its fiduciary duty to shareholders.[250] Under the contract theory of corporation, for instance, management is acting as trustees of the shareholders who are the beneficial owners (trustee/beneficiary relationship), or management acting as employees with the shareholders as owner-employer (employer/employee relationship). Each relationship is contractual, having duties and obligations recognisable under the law, including common law. Thus, management's CSR activities acting *ultra vires* to what they are legally bound to do is CSR acting against the law.[251] However, with the rise of the contemporary corporation, employees could be both shareholders and stakeholders. Shareholders because of outstanding shares in the organisation, and stakeholders because they are members of society or relevant stakeholder groups. The interplay during decisive moments of involving the shareholder-stakeholder manager would, perhaps, make an interesting observation.

2.6 Voluntary and Legally Mandating CSR

Parliamentarian and commentators have supported a voluntary approach to CSR, and if at all, government intervention should be at best minimal, subtle and indirect.[252] During the House of Lords debate on corporate governance and accountability, Lord Patten pointed out that there should be no more 'unnecessary regulation on the shoulders of businesses, which are trying to create jobs and employment opportunity', rather government's role should be to promote 'better

[249] R Lea, *Corporate Social Responsibility: IoD Member Opinion Survey* (The UK Institute of Directors, November 2002).
[250] McBarnet (note 246) *19*.
[251] Dahlsrud (note 243) 19.
[252] L Preuss *et al., '*Trade Unions and CSR: a European research agenda' (2006) 6 (3-4) Journal of Public Affairs: An International Journal 256. See also, House of Lords Debate (note 253).

reporting and clarity'.[253] Similarly, the EU stated that the 'development of CSR should be led by enterprises themselves', while 'Public authorities should play a supporting role through a smart mix of voluntary policy measures'.[254] Voluntarism is based mainly on industry-led private governance regime, which is in contrast with legislation used to mandate CSR and stimulate changes in corporate behaviour and governance. Rather than imposing new standards on companies or requiring companies to report on a standardised set of indicators, voluntarism seeks to encourage companies to strengthen private governance mechanisms such as codes of conduct, auditing, and their commercial power to transform supplier behaviour. It has a low level of sanction, as far as it does not require companies to improve standards nor impose penalties for noncompliance.

Literature reveals two main legal approaches to voluntary CSR: meta-regulation and reflexive law theory approach.[255] Meta-regulation, according to Ayres and Braithwaite, is regulation delegated, and the State can monitor such delegation.[256] It is the reliance on non-state institutions in achieving the objectives of the government to the extent that self-regulation and markets function positively. In this regard, state intrusion is unnecessary. There are two primary forms of meta-regulation. On one end, the State plays a less state-centred role, acting as a facilitator or monitor of CSR activities exercised by non-governmental institutions. Governments are perceived to 'steer' rather than to 'row'.[257] At the other end, the role of government would be that of a passive observer. The role of the state may be limited to constituting an enabling environment where non-state regulatory institutions can operate. For example, the state may play a role in ensuring the integrity of the information that is conducive to the functioning of a healthy market Governments may develop or authorise labelling and organic certification schemes and allow consumer preferences to dictate producer behaviour. Securities regulators, for example, require disclosure of relevant information to stock markets.[258] Even though meta-regulation is favoured by

[253] House of Lords Debate 05 July 2011, vol. 729, col. 203.
[254] Com (2011) 681 (note 45).
[255] O Amao, *CSR, Human Rights and the Law* (Routledge 2011) 74.
[256] I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 4.
[257] Peter Grabosky, 'Meta-regulation' in Peter Drahos (ed) *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017) 153.
[258] *Ibid.*

advocates of a *Laissez-faire* state, this type of regulation has its disadvantages. It erodes the foundation of the rule of law by appearing to position the delegated organisation or industry to formulate, implement and enforce the rules, resulting in a diminutive stance on accountability and achievement of CSR objectives. A relevant example is the UK newspaper industry, who were allowed to regulate themselves, and the lack of a governmental oversight eventually led to the phone-hacking scandal. The banking financial crises of 2008-2009[259] and the lack of TTCs' oversight, demonstrates that when state capacity in monitoring the respective industry is not robust, the outcome could be devastating, which can only be exacerbated when non-state regulatory institutions are themselves weak.[260] For this reason, industry regulation should be reinforced by, and integrated with, state regulatory systems.[261]

The reflexive law theory is a term to mean the 'regulation of self-regulation', as opposed to traditional command-and-control regulation.[262] According to Cohen, it is reflexive because the subject (regulation) 'reflects' the object (self-regulation). Reflexive law can be used to supplement other forms of regulation.[263] The theory is focused on procedural norms as opposed to substantive formalised rules. Cohen further argues that reflexive regulation does not dictate any particular outcome, unlike meta-regulation.[264] The UK Modern Slavery Act 2015 is an example of a reflexive regulation. The Act demands commercial organisations to prepare a slavery and human rights trafficking statement for each fiscal year without providing sanctions when a company fails to comply, therefore amounting to endorse voluntary CSR reporting, without any legally binding standards.[265] However, guided by the recognition that companies do adapt their policies and practices in response to legislation,[266] there is a growing demand, especially amongst tobacco activist, for the role of law in CSR

[259] KV Lins *et al.*, 'Social Capital, Trust, and Firm performance: the value of CSR during the financial crises' (2017) 72(4) The Journal of Finance 1785.
[260] Grabosky (note 257) 157.
[261] *Ibid.*
[262] *Ibid.* p73 and pgs.151-79.
[263] JL Cohen, *Regulating Intimacy: a new legal paradigm* (Princeton University Press 2002) 277.
[264] *Ibid.*
[265] G LeBaron and A Ruhmkof, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8(S3) Global Policy 15.
[266] See K Murphy, 'Procedural Justice and its Role in Promoting Voluntary Compliance' in P Drahos (ed) *Regulatory Theory* (Australian National University Press 2017) at p44: The instrumental model of compliance indicates that Individuals are thought to assess opportunities and risks and will disobey the law when the anticipated fines and probability of being caught for noncompliance are small in relation to the profits to be made through noncompliance.

to have less emphasis on voluntarism and more on legal regulation of the tobacco business. An example is the WHO FCTC, a tobacco control regulatory framework to be adopted as municipal laws by member nations, as an effective way in the reduction of tobacco prevalence. As a result, it terminates the reliance on voluntary corporate actions of tobacco companies to regulate corporate responsibility, rather it causes tobacco companies to act responsibly. Hence, corporate social responsibility is being brought about through law.

During the European Commission Green paper stage, trade unions and civil society organisations emphasised that CSR as a voluntary initiative 'are not sufficient to protect workers' and citizens' rights.'[267] Others called for international regulation to control corporate practise[268] because 'compliance efforts cannot fully succeed unless we bring governments back into the equation'.[269] Chandler called for more legal regulation and referred to voluntary CSR as a 'curse',[270] for it prohibits legislating to control corporate excesses. Academics have argued that voluntary CSR will be used against the law to prevent new legal protections or used as a way of inhibiting regulation.[271] Vogel contends that there are limits to what NGOs and the market can achieve and underpins the need for effective government regulation that is sustainable in comparison with market-driven CSR.[272] LeBaron and Ruhmkorf suggest that voluntary CSR without a legally binding standard is ineffective. The voluntary nature of CSR has led to inconsistencies. CSR reporting, for instance, does not yet have a measure of consistency in reporting practices.[273] As such, organisations cherry-pick supportive news story[274]as opposed to the standardised and easily comparable financial reports, where the content and reporting format are strictly regulated.

[267] COM, 'Communication from the Commission concerning CSR: a business contribution to sustainable development', COM (2002) 347, Final, 2 July 2002, at p4.
[268] K Naomi, *No Logo* (Picador 2009).
[269] John Ruggie, UN Special Representative for Business for Business and Human Rights, remarks at the forum on CSR, Bamberg, Germany, 14 June 2006.
[270] G Chandler, 'The curse of Corporate Social Responsibility', (2003) 2(1) New Academy Review 31.
[271] R Shamir, 'Between Self-Regulation and the Alien Tort Claims Act: On the contested concept of CSR', (2004) 38(4) Law and Society Review 365.
[272] D Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings 2005) 46.
[273] SP Sethi *et al.,* 'An Evaluation of the Quality of Corporate Social Responsibility Reports by Some of the World's Largest Financial Institutions' (2017) 140(4) Journal of Business Ethics 787-805.
[274] SP Sethi *et al.,* 'Enhancing the Quality of Reporting in Corporate Social Responsibility Guidance Documents: The Roles of ISO 26000, Global Reporting Initiative and CSR-Sustainability Monitor (2017) 122(2) Business and Society Review 139–163.

Regulation, therefore, would progressively lead to procedural harmonisation of CSR, given that, it would be fairer and presents a level playing field for businesses.[275]

Against this backdrop, the research will illustrate with India's mandatory CSR approach. The Indian government took a direct mandatory approach of inducing CSR. Corporations with specified net worth, or net profit, were mandated to spend 2% of its average net profit towards specified CSR activities.[276] The requirement applies to any company incorporated in India, either domestic or a subsidiary of a foreign company. The qualified company would have to set up a CSR committee whose function includes to formulate and recommend to the board of the company a CSR policy; to recommend the amount of expenditure to be incurred on the CSR activities referred to; and to monitor the Corporate Social Responsibility Policy of the company from time to time.[277] The CSR activities which may be included by companies in their CSR policies are prescribed under Schedule VII of the 2013 Companies Act, including, but not limited to, eradicating extreme hunger and poverty; promoting gender equality and empowering women; ensuring environmental sustainability; contributing to the Prime Minister's National Relief Fund or any other fund set up by the Central Government or the State Governments for socio-economic development. The Act also specifies that companies can give preference to the local area and communities where it operates.[278] Whilst India's mass rural population remains impoverished,[279] the passage of the Companies Act could be hailed as a positive step in ensuring that businesses contribute to equitable and sustainable economic development.

However, this approach lays emphasis on corporate philanthropy rather than strategic CSR. The redistributive process does not come without controversy. Karnani, for instance, asserts that the idea companies have a responsibility to act in the public interest, and will profit from doing so, is fundamentally flawed.[280] He contends that CSR, in this manner, is ineffective and dangerous. He argues that firms should be expected to embrace CSR when there is an organic market realignment between

[275] McBarnet (note 246) 27.
[276] S135(1), Indian Companies Act 2013.
[277] *Ibid*. s135(3)(a), (b) and (c).
[278] S135(5) India Companies Act 2013.
[279] Vijay Joshi, *India's Long Road: the search for* prosperity (OUP 2017); see also BBC, 'India country profile' (BBC News, 18 Feb 2019) <http://www.bbc.co.uk/news/world-south-asia-12557384> accessed 17/6/2014.
[280] A Jane, 'The Mandatory CSR in India: Boon or Bane', (2014) 4(1) Indian Journal of Applied Research 301-304.

profits and social interests. The reason behind the contention is that companies, who have a fiduciary responsibility to their shareholders, should not be coerced to sacrifice profits for the sake of social welfare.[281] CSR in this instance serves the purpose of corporate greenwashing.[282] Karnani believes that CSR in the Indian context should be de-emphasised with greater emphasis on the real conflict and issues.[283]

Commentators, in this Indian example, have further argued on the dysfunctionality of allowing steel or aluminium companies to run schools or hospitals.[284] Ticking a CSR checklist or writing a cheque, as mandated under the law, is a poor substitute for being a good corporate citizen. How companies make profits (ethically and legally) is more important than what they do with them (dividends or taxes). Mandatory CSR through taxation forces companies to substitute government and outsource or delegate the state's primary function.[285] Opponents of this CSR approach insinuate that companies should create employment and pay taxes, and it is unrealistic and unfair to expect companies to focus beyond the crux of their existence, which is to survive and grow in profitability. The mandatory 2% contributions could, however, be counter-intuitive to those companies affected by the financial crises. In addition, there is an apprehension that the mandated spending of 2% of a company's profits on CSR may eventually become a tax.[286]

Questionably, the prescriptive CSR projects are too narrow and seem to neglect other relevant areas, including mental health. Moreover, it does not provide for creative means to foster CSR. For instance, creating a digital platform in raising awareness on health issues. The mandatory approach, overwhelmingly, is geared towards philanthropy, which is a splinter, and not the crux, of CSR. It is an anomaly that section 135 of the Act referred to this legislative section as Corporate Social Responsibility. The philanthropic nature of the Act falls much into the ambit of the disapproving critique raised by Milton Friedman.[287] The Act legislated on CSR as a ‘whole’ rather than as a ‘subset’. Furthermore, when legislation is on CSR as a ‘whole’, the legislative Act takes

[281] *Ibid.*
[282] *Ibid.*
[283] *Ibid.*
[284] *Ibid.*
[285] *Ibid.*
[286] *Ibid.*
[287] M Friedman (note 169).

on the complexity and inconsistency of CSR. Legislating on the 'subset' of CSR is akin to the UK Bribery Act 2010, which research suggest proves much more effective in establishing standards and improving corporate governance.[288]

2.7 Transnational Tobacco Companies and CSR

This section examines the relationship between CSR and the transnational tobacco corporations in Nigeria. To achieve its aim, the section starts with a descriptive analysis of the CSR framework policies of transnational tobacco corporations, focusing mainly on BAT Nigeria and PMI, given that they both makeup over 95% of the market share in Nigeria.[289] Both companies are prominent figures in the CSR discourse and, due to their market positions, their behaviour affects public perception of the tobacco industry. Following on from this, the section examines the position of the law and how it shapes the practice of CSR in the tobacco industry. Drawing from CSR policies of TTCs and the legal position of CSR in the tobacco industry, this section concludes that there is a role for CSR to drive the context of obligations and responsibilities in the tobacco industry.

An observation of CSR statements presented by BAT (Nigeria), the largest tobacco company in Nigeria by market share,[290] revels three core principles in their 'Business Principles and Framework for CSR'[291]:

1) The principle of mutual benefit – this principle is based on building relationships and engaging constructively with stakeholders. To achieve this aim, BAT states it would proactively seek the views and concerns of stakeholders, translating stakeholders' expectations into actions, where reasonable and feasible.[292]
2) The principle of responsible product stewardship – this principle is the basis the company will 'meet consumer demand for a legal product that is a cause of

[288] G LeBaron and another, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8(S3) Global Policy 15. See also Serious Fraud Office high profile bribery and corruption cases such as Rolls-Royce and Standard Bank, and yet to be concluded cases as at time of writing: BAT, Airbus group, GSK, Rio Tinto, etc.
[289] WHO, 'Nigeria' (WHO, 2000) <www.who.int/tobacco/media/en/Nigeria.pdf> accessed 23 May 2021.
[290] *Ibid.*
[291] BAT, 'Business Principles and Framework for CSR', (BAT, date unknown) <BAT.com> accessed 14 July 2019.
[292] *Ibid.*

serious diseases' which 'should be developed, manufactured and marketed in a responsible manner'.[293] The company aspires to develop tobacco products that poses a reduced health risk. In reducing tobacco impact on public health, the company recognises that proportionate tobacco regulation is crucial to this objective. The company claims that it will communicate the harm to the public, obey all lawful regulations, prevent the underage sale of tobacco product, *inter alia*.[294]

3) The principle of good corporate conduct – this principle is the basis for high standards of behaviour and integrity, which should not be compromised for the sake of results.[295] To achieve this aim, the company ensures compliance with the law and with high standards of business practice, partnering with other businesses who conform to such high standards. Under their CSR framework, the company do not believe that being in the tobacco business is inconsistent with the practice of corporate social responsibility, and 'it would be an odd definition of CSR that only applied to 'popular' businesses'.[296] The company believes that it is their responsibility to incorporate the principles of CSR in every part of its operations, keeping the CSR framework under review to ensure that it reflects recent developments and changes in societal expectations.[297]

Under the CSR framework, the company recognises that fundamental human rights should be respected and claims to work with suppliers and commercial partners to promote the recognition of such rights.[298] The company also aims to accomplish world-class standards of environmental performance by reducing the environmental impact of their operations.[299] In realising the claim, the company will be restructured, including a rigorous environmental management system and the consideration of the environment in designing new products.

Philip Morris International's approach revolves on addressing the negative health impacts of its products by developing and commercialising less harmful

[293] *Ibid.*
[294] *Ibid.*
[295] *Ibid.*
[296] *Ibid.*
[297] *ibid*
[298] *ibid.*
[299] *Ibid.*

alternatives to cigarettes while managing social and environmental impacts across its operations and value chain.[300] The framework is based on four main pillars[301]: 1) Transforming our business – this involves accessing the impact of their products and providing less harmful alternatives; 2) Driving operational excellence – including responsible commercialisation, maintaining strong ethics and compliance culture, commitment to human rights, responsible sourcing of raw materials, tackling illicit tobacco trade is included under this section; 3) Managing social impact – this section embraces stakeholder engagement, the assessment and addressing the social impacts of their product and activities including the elimination of child labour, the promotion of health, safety and well-being and community engagement; 4) Reducing environmental footprint, including greenhouse gas (GHG) emissions, biodiversity and deforestation, waste and littering, and water use. PMI recognises that effective environmental management across their operations and value chain 'goes beyond compliance with applicable laws and regulations.'[302] PMI sets about prioritising the UN Sustainable Development Goals (SDGs) in its sustainable framework.

The CSR framework of both BAT and PMI incorporates major CSR themes, including CSR reporting, environmental sustainability, and stakeholder relationship. The framework recognises the hazardous effect of their product on society and then aligns itself with organisational activities that directly combat those hazards. Two examples include PMI's long-term goal to end cigarette smoking and to assist tobacco farmers transition from tobacco cultivation to other cash crops.[303] The framework suggests that CSR is not limited to organisational processes, but it also includes the tobacco product as well. In the sense that it asserts what a right tobacco product should be—less harmful. This has led tobacco companies commit to the production of less harmful tobacco products. Although the framework recognised the risk associated with tobacco products, but, more importantly, it fails to recognise that the tobacco 'epidemic', which has resulted in the death of millions of people every year, could be averted forthwith by ceasing to produce the harmful product. It is this lack of recognition, mainly due to profits, that has predominantly defined the CSR agenda of

[300] PMI, Sustainability Report (PMI, 2018) p4.
[301] *Ibid.*
[302] *Ibid.* p87.
[303] PMI, *Sustainability Report* (PMI, 2018).

transnational tobacco corporations as 'unCSR'[304] and 'greenwashing'.[305] For instance, Chapman warns that the tobacco industry's 'social responsibility' should be considered with caution,[306] whilst Fooks *et al.* suggest that tobacco companies employ CSR strategy to gain access to policymakers with the aim of influencing tobacco control policies.[307] The World Health Organization have also questioned the possibility of social responsibility in the tobacco industry, describing it as a tactic to inhibit tobacco control.[308] As a result, the WHO recommends that Parties should prohibit any contributions and publicity of social responsibly causes associated with the tobacco industry as it constitutes a form of promotion, sponsorship, and advertisement.[309] In other words, any "socially responsible" tobacco industry business practices, such as good employee-employer relations or environmental stewardship, should not be promoted to the public as they aim to promote a tobacco product, either directly or indirectly. Public dissemination of such information is prohibited, except for required corporate reporting or necessary business administration, such as for recruitment purposes and communications with suppliers.[310]

Against this backdrop, s27 of the Nigerian National Tobacco Control Act 2015 (NTCA)[311] prohibits government institutions and bodies from accepting voluntary contributions of any kind from the tobacco industry. The prohibition extends to a public office holder and political parties.[312] The NTCA prohibits the tobacco industry from the

[304] The word is coined to mean 'not CSR'; see also G Hastings & J Liberman, 'Tobacco corporate social responsibility and fairy godmothers: The Framework Convention on Tobacco Control slays a modern myth,' (2009) 18 Tobacco Control 73-74.
[305] Greenwashing is an insincere expression of concerns as a cover for products, policies and activities, notably to boost sales or reputation. See also F Houghton *et al.*, 'Greenwashing tobacco—attempts to eco-label a killer product' (2019) 9 Journal of Environmental Studies and Sciences 82; F Houghton *et al.*, 'Greenwashing tobacco products through ecological and social/equity labelling: a potential threat to tobacco control' (2018) 4(11) Tobacco Prevention and Cessation 37.
[306] S Chapman, 'Advocacy in action: extreme corporate makeover *interruptus:* denormalising tobacco industry corporate schmoozing' (2004) 13 Tobacco Control 445,452.
[307] G Fooks (note 73).
[308] WHO, *Technical Resource: article 5.3* (WHO 2012). Under the Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control, recommendation 17 (6) for members health policy states: Denormalize and, to the extent possible, regulate activities described as "socially responsible" by the tobacco industry, including but not limited to activities described as "corporate social responsibility".
[309] WHO FCTC (note 310) [25]-[28]. Also, the WHO FCTC recommendation is adopted in Nigeria under para19, First Schedule of the National Tobacco Control Act 2015.
[310] WHO FCTC, *WHO FCTC Guidelines for Implementation: Article 5.3, 8-13* (WHO FCTC, 2013).
[311] This Act is the foremost tobacco control legislation and further examination of the Act in the next chapter.
[312] See s27(a) – (c).

> *Provision of financial or other support to events, activities, individuals or groups…individual sportspeople or teams…welfare and other public interest organisations, government institutions or organisations, politicians, and political candidates or political parties, whether or not in exchange for attribution, acknowledgement or publicity, including* ***corporate social responsibility*** *activities of any kind.*[313]

What this means in practice, when read together with the WHO FCTC Guidelines, is that it creates an unusual industry-specific kind of CSR bereft of any public philanthropy, promotional element, and any form of government acknowledgment of the CSR activities associated with the tobacco industry. To present it another way, the law prohibits any form of 'outward appearances' of CSR. Which leads to the question—can the tobacco industry practice CSR in Nigeria without public philanthropy? For research suggests that the CSR agenda of Nigerian firms are mainly driven by philanthropy.[314] Okorochkova, however, argues that CSR is not philanthropy or charity but a company's commitment to operate in an economically, socially and environmentally sustainable manner.[315] Likewise, Lin-Hi contends that CSR through corporate philanthropy is systematically misleading and argues against linking CSR with philanthropy.[316] CSR should therefore be viewed upon as how companies make profits rather than how they give them away.[317] Moreover, findings reveal that stakeholders in Nigeria place less emphasis on the philanthropic component and more on economic, legal and ethical responsibilities.[318] Again, going by the core elements of the EC's depiction of CSR—that is, corporate responsibilities and corporate impact—tobacco corporations could act in a responsible manner, including adhering to municipal laws and international human rights initiatives, and 'go

[313] No. 19 of the First Schedule, NTCA 2015. Bold inserted by author for emphasis.
[314] K Amaeshi and C Ogbechie, 'Nigeria' in Wayne Visser and Nick Tolhurst (eds), *The World Guide to CSR* (GreenLeaf Publishing 2010) 276; K Amaeshi *et al.,* 'Corporate Social Responsibility in Nigeria: Western Mimicry or Indigenous Influences?' (2006) 24 Journal of Corporate Citizenship 83; M Obalola, 'Beyond philanthropy: CSR in the Nigerian Insurance Industry (2008) 4(4) Social Responsibility Journal 538.
[315] A Okorochkowa, 'What CSR is not: extremes of CSR perception in the world of business and strategic view on it in the era of conscious capitalism' (2016) 4(2) Review of Business and Economics Studies 83.
[316] N Lin-Hi, 'The problem with a narrow-minded interpretation of CSR: why CSR has nothing to do with philanthropy' (2010) 1(1) Ramon LLuLL Journal of Applied Ethics 75, 86.
[317] See note 243.
[318] SO Fadun, 'CSR practices and stakeholders expectations: the Nigerian perspectives' (2014) 1(2) Research in Business and Management 13.

above and beyond' in reducing the company's societal without displaying any form of 'outward appearances'.

Actions to act responsibly is driven by corporate management, and corporate management could be driven by the desire to act in an ethical manner. As a result, CSR could drive corporate governance without any form of public collaboration, advertisement, or promotional underpinnings.[319] It could serve as a vehicle for encouraging management to consider broader ethical considerations, especially in countries with weak institutions,[320] given that tobacco is still a legal product that needs to be regulated. Importantly, research suggests that emphasis should be on the drivers developing internal regulations where the society does not have adequate legal and non-legal drivers.[321] CSR therefore could be adopted to fill any regulatory gaps.

Against this backdrop, CSR role in the regulatory process could act an auxiliary benefit to the overall regulatory framework. TTCs evaluate their current performances, engage with stakeholders, implement-self assessment, produce CSR reports together with the evaluation and verification of the report, leading to recommendations for improvement. One of such improvements is TTCs' increase in research and development spending in order to develop less harmful tobacco products,[322] and this could partly be attributed to CSR commitments.[323]Societal engagement with stakeholders, including consumers and health professionals, is a prerequisite for the change from business as usual to sustainability. The decision to produce and promote less harmful alternatives was not driven by legislation but driven by CSR, as stated in the companies' CSR framework policies. Moreover, it could be argued that the law is also part of the problem, as the law gives legitimacy to the industry to sell a harmful legal consumer product in the form of cigarettes. It was also not driven by declining sales revenue. PMI worldwide annual revenue, for example, increased year-on-year from $67.7bn in 2010 to $79.8bn in 2018.

[319] MA Harjoto and H Jo, 'Corporate Governance and CSR Nexus' (2011) 100(1) Journal of Business Ethics 45; see also, M Rahim and S Alam, 'Convergence of Corporate Social Responsibility and Corporate Governance in Weak Economies: the case of Bangladesh' (2014) 112(4) Journal of Business Ethics 607.
[320] On the issue of weak institutions, see chapter 5 of this thesis; see also D Imhonopi and CA Onifade, 'Towards national integration in Nigeria: Jumping the hurdles' (2013) 3(9) Research on Humanities and Social Sciences 75.
[321] See, M Rahim (note 319).
[322] A Hancock, 'Philip Morris shifts focus to "smoke free" nicotine products' *ft.com* (9 April 2019).
[323] See BATN (note 291) and PMI (note 300) CSR policies.

For this reason, Lindorff *et al*. conclude that firms operating in controversial industry can contribute to society by solving specific social problems in ways that minimise the harm that would otherwise have been caused.[324] An example is a production of alternative, less harmful tobacco products (electronic cigarettes or heat-not-burn tobacco products). Countries such as the UK, Canada and New Zealand have recognised such less harmful product with the aim of reducing smoking prevalence, and they have promoted their use as a less harmful alternative to smoking tobacco.[325] Therefore, CSR can potentially fill the gap where legislation or other conditions have left a vacuum. Translating TTCs' CSR framework from policy to CSR-in-action is crucial. Institutionalised purpose and commitment to CSR should be the inherent embodiment of a good CSR policy. Commitment to the CSR agenda is key and should remain as crucial as ever.

2.8 Conclusion.

A literature review on CSR has attested there is no unified theory of CSR but rather several normative, descriptive, and instrumental theories and concepts.[326] The fluidity of the term demonstrates that CSR could at best be described rather than defined. The review identified the main themes of the concept, and the research adopted the EU's depiction of CSR, giving scope and guidance to an otherwise dynamic term.

In addition, the chapter revealed that the mandatory legislative approach to CSR does not capture the true essence of the concept. Moreover, when so called CSR legislation mandates firms to adopt CSR, the law also takes on the complexity and ambiguity of the concept; the result of which creates a questionable CSR policy. On

[324] Lindorff *et al*., 'Strategic Corporate Social Responsibility in Controversial Industry Sectors: The Social Value of Harm Minimisation' (2012) 110(4) Journal of Business Ethics 457.
[325] Public Health England, V*aping in England: an evidence update February 2019 - A report commissioned by Public Health England* (PHE 2019); see also NHS, 'Using e-cigarettes to stop smoking' (NHS, 29 March 2019) <https://www.nhs.uk/live-well/quit-smoking/using-e-cigarettes-to-stop-smoking/> accessed 9/7/2019.
[326] S Diehl *et al., Handbook of Integrated CSR Communication* (Springer 2017) 4; R Bhinekawati, *CSR and Sustainable Development* (Routledge 2017); SO Idowu and S Vertigas (eds.) *Stages of CSR: From Ideas to Impacts* (Springer 2017); A Okoye, *Legal Approaches and CSR* (Routledge 2017).

the opposing end of the divide is the voluntary approach to CSR, where research suggests that allowing organisations a choice to practise, or not to practise, CSR could be counterintuitive to promoting the CSR agenda. Sitting between these two opposing approaches is an approach where legislation does not drive CSR, but rather it drives a subset of CSR, and this approach appears to be a sufficient balance. Furthermore, the chapter was able to demonstrate the connection between law and CSR, and how they both advance each other.

The chapter further demonstrated how different normative understanding and legal definition of a corporation have influenced what the social responsibility of a corporation ought to be. Consequently, the research confines a corporation to mean natural personhood to prevent ambiguity, given that the Nigerian company law defines a corporate entity as a natural personhood. Accordingly, the acquiesced natural personhood of a corporation bestows both rights and obligations almost indistinguishable from that of an individual. The subsequent chapters will therefore examine such rights and obligations with regards to transnational tobacco corporations.

The chapter recognised the CSR statements of transnational tobacco corporations. In the statements, TTCs declared to engage with stakeholders, adhere to high standard of behaviour and integrity, reduce environmental footprint, among other declarations. Even though the CSR expressions recognised the harmful effect of tobacco, it , however, failed to immediately put an end to the production of such harmful product, despite the high morbidity rate associated with the product. As a result, tobacco control advocates have failed to accept CSR activities associated with the tobacco companies, referring to such activities as ‘greenwashing’ or ‘unCSR’.

Furthermore, the chapter explored the position of the law concerning CSR practise in the Nigerian tobacco industry. The law prohibits the government from any form of CSR engagements with the tobacco companies. The law also prohibits any form of CSR advertisement by the tobacco companies, amongst other CSR prohibitions, thus, creating an industry-specific form of CSR practice. However, the research maintains that CSR has a role in the regulatory framework, based on the fact that tobacco is still a legal consumer product that needs an enhanced form of regulation due to the health risks associated with tobacco. Although the law prohibits

any form of public advertisement or public collaboration of CSR activities associated with the tobacco industry, which this research classified as ‘outward’ CSR, the research argues that CSR could drive ‘internal’ corporate decisions. Such decisions could manifest itself in the wider society, including acting in place of any regulatory gap; as a result, it enhances the overarching objectives of the tobacco regulatory framework in Nigeria.

Chapter Three. Legal and Institutional Framework: Nigerian Tobacco Industry I

3.1 Introduction

> Tobacco consumption poses real risks to health, so we agree that tobacco products should be regulated…[327]

Conforming with the overall aim and objective of the research, the chapter identifies and evaluates the predominant legislation that regulates the tobacco industry in Nigeria: The National Tobacco Control Act 2015 (NTCA; Act). The Act, explicitly aimed at the tobacco industry, protects Nigerians from the devastating health, social, economic, and environmental impact of the tobacco industry. The chapter captures the capability of the legislation in fulfilling its objectives to the Nigerian people. To this end, the chapter starts with an introductory overview of the tobacco industry and regulation in Nigeria. It develops by dividing the NTCA into four sections, for an enhanced review structure. Then, it concludes by presenting recommendations to augment the law and inform policy.

3.1.1 Tobacco Regulation in Nigeria: An Overview

According to the WHO FCTC, legislation is necessary to protect society from the impact of the tobacco industry.[328] The first attempt by the Nigerian government to control the industry was in 1951 under the revenue allocation document on licensing and controlling tobacco importation.[329] This policy focused on the licensing, importation of tobacco, and payment of duties. Nigeria began to regulate the tobacco industry in the 1970s, but the industry undermined these efforts.[330] The first major

[327] British American Tobacco Nigeria, *Regulation and Lobbying,* (BAT, date unknown) <*http://www.batnigeria.com/group/sites/BAT_7YKM7R.nsf/vwPagesWebLive/DO7YLFUT?opendocument> accessed 29/5/2015.*

[328] For instance, see WHO, *WHO FCTC* (WHO 2005) 14.

[329] Under section 6 of the Nigeria (Revenue Allocation) Order in Council of 1951, in SO Nwhator, 'Nigeria's costly complacency and the global tobacco epidemic' (2012) 33(1) Journal of Public Health Policy 16–33.

[330] CO Egbe et al., 'Avoiding "A Massive Spin-Off in West Africa and Beyond": the tobacco industry stymies tobacco control in Nigeria' (2017) 19(7) Nicotine and Tobacco Research 877.

attempt to regulate tobacco use for health-related reasons occurred under the Tobacco Smoking (Control) Decree 20, 1990, by the then military government.[331] The Decree, in most part, was unsuccessful because it included industry-proposed language that weakened the law and resulted in poor implementation, as indicated in the 2008 WHO report.[332] The WHO report and Nigeria's ratification of the WHO Framework Convention on Tobacco Control (FCTC) triggered a resurgence in tobacco control,[333] resulting in the development of the first comprehensive FCTC-compliant tobacco control bill—the National Tobacco Control Bill 2009.[334] Although the bill was aimed at regulating the activities of tobacco industry, it was not enacted partly due to the interference from the tobacco industry.[335] With the failure of the bill, another edition was developed by the Federal Ministry of Health and sent to the Senate for approval. Eventually, the bill was approved by the Senate and signed by the Nigerian President.[336] The Bill is currently known as The National Tobacco Control Act 2015 (NTCA). Section 3.2 examines the NTCA.

3.1.2 Tobacco Industry in Nigeria: An Overview

> *[T]he tobacco industry or business in the tobacco industry includes any person or entity working on behalf of, or furthering the interest of, the tobacco industry*[337]

Nigeria is one of the five main tobacco production hubs in Africa, serving both local and international markets.[338] The predominant tobacco company in Nigeria is

[331] This was converted to an Act (Tobacco Control Act 1990 CAP.T16) when Nigeria transited to a democratic rule in 2000.
[332] World Health Organisation, *WHO Report on the Global Tobacco Epidemic, 2008: The MPOWER package.* (World Health Organisation Press 2008); CO Egbe et al., 'FCTC Implementation in Nigeria: Lessons for Low- and Middle- Income Countries' (2019) 21(8) Nicotine and Tobacco Research 1122.
[333] CO Egbe et al., 'Role of stakeholders in Nigeria's tobacco control journey after the FCTC: lessons for tobacco control advocacy in low-income and middle-income countries' (2019) 28(4) Tobacco Control 386.
[334] The Bill was titled "A Bill for an Act to Repeal the Tobacco (Control) Act 1990 Cap T16 Laws of the Federation and to Enact the National Tobacco Control Bill 2009".
[335] O Oladepo et al., 'Analysis of tobacco control policies in Nigeria: historical development and application of multi-sectoral action' (2018) 18(1) 959 British Medical Council Public Health 80.
[336] *Ibid.*
[337] Section 45 National Tobacco Control Act 2015.
[338] Under the terms of the MoU, British American Tobacco Nigeria made a commitment to work with the Nigerian government to make the company a potential for regional exports, available at BAT, 'about us' (BAT, date unknown) <www.batnigeria.com> ; CSEA (note 7) 6.

British American Tobacco.[339] BAT has had an operational presence in Nigeria since 1912;[340] in 1933, the company attempted the first tobacco manufacturing in Nigeria with the establishment of a pilot plant in a cotton factory in Oshogbo, located in the western part of Nigeria.[341] Japan Tobacco International (known locally as Habanera Ltd.) has a significant presence in Nigeria, serving both the local and West African markets.[342] Philip Morris Limited (PML) was incorporated in Nigeria in 2014 as an affiliate of Philip Morris International; however, the first operational presence in Nigeria was in 1963.[343] In 2015, PML signed a Third Party Manufacturing Agreement with International Tobacco Company (ITC), Ilorin, Nigeria, to produce some of its leading products.[344] PML, BAT, and Leave Tobacco & Commodities Nigeria Limited are the three registered tobacco companies that produce about 80% of the consumed tobacco products in Nigeria.[345] According to available data from Global Data Plc, 18.4 billion cigarettes sticks were sold in 2015 of which the three main tobacco companies domestically produced 12.2 billion,[346] with BAT accounting for 75% of the overall domestic production.[347]

Tobacco cultivation in Nigeria dates back to the nineteenth century when it was grown as a minor crop for domestic use, such as chewing and local trade.[348] It was not until 1915 that the Department of Agriculture began experiments with imported varieties to develop a commercially viable export trade in tobacco, but the experiments were unsuccessful. However, a revival of commercial tobacco farming started in 1933 when the Nigerian Tobacco Company (NTC), a subsidiary of BAT London, opened a cigarette factory in Oshogbo, Nigeria. The NTC, by distributing free seeds and other initiatives, encouraged local farmers to grow tobacco so as to guarantee the domestic supply of tobacco for the new factory.[349] Consequently, 83 acres of tobacco were

[339] British American Tobacco (Nigeria) Limited (BATN) was incorporated on 11 July 2000 as a fully owned subsidiary of the British American Tobacco Group, available at www.BATN.com accessed 25 October 2019.
[340] BATN, 'who we are' (BAT, date unknown) <www.Batnigeria.com> accessed 23 October 2019.
[341] JF Awojinrin, 'British direct investment and economic development in Nigeria, 1955-1972' (Doctoral thesis, Keele University 1974) 152.
[342] Top Employers Institute, 'JTI Nigeria (Habanera Limited)' (Top employers institute, 2019) <https://www.top-employers.com/en-GB/companyprofiles/ng/jti-nigeria-habanera-limited/ accessed 23 October 2019.
[343] *Ibid* at p88.
[344] Top Employers Institute, 'Philip Morris Limited' (note 342) accessed 23 October 2019.
[345] CSEA (note 7) 6.
[346] *Ibid.*
[347] *Ibid.*
[348] JF Awojinrin (note 332) 86.
[349] *Ibid.*

grown in Southern Nigeria in 1934 and this increased to 40,000 acres in 1965.[350] Tobacco expanded during these early times given the favourable sowing conditions and agrotechnical support from NTC; subsequently, on 6 November 2000, BAT Nigeria and NTC merged.[351] BAT continues to grow tobacco in Nigeria through a wholly-owned subsidiary—BAT Iseyin Agronomy Limited (BATIA), incorporated in 2003 with the core responsibility for all domestic tobacco growing operations and rural agricultural development activities.[352]

[350] *Ibid.*
[351] *Ibid.*
[352] BAT Nigeria (note 340).

3.2 National Tobacco Control Act of 2015.

3.2.1 NTCA 2015 and its relationship with WHO FCTC 2005.

The National Tobacco Control Act 2015[353] (NTCA) came into force on 27 May 2015.[354] The NTCA repeals the Tobacco Smoking (Control) Act 1990,[355] rendering the NTCA as the primary tobacco legislation in Nigeria. The NTCA provides a regulatory framework for tobacco control, addressing the production, sale, and manufacturing of tobacco products, amongst other matters. It gives effect to Nigeria's obligations under the WHO FCTC.[356] As such, the NTCA domesticates the World Health Organization Framework Convention for Tobacco Control (WHO FCTC or the Convention), which serves as the first global public health treaty. The Convention is one of the most widely endorsed treaties in the history of the United Nations.[357] It was adopted by the World Health Assembly on 21 May 2003 and entered into force on 27 February 2005.[358] Nigeria signed and ratified the Convention on 28 June 2004 and 20 October 2005, respectively.[359] According to the WHO, the treaty is evidence-based.[360] It reaffirms the right of all people to the highest standard of health, representing a "paradigm shift in developing a regulatory strategy to address addictive substances".[361] In other words, the Convention focuses on strategies to reduce the demand and supply of tobacco.[362] Describing tobacco as an epidemic escalated by globalisation, the treaty provides a new legal dimension for international health cooperation;[363] thus, its objective and protocols provides a framework to protect from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to

[353] Download the Act at <http://www.tobaccocontrollaws.org/files/live/Nigeria/Nigeria%20-%20TCA%20-%20national.pdf> accessed 10/10/16.
[354] Channels television news, 'Jonathan signs Tobacco Control Bill, five others into law' (Channels television, 27 May 2015) <http://www.channelstv.com/2015/05/27/jonathan-signs-tobacco-control-bill-five-others-into-law/> accessed 28 Jan 2018.
[355] Cap. T6 Laws of the Federation of Nigeria 2004.
[356] Part 1 of the NTCA 2015.
[357] WHO FCTC, *who fctc* (WHO FCTC, 25 May 2003).
[358] *Ibid.*
[359] World Health Organization Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166 (WHO FCTC).
[360] *Ibid.*
[361] *Ibid.*
[362] *Ibid.*
[363] *Ibid.*

tobacco smoke.[364] The Conference of the Parties (COP) is the governing body of the WHO FCTC, and its composition is made up of all Parties to the Convention. The FCTC is a legally binding treaty that commits Nigeria to develop and implement evidence-based tobacco control measures, so as to reduce the demand and supply of tobacco.[365]

An overview of the WHO FCTC (the Convention): divided into eleven parts and 38 articles, the Convention outlines the core principles for effective tobacco control. It directs member States by publishing guidelines on how to implement the Convention's proposals or actions. The WHO FCTC focuses on measures to reduce the supply and demand of tobacco. The supply reduction measures, for instance, include eradicating illicit trade[366] and developing alternatives for tobacco cultivation.[367] The Convention, under article 2, encourages Parties to implement stringent measures beyond those stipulated under the Convention, measures that are compatible under international law. Article 3 introduces the objectives, while article 4 presents the guiding principles of the Convention. The Convention encourages price and tax measures as an effective means to reduce tobacco prevalence,[368] as well as the use of non-price measures, such as effective legislation, regulation, and policies.[369] Article 8 addresses the adoption and implementation of effective measures to protect against the exposure of tobacco smoke in public spaces and indoor workplaces. Article 9 obliges Parties to regulate the contents, emissions, and methods of tobacco products. Article 10 calls upon Parties to compel manufacturers and importers to disclose to government authorities, and make public, information on the constituents and emissions of tobacco products. Article 11 requires each Party, within three years of entry into force of the Convention, to adopt and implement effective measures to prohibit misleading tobacco packaging and labelling; amongst other measures. All members of the Convention have adopted guidelines on how to implement Article 11. The Convention commits Parties to undertake a comprehensive ban of all tobacco

[364] *Ibid.*
[365] WHO, *Accelerating WHO FCTC Implementation in the WHO South-East Asia Region – A PRACTICAL Approach* (New Delhi: World Health Organisation, Regional Office for South-East Asia 2017) 2.
[366] Art. 15, WHO FCTC.
[367] Art.17, WHO FCTC.
[368] Art 6 WHO FCTC.
[369] Art 7 WHO FCTC.

advertising, promotion, and sponsorship, and to also eliminate all forms of illicit trade in tobacco products.[370]

Article 16 outlines ways to include the prohibition of tobacco products to under-aged persons under domestic law, as well as other measures limiting the access of tobacco products. These other measures include limiting the sale of tobacco products, either individually or in small packets; limiting the distribution of free tobacco products; ensuring that tobacco vending machines are not accessible to minors; and proposing a total ban of tobacco vending machines as an option for consideration. Article 17 contains the provision to support economically viable alternative activities. Parties are obliged to cooperate with each other and with competent intergovernmental organisations, to promote economically viable alternatives for tobacco workers, growers, and individual sellers. On the issue of environmental protection, the Convention addresses concerns regarding the severe risks posed by tobacco cultivation to human health and the environment.[371]

Again, the Convention is incorporated under the NTCA as a municipal law. Under this section, the NTCA will be divided into four parts (3.2.1.1 - 4). Each part will be evaluated based on its adequacy in meeting the objectives of the Convention. Against this evaluation, recommendations will be suggested to enable the Act, which in turn, enables the overarching principle of the tobacco regulatory framework.

3.2.1.1 Part IV: Regulation of Smoking

> *The duty to protect individuals from tobacco smoke corresponds to an obligation by governments to enact legislation to protect individuals against threats to their fundamental rights and freedoms. This obligation extends to all persons, and not merely to certain populations.*[372]

[370] Article 15 *ibid.*
[371] Article 18.
[372] Para4(b) WHO FCTC, 'Guidelines On the Protection from Exposure to Tobacco Smoke'(decision FCTC/COP2(7)). In 2007, the COP adopted the guidelines for implementation of Article 8 of the WHO FCTC on protection from exposure to tobacco smoke.

The NTCA prohibits smoking in listed 'public places' and residential homes co-occupied by a person under the age of 18,[373] with The Minister of Health empowered to expand the list of 'public places'.[374] Under the NTCA, 'public places' "means all public places listed…and excludes the roads, streets and highways and all outdoors places within the 5 meter rule".[375] However, the WHO FCTC guidelines states that public spaces 'should cover all places accessible to the general public or places for collective use…'.[376] Therefore, under the definition of listed 'public spaces', the NTCA should include all accessible 'public places'; anything less would run contrary to the Convention.

Furthermore, certain public places could be exempted from the List of places that prohibits smoking. That is, the NTCA could allow some indoor public areas, such as clubs and bars, to become smoking areas, if the manager or owner of the club/bar provides a facility for a 'designated smoking area'.[377] The designated smoking area could be a space within the indoor facility equipped with the 'state of the art ventilation equipment'.[378] Conversely, the WHO FCTC avers that such 'state of the art ventilation equipment' or the use of any designated smoking area have repeatedly shown to be scientifically ineffective to protect against exposure to tobacco smoke.[379] Guiding Principle 2 states that all indoor public places should be smoke-free[380] and any measures, other than a 100% smoke-free environment, do not protect against exposure to tobacco smoke. Moreover, a 2019 WHO report suggests Nigeria lacks a comprehensive 'smoke-free' legislation.[381] For this reason, it is recommended that the defective section be aligned with the objective of the WHO FCTC. Perhaps, the lack

[373] Section 9 NTCA 2015.
[374] Second Schedule NTCA 2015.
[375] Section 45 NTCA 2015.
[376] WHO FCTC (note 17) [18].
[377] s9 NTCA 2015.
[378] *Ibid.*
[379] Principle 1, WHO FCTC Guidelines on Protection from Exposure to Tobacco Smoke.
[380] Principle 2, *Ibid.*
[381] WHO, *WHO Report on the Global Tobacco Epidemic* (WHO 2019) 76.

of resources, tobacco industry interference, weak enforcement and political will[382] are reasons impeding a comprehensive framework.

3.2.1.2 Part V: Prohibition of Tobacco Advertising, Promotion and Sponsorship

The Act prohibits the advertisement of tobacco products in any form.[383] Any contravention of this section involves a fine, imprisonment or both.[384] Evidence suggests that the restriction on tobacco advertisement has had a significant impact on the reduction of tobacco prevalence in places like Canada, Finland, New Zealand, and Norway.[385]

The influence of the media represents one of the key developments in modern society. Today the media and advertisement platforms have become so diverse, ranging from the internet to text messaging, that it creates unique complexities. Advertising is an effective way for the tobacco industry to grow its consumer base, considering the vast amount spent on it. In the United States alone, the amount spent on cigarette advertising and promotion by the largest cigarette companies rose from $8.37bn in 2011 to $9.17bn in 2012.[386] One of the key justifications for the comprehensive ban on tobacco advertisement and promotion is the misleading nature of tobacco promotional campaigns.[387] Hoyer and Innis described deceptive advertisement as marketing communications that likely result in consumers having information or beliefs that are incorrect or cannot be substantiated.[388] The tobacco companies have falsely claimed, mostly through third parties, that smoking played little or no role in the causation of cancer and other associated diseases. In the case

[382] VC Echebiri, 'The factors affecting Nigeria's success toward implementation of global public health priorities' (2015) 22(2) Global Health Promotion 75; CO Egbe *et al.,* 'Framework Convention on Tobacco Implementation in Nigeria' (2019) 21(8) Nicotine and Tobacco Research 1122.
[383] S12(1)(a) NTCA 2015.
[384] S14.
[385] C Sunstein, 'Is Tobacco a Drug? Administrative Agencies as Common Law Courts' (1998) 47(6) Duke Law Journal 1013, 1022.
[386] Federal Trade Commission, 'Federal Trade Commission Cigarette Report for 2012' (FTC, 27 March 2015) <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-releases-reports-2012-cigarette-smokeless-tobacco-sales> accessed 9 June 2015.
[387] WHO, *WHO report on the global tobacco epidemic: enforcing bans on tobacco advertising, promotion and sponsorship* (WHO 2013).
[388] WD Hoyer and DJ MacInnis, *Consumer Behaviour* (2nd edn, Houghton Mifflin 2000).

between *United States vs Philip Morris USA,*[389] District Judge Gladys Kessler held that the major tobacco companies are using deceptive claims to market and promote their products. Similarly, Judge Brian Riordan of the Quebec Superior court, Canada, rebuked the TTCs for misleading facts.[390] His ruling pointed out that,

> by choosing not to inform either the public health authorities or the public directly of what they knew, the [Tobacco] Companies chose profits over the health of their customers… it is clear that it represents a fault of the most egregious nature and one that must be considered in the context of punitive damages.[391]

Although section 12(1) of the NTCA prohibits the advertisement, sponsorship, and promotion of tobacco products in any form, section 12 (2) of the Act gives an exception to section 12 (1), creating a loophole. Section 12(2) states that section 12(1) does not apply to 'communication' between manufacturers, retailers of tobacco products and any 'consenting person age 18 and above', but the Act does not clarify or define the meaning of a 'consenting adult', nor does it state what constitutes one. Again, the Act neither defines nor states what constitutes 'communication' between the consenting adult and the tobacco company. Moreover, the FCTC Guidelines states that any such exception should be clearly defined[392] and access to such information should be restricted.[393] The provision of s12(2), in practice, presents an alternative to the supply, demand, and advertisement of tobacco products, antithetical to the aims of the FCTC and the overall objectives of the NTCA. For this reason, it is proposed that the relevant authorities should improve on this escape clause, therefore giving effect to the aims of the Act and to the clarity of legislative expressions. The Act will also benefit from a comprehensive guidance, like the Convention's guidelines and the guidance to the UK Bribery Act, 2010.

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[389] *United States vs Philip Morris USA,* 449 F.Supp.2d 1 (D.D.C. 2006).
[390] *Blais v. JIT-Macdonald and ors* District of Montreal, PQ No.500-06-000076-980 (2012) at [269]; Joint class action with *Cecilia Letourneau v JIT and ors,* District of Montreal, PQ No. 500-06-000070-983 (2012).
[391] *Ibid.* [239]. Cf RJ Reynolds & ors v FDA *RJ Reynolds v FDA* (2012) 696 F.3d 1205, where the US Supreme court declared the general rule that the speaker has the right to tailor speech applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid [1211].
[392] World Health Organization, 'Tobacco advertising, promotion and sponsorship', COP guidelines for implementation of Article 13 of the WHO FCTC, decision FCTC/COP3(12) at [33].
[393] *Ibid.*

The Convention recommends Party states to prohibit public education campaigns initiated by the tobacco industry, such as the 'youth smoking prevention campaigns' (YSP), on the basis that they involve 'contributions'[394] or represent corporate promotion.[395] Although this prohibition may be enforced under paragraph 19, Second Schedule of the NTCA 2015, the paragraph, however, lacks clarity. Moreover, after the enactment of the NTCA 2015, BAT Nigeria continues to promote its YSP campaign on its website.[396] As a result, the NTCA would benefit from a guidance section to promote clarity and reduce ambiguity.

The WHO FCTC recommends limited interaction between government officials and the tobacco industry;[397] any interaction should be conducted transparently and should be made public.[398] In Uganda, for instance, any tobacco control policy government official caught interacting with the tobacco industry is liable to imprisonment under the tobacco control legislation.[399] The NTCA also prevents any form of voluntary contribution made by the tobacco industry to any government, public official or political party.[400] On the contrary, evidence suggests that TTCs have made contributions to government institutions, including donating vehicles to the Nigeria Customs Service and training the Nigerian Police Force in Lagos on tobacco control enforcement.[401] The interaction between Nigerian officials and TTCs have been a principal factor for tobacco interference in Nigeria.[402] For instance, the Nigerian Ministry of Health filed a report to the WHO FCTC that the lack of funds and 'tobacco industry interference in government' have been a barrier in the execution of the Convention.[403] Another example of TTCs' interference with the tobacco regulatory

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[394] *Ibid.* [26]; Contribution falls within the definition of tobacco sponsorship in art 1(g) of the WHO FCTC.
[395] *Ibid.*
[396] BAT, 'Youth access prevention' (Batn.com, date unknown) <http://www.batnigeria.com/group/sites/bat_7ykm7r.nsf/vwPagesWebLive/DO7YLFWZ/$FILE/medMD8WJLE4.pdf?openelement> accessed 27 October 2019.
[397] Art.14 WHO FCTC.
[398] Section 25, NTCA 2015. Example of such transparent meeting could be in a public hearing.
[399] WHO FCTC, 'Uganda: New Tobacco control Law Adopted' (untobaccocontrol.org, 2015) <http://apps.who.int/fctc/implementation/database/groups/uganda-new-tobacco-control-law-adopted> accessed 4 Aug 2015.
[400] S27.
[401] CO Egbe et al., 'Role of stakeholders in Nigeria's tobacco control journey after the FCTC: lessons for tobacco control advocacy in low-income and middle-income countries' (2019) 28(4) Tobacco Control 386.
[402] CO Egbe et al., 'FCTC Implementation in Nigeria: lesson for low- and middle- income countries' (2019) 21(8) Nicotine and Tobacco Research 1122.
[403] Reporting Instrument of the WHO FCTC (Nigeria, Report submitted 29 April 2014) section 5.4 at p55; WHO, *Tobacco Industry Interference: a global brief* (WHO 2012).

framework is the memorandum of understanding (MoU) between British American Tobacco Nigeria (BATN) and the Nigerian government. Under the MoU, BATN committed to collaborate with the Nigerian government in regularising the tobacco sector.[404] Such collaboration is in breach of section 12 of the NTCA. To limit such breaches, section 26 NTCA stipulates a public education and awareness campaign on the risk of collaborating with the tobacco industry and on the risk of tobacco companies' interference with tobacco control.

In respect to these findings, adequate resources to enable the tobacco regulatory structure is recommended and the interaction between the government and the tobacco industry should cease.

3.2.1.3 Parts VI-IX: Sales and Product Regulation; Licensing.

Section 15 prohibits the sale and access to tobacco products to persons below 18 years. The contravention of this provision will result in a fine, imprisonment, or both.[405] Although government policies can increase or decrease the age at which one can buy cigarettes, research suggest that it is unlikely that a complete ban on under 18 years would be fully effective.[406] Findings from Hersch, for instance, suggests that most state regulations aimed at fighting teenage smoking have had little or no effect.[407] Hersch findings indicates that most teens do not consider it difficult for minors to purchase tobacco products within their community, regardless of the age restrictions on purchasing tobacco. The recommendations he proffers outside of the traditional regulatory framework that may influence teen smoking are education and parental intervention.[408] The findings indicate that the legislative apparatus alone is inadequate

[404] BATN, 'Who we are' available at www.batnigeria.com accessed 26 October 2019.
[405] Section 16 NTCA 2015.
[406] D Hammond *et al.,* 'Prevalence of vaping and smoking among adolescents in Canada, England and the United States: repeat national cross sectional surveys' (2019) 365(8204) the British Medical Journal 1; IU Itanyi *et al.,* 'Disparity in tobacco use by adolescents in southeast Nigeria using global youth tobacco survey approach' (2018) 18(1) BMC public health 317; A Gbadamosi, 'Regulating child-related advertising in Nigeria' (2010) 11(3) Young Consumers 204.
[407] Joni Hersch, 'Teen Smoking Behaviour and the Regulatory Environment' (1998) 47 Duke Law Journal 1143.
[408] *Ibid.* at p1145. Data from the research reveals teens who live in households where smoking is not permitted are less likely to smoke than those who live in less restrictive households. Education– by facilitating greater awareness of the addictive power of cigarettes could be effective in curbing teen smoking; secondly, parental restriction – the potential for parental restrictions on limiting teen smoking. But there are indications that parents are not well informed about their children's smoking behaviour.

to solve the tobacco crisis. Therefore, it is recommended that other non-regulator measures could be explored in the legislation. The performance of an intensive public awareness campaign is crucial for the development of an adequate tobacco regulatory framework. The relevance of this approach is beneficial because, as research suggests, there is a lack of public awareness of significant tobacco regulatory matters.[409] The tools and infrastructure to raise public awareness are essential means of bringing about change in the behavioural norms around tobacco consumption and exposure to tobacco smoke.[410] The WHO FCTC Guidelines recommends each member to specify the people, bodies or entities responsible for tobacco-control education, communication and training. On the contrary, the NTCA did not specify the government body responsible. Instead, s26 states that a 'responsible authority of government' shall be appointed or 'made aware' by the Minister of Health. A WHO report in 2019 indicated that there was no national mass media (anti-tobacco) public campaign conducted in Nigeria, with a duration of at least three weeks, between July 2016 and June 2018.[411] In light of the report, Nigeria should strengthen the NTCA by adopting the recommendations of Article 12 of the Guidelines. The provisions of the guidelines include providing training and adequate human, material, and financial resources to establish and sustain the programme at local, national, sub-national and international levels; raising tobacco taxes as a funding mechanism; monitoring and evaluating the outcomes of public education and communication interventions in different target groups whilst considering critical differences, such as gender, educational background, age, and literacy.[412]

On the issue of tobacco supply reduction, the NTCA adopts article 15 of the WHO FCTC on the elimination of illicit trade in tobacco products.[413] According to the Convention, illicit trade poses a serious threat to public health, as it increases access to, often cheaper, tobacco products, fuelling the tobacco epidemic and undermining tobacco control policies.[414] It also causes substantial losses in government revenues

[409] BA Aina *et al.*, 'Promoting cessation and a tobacco free future: willingness of pharmacy students at the University of Lagos, Nigeria' (2009) 5(13) Tobacco Induced Diseases 1.
[410] WHO, *Guidelines for the implementation of article 12 of the WHO FCTC: education, communication, training and public awareness* (WHO 2013) 76.
[411] WHO, *WHO Report on the Global Tobacco Epidemic 2019* (WHO 2019) 96-7.
[412] WHO (note 410) 71-92.
[413] Section 30, NTCA 2015.
[414] WHO FCTC, *The Protocol to Eliminate Illicit Trade in Tobacco Products: an overview* (WHO FCTC, Jan 2015) <http://www.who.int/fctc/protocol/Protocol_summary_en.pdf?ua=1> accessed 16 June 2015.

and, at the same time, contributes to the funding of international criminal activities.[415] These severe matters prompted Party members to adopt the 'Protocol to Eliminate Illicit Trade in Tobacco Products' (Protocol), which serves as a new international treaty with the objective of eliminating all forms of illicit trade in relation to tobacco and tobacco products.[416] The Protocol supplements Article 15 of the WHO FCTC. 'Illicit trade' under the Protocol is defined as any practise or conduct related to producing, shipping, receiving, having, distributing, selling or buying tobacco products that are prohibited by law.[417] To prevent the illegal trade, the Protocol aims to make the supply chain of tobacco products secure through a series of measures by governments, including the establishment of a global tracking and tracing regime and a global information-sharing point located in the Secretariat of the WHO FCTC.[418] Even though Nigeria is a Party to the Protocol,[419] it failed to domesticate the Protocol, considering that under s12 of the 1999 Nigerian Constitution, an international treaty has to be domesticated before it can be enforceable. Due to the importance of the Protocol, it is recommended that the legislative arm of government domesticates the Protocol. Other ways to limit the supply of tobacco under the Protocol is to ensure control of the supply chain, include licensing and the regulation of Internet-sales.[420]

In addition, the Act prescribes all tobacco packaging to have health warnings covering not less than half of the total surface area.[421] For such warnings to be adequate, Viscusi argues they must convey new and credibly information.[422] In other words, do the proposed warnings convey any new information? and is the warning information credible?[423] The warnings in the NTCA appears to contain little information that smokers have not already heard; consequently, it does not pass Viscusi's test. The second point on information credibility has led to claims and counterclaims by pro-tobacco actors and tobacco control advocates, not least by the tobacco industry, who have declared such move—warnings and symbols—as an infringement on property

[415] *Ibid*.
[416] *Ibid.* The Protocol was negotiated by the Parties to the WHO FCTC over several years and was adopted in November 2012.
[417] *Ibid.*
[418] *Ibid.*
[419] WHO, *Protocol to eliminate illicit trade in tobacco products* (WHO 2013).
[420] *Ibid.*
[421] Section 20(1).
[422] WK Viscusi, 'Constructive Cigarette Regulation' (1998) 47(6) Duke Law Journal 1095.
[423] *Ibid*.

rights and the freedom of expression.[424] More on the infringements claimed by the TTCs is under section 3.3.

3.2.1.4 Parts X – XII: Enforcement; Education & Public Awareness; Price and Tax Measures

The Act reveals three enforcement officials: the Nigerian police,[425] an authorised officer,[426] and any person who owns, controls, or occupies smoke-free premises.[427] Enforcement of rules in any society, especially Nigeria, is key. The Nigerian police force has been notably uneven and often more concerned with other matters than crime control,[428] leading to a surge in private security actors and vigilant citizens filling the security gap.[429] Nigerians, according to Owen *et al.*, do not trust the police and have become accustomed to the injustice, lack of finality and ineffectiveness of the justice system.[430] Basic social conditions like high rates of poverty and illiteracy have constrained the ability of many to relate effectively with the criminal justice system. Many researchers into policing across Africa have concluded that the 'criminal justice system can be an ineffective and blunt instrument that triggers more trouble than it resolves'.[431]

Under the Act, the granting of private citizens, such as the manager of a smoke-free premises, to enforce the Act may be controversial. Moreover, the Act is silent on the immunities and limitations of the manager's enforcement powers. If private individuals are to assume the roles of the police, then the scope of authority of the individual should be clearly defined. When the state permits the manager or a private person to take reasonable steps to stop any person from smoking in a prohibited area, the access to force is, to a considerable extent, foreseeable, especially when the manager confronts perpetrators who intend to cause bodily harm. As authority is

[424] G Fooks and AB Gilmore, 'International trade law, plain packaging and tobacco industry political activity: the Trans-Pacific Partnership' (2014) 23(1) Tobacco Control 1.
[425] Section 31, NTCA 2015.
[426] Section 32, *ibid.*
[427] Section 10, *ibid.*
[428] O Owen *et al.*, 'Between vigilantism and bureaucracy: Improving our understanding of police work in Nigeria and South Africa' (2014) *Theoretical Criminology, DOI: 10.1177/1362480614557306* accessed 15 August 2015.
[429] *Ibid.*
[430] *Ibid.*
[431] *Ibid.* at p12

derived from the state, the manager could probably substitute for the state police, considering that the NTCA stipulates the manager should take steps to maintain compliance whenever the police are unavailable to enforce the non-smoking ban. To moderate the probable danger of this delegation, certain countries have restricted these concessions, such that they are only available in response to culpable threats to the core elements of a crime. For instance, section 3 of the Criminal Law Act 1967 (UK) allows an individual to use reasonable force to effect or assist an arrest, or to prevent crime,[432] but section 24A of the Police and Criminal Evidence Act 1984 limits the exercise of this power of arrest to indictable offences. Furthermore, empowering the manager of a smoke-free premise to facilitate compliance under the provision of the NTCA is, arguably, the state eroding and evading its duties. For instance, Dsouza argues that while every person deserves to be protected under the law, a state should not avoid its responsibility to its citizens by diluting its monopoly of force to the extent that the state becomes a secondary agent.[433] In addition, enforcing the smoke-free rules could result in injury, death,[434] or more public disorder. These various interests are best served by the clarification of the conditions under which a manager should be authorised on the degree of force that can be exercised and the standard of care to which the manager will be held.

Another ambiguous section under the NTCA is enforcing the provisions of the Act over the internet or social media platforms.[435] The Act prohibits the advertisement and the sale or distribution of tobacco products over the internet[436] However, a desktop research revealed a network of promotional tobacco products.[437] The internet

[432] See *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136 [83].
[433] M Thorburn, 'Justification, Powers and Authority' (2008) 117(6) The Yale Law Journey 1070.
[434] For example, former UK heavy weight boxer, James Oyebola, was shot and killed in 2007 in the UK after asking three men to stop smoking at BBC, 'Oyebola was a first-class man' (*BBC News*, 27 July 2007) <http://news.bbc.co.uk/1/hi/england/london/6919568.stm> accessed 24/6/2015.
[435] B Brock *et al*, 'Tobacco Industry Marketing: an analysis of direct mail coupons and giveaways' (2015) 24(5) Tobacco Control 505: Despite marketing prohibitions tobacco companies are shifting focus towards direct marketing to consumers through the mail and on the internet at p505; CL Jo *et al*, 'Price-related Promotions for Tobacco Products on Twitter', (2016) 25 Tobacco Control 476-79: the research sampled 2,847 English tweets from 6 December 2012 to 20 June 2013 and 97% of the tweets mentioned tobacco products while 3% mentioned tobacco cessation products. See also, Jon-Patrick Allen *et al*, 'When a Ban Really is not a ban: Internet Loopholes and Djarum flavoured Cigarettes in the USA', (2016) 25 Tobacco Control 489.
[436] Section 15(4).
[437] A 'smoking' search on Facebook and YouTube conducted on 26 August 2015, uncovers abundance pictures and videos of smoking and tobacco products which can be viewed in Nigeria by anyone with an internet connecting device. See also, Amanda Richardson and ors, 'The Cigar Ambassador: How Snoop Dog Uses Instagram to Promote Tobacco Use' (2014) 23(1) Tobacco Control 79.

transcends national borders, and this causes complexity. As a result, the internet has become one of the main battlegrounds to establish the rule of law,[438] raising the issue of enforcement, jurisdiction, and accountability. For instance, who should be held accountable for the tobacco video or picture content? Should it be the internet service providers,[439] social media platforms, or the uploader, who could be anonymous? Generally, the placing of accessible materials online does not mean that the content provider or producer is domiciled in Nigeria. Under common law, a court had no authority outside its territorial limits,[440] so when the defendant is abroad and the identity of the perpetrator remains unknown, service of the writ is almost impossible. In theory, the Nigerian Criminal Code (CC),[441] makes provision for such offences. Section 12 CC states that when an act against any Nigerian federal law is committed outside Nigeria, the transgression is deemed as an offence perpetrated in Nigeria.[442] Since the NTCA prohibits the promotion of tobacco product, then the producer of such content could be prosecuted. In addition, actions can be issued *in personam* under Section 12(2) Criminal code:

> if that act or omission occurs elsewhere than in Nigeria, and the person who does that act or makes that omission afterwards comes into Nigeria, he is by such coming into Nigeria guilty of an offence of the same kind, and is liable to the same punishment, as if that act or omission had occurred in Nigeria and he had been in Nigeria when it occurred.

The CC could, however, absolved the accused from the charge, provided 'the accused person did not intend that the act or omission should affect Nigeria'.[443] Foreign content providers on the internet, on the one hand, could be absolved based on this provision.

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[438] See: Michael Geist, 'Cyberlaw 2.0' (2003) 44 Boston College Law Review 323, 332-35 (describing the increasingly "bordered" nature of the Internet); JL Goldsmith, 'Against Cyberanarchy' (1998) 65 University of Chicago Law Review 1199, 1200 (challenging the notion that regulation is not applicable to the Internet); DR Johnson & D Post, 'Law and Borders-The Rise of Law in Cyberspace' (1996) 48 Stanford Law Review 1367, 1367 (arguing that cyberspace requires a system of rules quite distinct from the laws that regulate physical, geographically-defined territories.

[439] A Hamdani, 'Who's Liable for Cyberwrongs?' (2002) 87 Cornell Law Review 901, 903; *Godfrey v Demon Internet Ltd* [2001] QB 201 (QB).

[440] *Lenders v Anderson* (1883) 12 QBD 50, 56; *Trower & Sons Ltd v Ripstein* [1944] AC 254, 262 (PC); *Pennoyer v Neff* 95 US 714, 722 (1877).

[441] Cap C38 LRN 2004.

[442] Criminal code (cc). Similar provisions made in the Penal code of Northern Nigeria.

[443] s12(2) CC.

On the other hand, it could be argued that the reason for the broadcast, in the first instance, is to have a universal *effect*; information placed on the internet is usually for all internet users anywhere in the world, and Nigeria is no exception. This geographical lack of boundary creates difficulties in applying the territorial rules of jurisdiction.[444] Rahman argues that internet communications do not take place in any territory, but rather in cyberspace or in a virtual interactive environment.[445] Even though cyberspace may appear borderless, it is a misconception to assert that internet activities do not take place in the physical world. The constituent elements of cyberspace, that is, the human and corporate actors, and the computing and communications equipment through which a transaction stipulates from, all have a real-world existence and are in one or more physical world legal jurisdictions.[446] Transnational collaboration, in this instance, is crucial. One can only wait to see how the courts and the enforcement agents in Nigeria would implement the prohibition of promoting tobacco products via the internet.

Under s43 — tax and price measures — the government and its agencies can implement tax policies and strategies or fiscal measures to promote the objectives of the NTCA. Among several tobacco control measures, the World Health Organization (WHO) considers tobacco taxation as the most effective policy tool for reducing tobacco prevalence and improving public health.[447] It offers the additional advantage of raising substantial government revenues that can be used to fund priority investments that benefit the entire population.[448] For tobacco taxes to be effective, it must be well designed and high enough to discourage consumption. Research suggests that Nigeria needs to re-design its tobacco tax system, which is still much lower than the recommendation of the WHO, a recommendation that is benchmarked at 75% of the retail price.[449]

The NTCA also derogates from the Convention by being silent on the electronic nicotine delivery systems (ENDS) and the electronic non-nicotine delivery systems

[444] A Rahman, 'Personal Jurisdiction of the Internet: A Global Perspective' (2015) 1(14) Journal of Internet Commence 114.
[445] C Walker *et al.,* (eds.), *The Internet, Law and Society* (Pearson 2000) 3.
[446] C Reed, *Internet Law: Text and Materials* (Butterworths 2000).
[447] Conference of the Parties WHO FCTC, *Guidelines for implementation of article 6 of THE WHO FCTC: Price and tax measures to reduce the demand for tobacco*, decision FCTC/COP6(5), 16 Oct 2014.
[448] *Ibid.*
[449] CSEA (note 7) 6.

(ENNDS), such as e-cigarettes. There are no restrictions on the sale, packaging, promotion, and advertising of e-cigarettes because the products do not fall under the definition of tobacco products. According to s45 NTCA, tobacco product is defined as products entirely or partly made up of tobacco leaf, and since ENDS and ENNDS have no tobacco leaf, the products are not regulated under the NTCA. This lack of regulation is contrary to the WHO FCTC, which states that members must consider prohibiting or restricting them.[450] In accordance with the Convention, the NTCA should broaden the definition of tobacco products to include ENDS, ENNDS, and any other similar product.

[450] WHO FCTC Convention Secretariat, 'progress report on regulatory and market developments on ENDS and ENNDS' WHO FCTC/COP/8/10, 27 June 2018, [8] - [10].

3.3 NTCA 2015: Challenges from the TTCs

Transnational tobacco corporations have litigated against tobacco regulatory policies in multiple jurisdictions.[451] In many of those litigations, the health impact has outweighed the claims presented by the tobacco companies.[452] The focus of this section is to employ those experiences to inform and enhance the tobacco regulatory framework in Nigeria.

Transnational tobacco corporations have challenged tobacco control regulations on the basis they encroached on their fundamental rights.[453] They claim, for instance, that tobacco packaging restrictions violates the rights of expression.[454] Nigeria has similar regulatory restrictions under the NTCA—every tobacco product package should have health warning signs covering 50% of the total surface area.[455] TTCs have further argued that such interference not only violates freedom of expression,[456] but it also violates the right to own property[457], both of which are guaranteed under sections 43 and 44 of the Nigerian constitution, respectively. Regardless of how these claims have been argued in other jurisdictions, the research seeks to uncover the potential responses under the tobacco regulatory framework in Nigeria. To this end, it will discuss the scope of the tobacco companies' claims under the legislative and constitutional context and seek guidance from foreign jurisdictions, given that there is a lack of tobacco control case laws in Nigeria. Moving forward, the next paragraph will focus on the government's prerogative to restrict corporate rights and, more importantly, on the court's custom to protect against contentious restrictions.

Under the Nigerian constitution, government is empowered to restrict fundamental rights for the interest of public health. The restrictions, however, should

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[451] *BAT Australia Ltd et al. v Commonwealth of Australia* [2012] HCA 43; Philip Morris SARL v Uruguay (ICSID Case No. ARB/10/7); *BAT Uganda Ltd v. AG & ors* (2019) No 46 of 2016, Constitutional Court of Uganda.
[452] *Ibid.*
[453] *BAT & ors v. Dept of Health* [2016] EWHC 1169 (Admin) (UK); *BAT Uganda Ltd v. AG & ors* (2019) No 46 of 2016, Constitutional Court of Uganda.
[454] *BAT v Australia* and *Philip Morris v Uruguay* (note 451). Rights of expression is guaranteed under section 39(1) of the 1999 constitution, Fed. Rep. of Nigeria.
[455] Section 20 NTCA.
[456] *RJ Reynolds v FDA* (2012) 696 F.3d 1205.
[457] *BAT v Australia* (note 451).

be 'reasonably justifiable in a democratic society'.[458] This prerequisite have been condemned as 'efforts of the Nigerian elites or *bourgeoisie* … to dictate the amount of freedom the people can have'.[459] For this reason, amongst others, section 46 of the constitution provides every Nigerian with an avenue for redress, empowering the High Courts with the responsibility of balancing the authority of government with the rights of citizens.[460] In this regard, the Courts protect the fundamental rights of every Nigerian.[461] Increasingly, the courts have had to balance different contending interests, and when in a position with no local precedent, the courts seek guidance from foreign authorities. The Nigerian judicial system, therefore, ascribes potency to foreign judicial decisions with similar provisions and circumstances.[462] For instance, in *Cheranci v Cheranci,*[463] the decision of the Nigerian court was guided by the experiences of both India and the United States. Similarly in the UK, all five Law Lords in *Fairchild v Glenhaven Funeral Services Ltd,* referred to foreign authorities in their judgments, with Lord Bingham acknowledging that his conclusion was "fortified by the wider jurisprudence".[464] For this reason, as well as the lack of tobacco control case laws in Nigeria, the research sought guidance from foreign precedents.

As the Nigerian constitution allows the government to restrict rights, provided the restrictions are 'reasonably justifiable',[465] the next paragraph will focus on the standard used to determine if a restriction is 'reasonably justifiable'. Then, the standard will be engaged to determine if the restriction under the Nigerian Tobacco Control Act can withstand the applicable level of scrutiny.

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[458] s45(1) Constitution FRN 1999: 'Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justiciable in a democratic society (a) in the interest of defence, public safety… or public health' (b) for the purpose of protecting the rights and freedom of other persons.

[459] M Akpan, 'The 1979 Nigerian Constitution and Human Rights' (1980) 2(2) Universal Human Rights 23, 36.

[460] *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* [2001] WRN 1; (2002) AHRLR 159.

[461] *Inspector-General of Police v ANPP and ors* (2007) African Human Rights Law Reports 179 [34].

[462] *Okonkwo* (Note 460) [15]; see also *Nigerian Ports Authority v Ali Akar & Sons* (1965) 1 All NLR 526; *Olafisoye v Fed Rep Nigeria* (2004) 4 NWLR (pt 804) 580; see also *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307, para 23.

[463] *Cheranci v Cheranci* [1960] NRNLR 24 (High court, Northern Region of Nigeria). See also the following cases with similar approach: A Akar (*note 462*); Olafisoye (note 462).

[464] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, [34] cited in Lord Toulson, 'International Influence on the Common Law' (Common Law and Commercial Bar Association, London, 11 November 2014) para13 <https://www.supremecourt.uk/docs/speech-141111.pdf> accessed 3 September 2015.

[465] S45(1) Constitution FRN 1999.

The constitution safeguards individual and corporate rights, unless it can be proved that pressing public interest demands otherwise.[466] In *Williams v Majekodunmi,* the Nigerian Supreme Court states that the rights of the individual can be invaded only if it is 'essential for the sake of some recognised public interest'.[467] However, the phrase 'reasonably justifiable' is somewhat ambiguous and difficult to interpret[468] For the court to recognise its responsibility to determine whether or not the law is 'reasonably justifiable in a democratic society', it is imperative for it to discover the meaning of the phrase. It is a phrase which can, without further definition, lead to legal complexities. Bate J., in the Nigerian case between *Cheranci v Cheranci,* embarked on finding standards to judge when a legislation is deemed reasonably justifiable,[469] and the court guided itself using the following standard:

> (1) There is a presumption that the Legislature has acted constitutionally and that the laws which they have passed are necessary and reasonably justiciable.
> (2) … (a) it must be necessary in the interest of public morals or public order [*or public health]*;
> (b) must not be excessive or out of proportion to the objective it sought to achieve.*[470]*

After establishing the standard to determine if a restriction is 'reasonable justifiable', the next paragraph will focus on TTCs' accusations that certain tobacco control regulation violates their rights. Although the accusations presented in the research are from foreign proceedings, Nigeria will benefit for two main reasons: first, certain provisions of the NTCA share similarities with the foreign litigated claims, and Nigeria still runs the risk of a tobacco regulatory challenge. Second, the knowledge will inform academics, judiciary, and policy makers, subsequently reinforcing the tobacco regulatory framework.

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[466] *Ibid.*
[467] *Williams v Majekodunmi,* (1962) FSC 166/1962. See similar provisions under Article 19, UN Int'l Covenant on Civil and Political Rights where restriction of freedom of expression permissible under certain conditions such as for the protection of national security and public health.
[468] DC Holland, 'Human Rights in Nigeria' (1962) Current Legal Problems 145,154.
[469] [1960] NRNLR 24 (High court, Northern Region of Nigeria) at p28.
[470] *Ibid.* p29. Italics inserted by author. See also *Williams v Majekodunmi* (note 467).

Transnational tobacco corporations have argued, *inter alia*, that the tobacco packaging restrictions violates the right of expression and the right to property.[471] Despite the fact sections 43 and 44 of the Nigerian constitution guaranteed the right of expression and the right to property, respectively, section 20 of the National Tobacco control Act imposed restrictions on tobacco packaging. The violation regarding the right of expression will be considered under the U.S case of *R.J. Reynolds Tobacco Company and ors v Food & Drug Administration (FDA)* (hereinafter*, RJR)*.[472] Using key elements from the case law, the research will seek to analyse the tobacco restrictions under the Nigerian legal framework.

In *RJR*[473], five tobacco companies[474] filed a complaint[475] against the FDA, alleging that specific provisions of the Family Smoking Prevention and Tobacco Control Act (Tobacco Act) violated their First Amendment right to freedom of expression. The only issue before the court was that the graphic warning label promulgated by the FDA—which incorporates textual warnings, a corresponding graphic image, and a smoking cessation telephone helpline—violates the First Amendment's freedom of expression.[476] The court applied the *Central Hudson*[477] test, which allows restrictions on commercial speech if the government can prove (i) its asserted interest is substantial, (ii) the restriction directly and materially advances that interest, and (iii) the restriction is narrowly tailored. Whilst the Appellate Court acknowledged that the FDA's interest in reducing smoking rates could qualify as a substantial interest, the Court ruled that the FDA failed to prove that the graphic warnings would reduce smoking rates. The Court stated that the FDA did not provide 'a shred of evidence – much less the "substantial evidence" required … showing that the graphic warnings will "direct advance" its interest in reducing the number of Americans who smoke'.[478] Even though the FDA used data from Canada and Australia

[471] see *BAT v Australia* (note 451) *and Philip Morris v Uruguay* (note 451).
[472] *696 F 3d 1205 (DC 2012); No 11-5332.*
[473] *R.J. Reynolds Tobacco Company and ors v Food & Drug Administration* 696 F 3d 1205 (DC 2012); No 11-5332.
[474] RJ Reynolds Tobacco Company, Lorillard Tobacco Company, Commonwealth Brands Inc, Liggett Group LLC, and Santa Fe Natural Tobacco Company Inc.
[475] Online copy of initial complaint at < http://www.hpm.com/pdf/blog/TobCompl-8-2011.pdf> accessed 23 July 2015.
[476] *Ibid.* [1212].
[477] *Central Hudson Gas & Electric corp v Public Service Commission of New York* (1980) 447 US 557, 566, 100 S Ct 2343, 65 L Ed 2d 341; No 79-565.
[478] *Ibid.* [1291].

to assess the effectiveness of graphic warnings, the court believed that the FDA offered no evidence to show 'that such warnings have *directly caused a* material decrease in the smoking rates in any of the countries that now require them'.[479] The court ruled the graphic warnings were unconstitutional restrictions on economic freedom of expression because the FDA failed to prove that the restriction would advance the government's interest.[480] However, in *BAT South Africa (Pty) Ltd. v. Minister of Health,*[481] the South African court held a contrasting view. The court declared that instances may occur where it is impossible to prove the outcome of a particular measure, or its effectiveness. It does not necessarily follow that the policy is therefore unreasonable or unjustifiable. Rather, if the concerns are of sufficient importance and the risks associated with them are sufficiently high, then, that may be enough to justify the restrictive measure.[482]

The key standards highlighted in *RJR* and *Cheranci,*[483] aforementioned, would be harnessed to evaluate if the tobacco packaging restrictions infringes on the fundamental rights of TTCs. To recapitulate *Cheranci*, three key elements are necessary for the tobacco restriction to be reasonably justifiable: the legislature acted constitutionally; the restriction is necessary to advance public interest; the restriction is proportionate to the objective and not excessive. To recapitulate *RJR,* the court applied the *Hudson Central* test: government should have a substantial interest; the restriction should advance the cause of the public's interest; restriction should be narrowly tailored, proportional, and not excessive. Given that the key elements of both cases overlap, the research will treat the standards jointly.

On the first point, did the Legislature acted constitutionally in enacting the NTCA? Under Nigeria's treaty obligation, the NTCA incorporates the principles of the WHO FCTC. Section 12(2) of the constitution FRN empowers the legislature to make laws on 'matters …to implement a treaty'. Therefore, the legislature acted in accordance with the constitution. The next issue is whether the government has a

[479] *Ibid*.
[480] The Public Health Advocacy Institute, 'RJ Reynolds v FDA' (PHAI, 8 July 2013) <http://www.phaionline.org/2013/07/08/r-j-reynolds-tobacco-co-v-food-drug-admin-no-11-5332/> accessed 25 July 2015.
[481] *BAT South Africa (Pty) v Minister of Health* (463/2011) [2012] ZASCA 107; [2012] 3 ALL SA 593 (SCA), 20 June 2012. (Supreme court of Appeal of South Africa).
[482] *Ibid.* [21].
[483] *Cheranci* (note 469).

substantial interest in safeguarding public health. Section 17(3)(c) of the 1999 constitution stipulates that 'the state shall direct its policy towards ensuring that the health…of all persons…are safeguarded and not endangered or abuse', while item 17 on the concurrent legislative list of the same constitution stipulates that the federal legislative bodies may make laws for the federation with regards to health matters. Section 45 of the aforementioned constitution empowers the government to promulgate laws that are reasonably justifiable in the interest of public health and safety, amongst other interests. Considering these constitutional provisions, the Nigerian government has a substantial interest to safeguard public health.

The next question is on necessity. In other words, is the tobacco restriction necessary in the interest of the public. Whilst serving as the President and CEO of Imperial Tobacco Canada, Marie Polet affirms that 'smoking can cause a number of serious and, in some cases, fatal diseases',[484] and went further to assert that no tobacco 'product in any form could qualify under the definition of "safe"';[485] as a result, the judge proclaimed, *inter alia*, that tobacco product is 'dangerous and harmful to the health of consumers'.[486] Besides, the World Health Organization recognises tobacco as an 'epidemic' that needs to be eradicated.[487] Consequently, there is the urgency and necessity to pass laws and regulations restricting the sale, manufacture, and advertisement of tobacco products. The provision and objectives of the NTCA would, therefore, be beneficial and *necessary* to protect public health from the tobacco 'epidemic'.

Another key standard raised is that the restriction should be proportionate and advance the cause of public health, demonstrating a material reduction in tobacco prevalence. Fundamentally, the NTCA is a law to bring about social change, but the social impact of tobacco control, including on advertising and promotion[488], sale[489], packaging and labelling,[490] and environmental tobacco smoke,[491] is difficult to

[484] *Létourneau/Blais v Imperial Tobacco Canada Limited,* District of Montreal, PQ No.500-06-000076-980 (2012) at [45]; the prosecutor cross-examined Marie Polet and this was the reply to question 302.
[485] *Ibid.* at question 334.
[486] *Ibid.* [46], about ITL's tobacco products.
[487] WHO Report on the Global Tobacco Epidemic (note 411); WHO FCTC (note 359); WHO Protocol (note 414).
[488] S12 NTCA 2015.
[489] S15 *ibid.*
[490] S20 and s21.
[491] Second schedule NTCA 2015.

assess[492], an assessment that is compounded in Nigeria given the lack of data.[493] Government collating and granting public access to such information is necessary to formulate and adapt tobacco regulatory measures and policies, considering that tobacco is not only a health hazard, but it is also a developmental threat.[494] However, findings suggest that a comprehensive tobacco regulatory framework could reduce tobacco consumption, alongside education, public health reform and other measures.[495] For instance, data[496]collated after Australia introduced plain packaging rules[497] suggest a correlation between plain packaging restriction and the reduction in smoking prevalence.[498]

On the subject of whether the tobacco regulatory restriction is proportionate to the objective, the UK supreme court presented two principal test questions in *R (on the application of Lumsdon & ors) v Legal Services Board:*[499] first, is the measure in question suitable or appropriate to achieve the objective pursued? and secondly, is the measure necessary to achieve that objective, or could the objective be attained by a less onerous method?[500] Furthermore, in *Bank Mellat v Her Majesty's Treasury (No 2),*[501] a relevant UK Supreme Court case, notably as it is centred on the justification of domestic law interferences with Fundamental rights principles,[502]Lord Sumption raised four test questions to determine proportionality:

[492] A Gilbert and J Cornuz, *which are the most effective and cost-effective interventions for tobacco control?* (WHO Regional Office for Europe's for Health Evidence Network 2013).
[493] D Adeloye *et al.*, 'Current prevalence pattern of tobacco smoking in Nigeria: a systematic review and meta-analysis' (2019) 19(1719) BMC Public Health 1-14.
[494] RE Malone & JS Yang, 'Tobacco a threat to development?' (2017) 26 Tobacco Control 241-242.
[495] A Gilbert and J Cornuz, *which are the most effective and cost-effective interventions for tobacco control?* (WHO Regional Office for Europe's for Health Evidence Network 2013); D Adeloye, *supra* at (n493); DT Levy *et al.*, 'The impact of implementing tobacco control policies: the 2017 tobacco control scorecard', (2018) 24(5) Journal of Public Health Management and Practice 448-457.
[496] See, for instance, Report of Dr. Tasneem Chipty, 'Study of the Impact of the Tobacco Plain Packaging Measure on Smoking Prevalence in Australia' (Australian Govt Dept of Health, 24 Jan 2016). See R (application of BAT et al.) v Secretary of State for Health [2016] EWHC (Admin) at [501]-[516].
[497] Section 2 Plain Packaging Act No. 148, 2011. The Act came into effect in 2012.
[498] *R (application of BAT and others) v Secretary of State for Health, ibid.*
[499] *R (on the application of Lumsdon & ors) v Legal Services Board* [2015] UKSC 41 [33].
[500] *Ibid. There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured.*
[501] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39.
[502] The Human right principles are: Human Rights Act 1998 and the European Convention on Human Rights.

> (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice, they inevitably overlap because the same facts are likely to be relevant to more than one of them.[503]

Although the test questions raised to determine if a measure is proportionate overlap with standards already addressed in *RJR* and *Cheranci*, the research will still focus on the test questions, but without being repetitive.

Proportionality in this instance is concerned with balancing the interests of TTCs against public health interest. It is the duty of the courts to balance the interests by giving weight to presenting opinions. In balancing public health interests against TTCs', the Nigerian courts can rely on, or give weight to, opinions on health issues of the WHO and its Convention. The Convention counteracts the activities of transnational tobacco corporations.[504] Foreign judiciary have consistently relied on the views and opinions of the WHO.[505] In *USA v Philip Morris,*[506] the Court attached great weight to the fact that the WHO FCTC was '*adopted by consensus',* and it is based on the best scientific evidence and experience, bearing a "*decisive influence*" in the direction of a case.[507] The WHO FCTC have been cited to demonstrate that a restrictive measure was proportionate, reasonable, and justifiable, and the courts have extensively relied on such evidence.[508] In *Philip Morris v Uruguay,*[509] the international arbitral tribunal noted that the WHO FCTC could serve as a 'point of reference for reasonableness' of Uruguay's restrictive measures. Ruling in favour of Uruguay, the

[503] *Bank Mellat* (note 501) [20].
[504] WHO Report on global tobacco epidemic (note 411).
[505] See for example: Case 174/84 *Commission v Federal Republic of Germany* [1987] ECR 1262 at [41], [44] and [52]; and Case C-473/98 *Kemikalieinspektionen v Toolex Alpha AB* [2000] ECR I 5702 at [42].
[506] *USA v Philip Morris USA Inc. et al* (US District Court for the District Court of Columbia, Civil action No.99-2496 GK, 17 Aug 2006).
[507] *Ibid* [111]-[113]. This was also the finding in *Philip Morris SARL et al. v Oriental Rep. of Uruguay* (ICSID CASE NO. ARB/10/7) [396]: 'In the Tribunal's view, in these circumstances there was no requirement for Uruguay to perform additional studies or to gather further evidence in support of the Challenged Measures. Such support was amply offered by the evidence-based FCTC provisions and guidelines adopted thereunder'.
[508] *Philip Morris SARL v Uruguay* (Award), ICSID Case No. ARB/10/7 (8 July 2016); *BAT v Cabinet Secretary for Kenya*, Civil Appeal No. 112 of 2016, 17 Feb. 2017 (Court of Appeal Kenya); *BAT South Africa (Pty) Ltd v Minister of Health* (463/2011) [2012] 3 ZASCA 107.
[509] *Ibid.*

tribunal was informed by the WHO FCTC in its finding that Uruguay's restrictive measures were reasonable. In addition, the WHO FCTC acts as a municipal law under the NTCA, fulfilling Nigeria's treaty obligation with the Convention. The Nigerian constitution, which is the *grundnorm,* provides for the adoption of a treaty under s12. As a result, it could be argued that any measure arising from the NTCA should be justifiable and proportionate.[510] The Convention, as well as other research, recognises that tobacco is a harmful product, resulting in the death of millions of users each year.[511] Based on the high morbidity rate, the question raised in the proportionality test—whether the measure is necessary and suitable to achieve its objective—could be argued that the restrictions, which equates to saving lives and protecting children from tobacco addiction, is necessary. The courts have also held that the seriousness of tobacco hazards should outweigh other interests.[512] Furthermore, the fact that other lesser measures could be used or could be proven to be more productive is not one that the court should consider, given that the criterion to be applied is if the legislation is manifestly inappropriate. Moreover, in the context of tobacco control, there is no single conclusive way to advance tobacco control, except via a comprehensive tobacco control framework comprising legal and non-legal measures, yet there are still no guarantees of a widespread reduction.[513] This makes it even impossible, with regard to tobacco restrictions, for the courts to give an exception based on the fact that there is a lesser intrusive measure.[514]

Against this backdrop, the pronouncement of the NTCA is in accordance with both national and international consensus: protecting public health supersedes the interests claimed by the TTCs. Nigeria should, therefore, ensure a comprehensive tobacco control framework and, more importantly, ensure a vigorous enforcement of the tobacco control rules. This area of health regulation is not a policy blank canvass but rather, it is a significant effort to protecting the health and wellbeing of citizens.

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[510] *BAT South Africa (Pty) Ltd v Minister of Health* (463/2011) [2012] ZASCA 107; [2012] 3 All SA 593 (SCA) (20 June 2012) at[22]-[23].

[511] WHO Report on the global tobacco epidemic, *supra,* at (n411); G Paraje and D Araya, 'Relationship between smoking and health education spending in Chile', (2018) 27(5) Tobacco Control 560.

[512] *BAT South Africa (Pty) Ltd v Minister of Health*, *supra,* at (n510) at [25]; *BAT v Australia, supra,* at (n451); SY Zhou *et al.*, 'The impact of the WHO FCTC in defending legal challenges to tobacco control measures' (2018) 28(2) Tobacco Control 113.

[513] A Gilbert (note 492).

[514] *BAT South Africa* (note 510) [26].

3.4 Conclusion

The chapter reveals some gaps in the primary tobacco control legislation, therefore, reinforcing the claim that the NTCA is an integral part of the tobacco regulatory framework but should not stand in isolation both in practice and perception.[515] The NTCA should be complemented with other regulatory and non-regulatory actions. It proves that there is a capacity for other voluntary measures, such as CSR, to espouse social change. The execution of the law, public awareness and education have shown to play a critical role in a tobacco control policy. This position is key, considering the gaps highlighted to realign the NTCA with the WHO FCTC.

The findings identified in this section that could inform practice and policies are:

1) The loophole identified under section 12 of the NTCA should be closed, given that it creates an avenue to circumvent tobacco control policy in Nigeria.
2) Procedural guidelines specifically for tobacco control and the NTCA would promote greater understanding in practice. An example is the UK guidance on procedures relevant to the UK Bribery Act issued by the UK Justice Ministry.
3) Public awareness and education of the Act should be considered.
4) Increase of funds and other relevant resources to tobacco control policies and institutions.
5) There should be a zero-tolerance on the interaction with TTCs to prevent interference.
6) The WHO FCTC informs parties to adopt 'measures *beyond* those required by the Convention'. The 'full' adoption of the Convention could be regarded as the first step to attain the *beyond* status. After that, the implementation of measures beyond that of the Convention could be regarded as the second or penultimate step. The point is that the identification of these gaps suggest Nigeria has not yet attain the first step, and a long way from the accomplishing the second.
7) Smoking is still ongoing in certain public places. There should be improvements in enforcing the 100% smoke-free environmental policy. The NTCA also has limited environmental policies that protect the environment from the impact of

[515] JI Nazif-Munoz *et al.*, 'The impact of child restraint legislation on the incidence of severe paediatric injury in Chile' (2017) 23(5) Injury Prevention 291; L Swepston, 'Child labour: its regulation by ILO standards and national legislation' (1982) 121(5) Int'l Labour Review 577.

tobacco industry activities. The other laws identified in this chapter could serve as an auxiliary benefit to the NTCA, an Act that should be realigned with the objectives of Article 18 of the WHO FCTC.

8) Consequently, the NTCA falls short of keeping with the 'spirit and the letter' of the WHO FCTC, which it purports to represent.
9) The manager or owner of smoke-free premises should have their smoke-free enforcement role clarified. The NTCA 2015 will significantly benefit from a supplementary guidance similar to the Bribery Act 2010 guidance provided by the U.K. Ministry of Justice or the Guidelines to the WHO FCTC.
10) There should be regular monitoring and data collection process to measure the success of the NTCA and tobacco control efforts. There is a need to significantly improve the data and research gap on tobacco control in Nigeria to design more effective tobacco control policies. At present, non-state actors and non-governmental organisations and donors have played the leading role in meeting the data and research needs of this thesis/research. However, the government stands to benefit significantly with the availability of quality data and evidence-based policy design. It is therefore incumbent on the government to allocate human and financial resources towards this end.
11) Non-regulatory methods should be explored. Encouraging parental intervention through public awareness in reducing smoking prevalence in minors and teenages as an example.
12) Nigeria should domesticate the 'Protocol to Eliminate Illicit Trade in Tobacco Products'
13) The Act has to provide for the restriction of electronic nicotine delivery systems (ENDS) and electronic non-nicotine delivery systems (ENNDS) in line with the WHO FCTC.

Chapter Four. Legal and Institutional Framework: Nigerian Tobacco Industry II.

4.1 Introduction

The WHO FCTC encourages existing legislation to form part of the tobacco regulatory framework.[516] This chapter, therefore, explores laws that could be applied to regulate the activities of transnational tobacco corporations. It demonstrates that the selected laws, collectively or severely, could be refocused or adapted towards the activities of TTCs and, therefore, function as an intricate part of the tobacco regulatory framework. Since host states have the primary obligation to control transnational tobacco corporations, the selected laws would ensure the protection of the people, as well as the environment, from the impact of the tobacco industry. These set of laws, unlike the NTCA 2015, are not explicitly targeted at the tobacco industry, but they are intended as an auxiliary benefit to the NTCA, providing remedies for people who have been impacted by the activities of the tobacco industry, which in turn enhances the overall tobacco regulatory framework. In addition, the chapter examines Nigeria's tobacco control inaugural committee and institutions, established to fulfil Nigeria's obligation under the WHO FCTC. The chapter addresses the adequacy of these laws and institutions in the context of tobacco control. It concludes by drawing out recommendations to improve the law and inform policy.

4.2 Nigerian Company Law and the Regulation of TTCs.

Nigeria regulates the creation and operation of registered companies through its domestic company law.[517] In the nineteenth-century, Nigeria experienced exponential trade growth after the abolition of slave trade and the formal establishment of British colonisation.[518] Under colonial statutes enacted between 1876 and 1922, the law applicable to companies in Nigeria at this time was the common law, the doctrines of equity and the statutes of general application in England on the first day of January

[516] See for instance, WHO FCTC (note 450) [20].
[517] S McLaughlin, *Unlocking Company Law*, (3rd edn, Routledge 2015) 2.
[518] JO Orojo, *Company Law in Nigeria* (3rd edn, Mbeyi & Associates 1992).

1900, subject to any later relevant statute.[519] The implication of which common law concepts were received into the Nigerian company law and have remained part of the law.[520] With the continued growth of trade, the colonialist deemed it necessary to promulgate laws to facilitate business activities locally. This led to the first company law in Nigeria, the Companies Ordinance of 1912, a local enactment of the Companies (Consolidation) Act, 1908 of England.[521] The first measure aimed at regulating transnational corporations was the provisions under the Nigerian Companies Act, 1968. It required local incorporation of any foreign corporation. The objective was to position transnational corporations under the ambit of the law and unify compliance, including the disclosure of accounts and the regulation of director and shareholders. This local incorporation of transnational corporation is still observed under the current Nigerian company law: The Companies and Allied Matters Act, 1990 (CAMA).[522]

The incorporation of transnational corporations, under s54(1) of CAMA, creates a parent-subsidiary relationship, where the parent company is registered in a foreign country, and the subsidiary is registered in Nigeria. This creation, according to Ogowewo, restricts foreign investment.[523] It also produces a situation where parent companies deny liability from the actions of their subsidiaries, because the subsidiaries are Nigerian companies under the principle of limited liability.[524] The default rule in Nigeria, like in other common law jurisdiction, is that a holding company and its subsidiaries are each distinct and separate legal person.[525] It is also the position of the Nigerian law that a subsidiary is not an agent of the parent company but a different entity.[526] Theoretically, it may be possible to proceed against a parent company in the Nigerian courts. The primary concern would be the enforcement of judgement in the home state of the parent company. According to Orojo, if a parent

[519] *Ibid.* 17-18.
[520] *Ibid.* one of such concepts is the separate and independent legal personality of companies, illustrated in *Salomon v Salomon and co.* (1897) AC 22.
[521] *Ibid.*
[522] Companies and Allied Matters Act, Chapter 59, Laws of the Federal Republic of Nigeria 1990.
[523] TI Ogowewo, 'The Shift to Classical Theory of Foreign Investment: Opening up the Nigerian Market' (1995) 44 Int'l and Comparative law Quarterly 915.
[524] This distinction was employed by the Nigerian Court of Appeal in awarding Shell a stay of execution against a High Court judgement in favour of an oil community against Shell for gas flaring in the case between *Shell Petroleum Development Company (SPDC) of Nigeria v. Dr Pere Ajuwa and another,* Court of Appeal, Abuja Division, no. CA/A/209/06, 27 May 2007. See also *Mobil Producing (Nig.) v Monokpo* (2003) 18 Nigerian Weekly Law Report (pt. 852) 346.
[525] *M. O Kanu and Sons v. FBN Plc* (1998) 11 NWLR (pt.572) 116, 121.
[526] Musa v. Ehidiamhen (1994) 3 NWLR (pt.334) 554 CA.

company has a subsidiary in a foreign country, the parent company would not be subjected to the authority of the host country; therefore, if the host country gives a ruling against the parent company, the courts of the home state will refuse to enforce it.[527]

However, the reverse could be possible. That is, legal action could be initiated in the home state of a parent company for violations conducted by its subsidiaries in host states.[528] In *Milieudefensie v Royal Dutch Shell Plc et al.*,[529] for instance, the plaintiff sued Shell Nigeria and its parent company, Royal Dutch Shell Plc, in the home state of the parent company—The Hague, Netherlands—for human and environmental rights violations perpetrated by the subsidiary in Nigeria. Aside from granting jurisdiction for the case to be held, the Dutch court ruled that the parent company owed a duty of care to victims of its subsidiary company. In a similar line of reasoning, the UK Court of Appeal in *Chandler v Cape plc*[530] held that, under certain circumstances, a parent company owed a direct duty of care to its subsidiaries to ensure a safe system of work. The significant of these rulings concerning the regulation of the tobacco industry in Nigeria is that, under common law principles, such as the duty of care, applicants could potentially initiate a claim against a transnational tobacco corporation and its Nigerian subsidiary in the home state of the transnational tobacco corporation.

4.3 Common Law.

> *32(1) Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the* ***common law of England*** *and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.*

[527] JO Orojo, *Company Law in Nigeria* (3rd edn, Mbeyi & Associates 1992) 85.
[528] *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3; *Milieudefensie v Royal Dutch Shell Plc,* Court of Appeal of the Hague, Case No. 200.126.149.
[529] *Ibid.*
[530] *Chandler v Cape plc* [2012] EWCA civ 525; see also *Vedanta v Lungowe* [2019] UKSC 20.

32(2) Such Imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law.[531]

Common law and its principles form a fundamental part of the Nigerian legal system,[532]even though they are subject to the Nigerian constitution.[533] The prominence of common law rests in the fact that an action can be issued where there is a lacuna in the provisions of statutes.[534] It provides the opportunity for an aggrieved to seek redress. In many countries, legal cases based on theories of negligence, duty of care, deception, and other theories of manufacture liability are common law matters, critical when consumers litigate against tobacco corporations.[535]

Several legal elements that the claimant have to prove to succeed in litigation, and the several defences employed by the defendant, have made it a challenge to seek redress against tobacco manufacturers.[536] Moreover, tobacco-related diseases often appear many years or even decades after a tobacco user begins to use tobacco products; thus, constraining the nexus between causation and its consequences: *Novus actus interveniens.*[537] In the case of negligence, for instance, the claimant has the burden of proving that the defendant was careless in the exercise of his duty of care and, in addition to showing that damage occurred, he must also show that the damage occurred as a result of the negligence of the defendant.[538] Lord Atkin emphasised the appropriate note of caution by stating that,

[531] Interpretation Act, c 192, LRN 1990 (emphasis added).
[532] AO Obilade, *Nigerian Legal System* (Sweet & Maxwell 1979); Charles Mwalimu, *The Nigerian Legal System* (Lang Publishing 2005) 399.
[533]*Inspector-General of Police v All Nigeria Peoples Party & ors* (2007) AHRLR 179, NgCA 2007.
[534] O Oluduro, *Oil Exploitation and Human Rights Violation in Nigeria's Oil producing Communities* (Intersentia Publishing 2014) 166.
[535] DD Blanke and Vera da Costa e Silva (eds), *Tobacco control legislation: an introductory guide* (World Health Organization Publication 2004).
[536] DD Blanke (note 535).
[537] *Ibid*. See, for instance, R v Jordan (1956) 40 Cr App R 152 (CA); R v Smith [1959] 2 QB (CMAC) *Cf* Thambo Meli and ors v R [1954] 1 All ER 373 (PC). See J Sanders and J Machal-Fulks,'The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law'(2001) 64(4) *Law and Contemporary Problems* 110.
[538] *Donoghue v Stevenson* [1932] UKHL 100; *Baker v T E Hopkins & Son Ltd* [1959] 3 ALL ER 225 (CA); *Caparo* v *Dickman* [1990] 2 AC 605.

> To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials.[539]

As at the time of research, no successful individual or government tobacco litigation claim has occurred in Nigeria. However, common law and common tort law are constantly being developed.[540] A recent development in the common law principle of *forum non conveniens* could, perhaps, lead to the rise of holding TTCs and other multinational companies accountable. The common law doctrine refers to the proper place or jurisdiction to initiate litigation. Traditionally, a claim is made in tort 'where the harmful event occurred'[541] or where damage is suffered,[542]but with the recent cases of *Milieudefensie*[543] and *Okpabi*,[544] it appears that the courts are willing to expand the scope. In those two cases, both the harmful event and the damage occurred in Nigeria, but the courts in the host state of the parent companies allowed the case to be heard, even though the subsidiary and the holding or parent company are recognised as distinct legal entities.[545] The option to have a different forum could therefore help hold TTCs accountable for tort or human rights violations, because access to justice in Nigeria is hindered by a number of obstacles unique to corporate human rights abuses, ranging from restrictive procedural rules to delays in legal proceedings and enforcement of judgements.[546] However, the aim in this regard is to improve access to justice in Nigeria.

4.4 Criminal Code

[539] *Ibid.* Donoghue p580.
[540] Tony Weir, *An Introduction to Tort Law* (Clarendon Law Series 2006) pp3-4.
[541] *Four Seasons Holdings Incorporated v Brownlie* [2017] UKSC 80 [39].
[542] *Ibid* [41].
[543] *Milieudefensie* (note 528).
[544] Okpabi (note 528).
[545] See section 338 CAMA and section 316 CAMA.
[546] International Commission of Jurist, *Access to Justice: Human Rights Abuses Involving Corporations* (ICJ 2012).

The Nigerian Criminal Code (CC)[547] is not specifically targeted at the tobacco industry; it could, however, be applied in cases of air and water pollution activities of the tobacco industry. Section 245 of the CC, for instance, states:

> *Any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir, or place, so as to render it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanour, and is liable to imprisonment for six months*.

This legislation could be used as a protective measure against water contamination. Report suggests that the large and frequent applications of fertilisers, herbicides and pesticides, which is required to protect the tobacco plant from insects and diseases, pollutes the local groundwater and waterways, and decreases the long-term fertility of the soil.[548] Equally, Goodland et al. reveal that besides being 'hazardous to users, these chemicals can contaminate village water supplies'.[549] Some of these residues have been found in underground water and deep wells in Nigeria.[550]

Another relevant provision is section 247 of the CC, which states that any person who:

> *(a) vitiates the atmosphere in any place so as to make noxious to the health of persons in general dwelling or carrying on business in the neighbourhood, or passing along the public highway; or*
> *(b) does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, whether human or animal, is guilty of a misdemeanour, and is liable to imprisonment for six months.*

The above section is apposite with the intensive application of pesticide during the various stages of tobacco cultivation, as previously mentioned. The application of these substances to water and air may cause the genetic selection of pesticide-

[547] Cap. C38, LFN, 2004. Hereinafter referred to as CC.
[548] J Madeley, 'The Environmental Impact of Tobacco Production in Developing Countries' in Alan Blum (ed), *Cigarette Underworld* (Medical Society of the State of New York 1985) 70.
[549] Goodland et al., *Environmental Management in Tropical Agriculture* (Westview Press 1994).
[550] ED Orunonye and E Okrikata, 'Sustainable Use of Plant Protection Products in Nigeria and Challenges' (2010) 2(9) Journal of Plant Breeding and Crop Science 267, 268.

resistant insects, making the control of diseases such as malaria particularly challenging.[551] There is also the risk of wildlife exposure to tobacco pesticides through accidentally eating toxic pesticide residues found on plants and insects, or through contact with their skin and eyes, as well as through inhaling pesticide vapours.[552] This exposure has devastating health effects for both birds and mammals.[553] Pesticide poisoning in the developing world is a grave concern.[554] A high proportion of pesticide intoxications appear to be due to lack of knowledge, unsafe attitudes, and dangerous practices.[555]

In Nigeria, it is prohibited to manufacture, formulate, import, export, advertise, sell or distribute pesticide unless under the Pesticide Registration Regulations (PRR) 2005.[556] The National Agency for Food and Drug Administration Control (NAFDAC) is the agency responsible for controlling and registration of pesticides in Nigeria,[557] resulting in the EU prohibiting certain Nigeria products due to the high concentration of pesticides.[558]

The use of these legislative provisions may be challenging. Commentators have argued that the phrases 'corrupts or fouls' and 'render it less fit for purpose which it is ordinarily used' are too general for precise judicial interpretation.[559] As such, it poses a significant challenge for the prosecution to produce scientific evidence to prove the charge beyond a reasonable doubt, as stipulated under the Nigerian criminal justice system.[560] Another challenge appears to be the laxity in executing the framework. Farmlands located in rural areas may lack intelligent monitoring by the authorities, and this may perhaps be the reason proscribed elevated level of residue

[551] A Olsen, 'Pesticides in Tobacco Increase Health Risks' (Pesticide Action Network, 12 May 2006) <http://www.panna.org/legacy/panups/panup_20060512.dv.html> accessed 9 March 2016.
[552] *Ibid.*
[553] *Ibid*.
[554] M Eddleston et al., 'Pesticide Poisoning in the Developing World- a minimum pesticides list' (2002) 360 Lancet 1163-1167.
[555] G Forget, 'Pesticides and the third world' (1991) 31(1) Journal of Toxicology & Environmental Health 11.
[556] Ss1&2 PRR 2005.
[557] Section 8 Drugs and Related Products (Registration, etc.) Act 1996 as amended; See Commencement section and s1 PRR 2005.
[558] Food Safety Authority of Ireland, 'Withdrawal of dried beans originating from Nigeria due to potential presence of pesticides' (Food Safety Auth of Ireland, 13 July 2020); AA Adewunmi *et al.,* 'Pesticides and Food Safety in Africa' (2018) 8(2) European Journal of Biological Research 70.
[559] MT Okorodudu-Fubara, 'Statutory Scheme for Environmental Protection in the Nigeria Context: Some Reflections of legal Significance for the energy Sector' (1996) Nigeria Current Law Review 12 in O Oluduro, *Oil Exploitation and Human Rights Violation in Nigeria's Oil Producing Communities* (Intersentia 2014) 134.
[560]O Oluduro *ibid.*

is found in the food supply chain. In the same context, a residual analysis conducted by Ululating et al.[561] shows a high percentage of residue, including banned pesticides, discovered in food samples.

Furthermore, the provisions of the law underrate the severity of the offence. Under s245 CC, the fouling or corruption of water is referred to as a misdemeanour liable to six months incarceration. Bearing in mind that such an act of 'poisoning' could cause death or grievous harm.

Considering the above, the following recommendations are proposed: 1) there should be a comprehensive monitoring system, particularly in the hinterlands, with an extensive training program on the proper handling and application of pesticide by the relevant agencies; 2) a substantial provision of punishment from misdemeanor to severity, mainly when it results in the death of the consumer; 3) the diversification to crops that require lesser or no use of pesticide, herbicide or fertilizer; 4) and the promotion of organic substitute of pesticides and fertilizers.

4.5 Environmental Sustainability in Nigeria and Tobacco Regulation.

> In carrying out their obligations under this Convention [WHO FCTC], the Parties agree to have due regard to the protection of the environment and the health of persons in relation to the environment in respect of tobacco cultivation and manufacture within their respective territories.[562]

Nigeria has an obligation under the Convention to protect the environment from the impact of TTCs. However, data suggests that environmental degradation as a result of deforestation to cultivate tobacco has significantly increased: in 1934, 86 acres of land was used for the cultivation of tobacco; by 1985, the figure has risen to 120,000 acres with 60,000 farmers growing tobacco.[563] Going by this upwards trajectory, more than 240,000 acres of land would be used to cultivate tobacco by

[561] A Olulakin *et al.*, 'Assessment of Selected Food Products for Pesticide Residue in Major Markets of Oyo state, Nigeria' (2001) 54 Int'l letters of CPA 47.
[562] WHO FCTC, Part V, Article 18: 'Protection of the Environment'.
[563]DF Pearse, 'Aspects of Smoking in Developing Countries in Africa' in Alan Blum (ed), The Cigarette underworld (Medical Society of the State of NY 1985) 72.

2036. Furthermore, the World Health Organisation's report states that around 12.6 million people died as a result of living or working in an unhealthy environment, which corresponds to approximately 1 in 4 of total global deaths.[564] Environmental risk factors, such as air pollution (including exposure to second-hand tobacco smoke), water and soil pollution, chemical exposures, climate change, and ultraviolet radiation, contribute to more than 100 diseases and injuries.[565] Environmental resource control and management is, therefore, paramount.

Against this backdrop, a subsequent question comes to mind— to what extent is environmental sustainability achievable in the Nigerian tobacco industry, or to what extent can tobacco control achieve environmental sustainability in the tobacco industry? Drawing a significant route towards a sustainable future, Hollander contends that the most critical environmental problem is poverty. He believes that economic development and affluence pose a significant threat to the world's environment and resources. Describing inferences to the great strides made by affluent democracies towards improving and protecting the environment, Hollander makes the case that one of the essential prerequisites for environmental sustainability is a global transition from poverty to affluence.[566]

Research suggests a relationship between environmental stress and development in sub-Saharan Africa. The region tragically suffers the vicious cycle of poverty that leads to environmental degradation, which then leads to even greater poverty.[567] This resonates profoundly in Nigeria for over 50% of Nigerians live in poverty,[568] and poverty is higher in the rural areas, where tobacco is mostly cultivated, than in urban areas.[569] According to the WHO, many tobacco farmers are poor and in debt,[570] leading to a vicious circle of poverty and illness.[571]

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[564] WHO FCTC 'WHO publishes a news release about environmental risks factors' (WHO FCTC, 15 March 2016) <http://www.who.int/fctc/mediacentre/news/2016/en/> accessed 10 Apr 2016.
[565] *Ibid.*
[566] JM Hollander, *The Real Environmental Crisis: why poverty, not affluence, is the environment's number one enemy* (University of California Press 2003).
[567] T Reardon and SA Vosti, 'links between rural poverty and the environment in developing countries: asset categories and investment poverty' (1995) 23(9) World Development 1495.
[568] Oluduro (note 534).
[569] JI Ikharehon and N Omoregie, "Corruption and Poverty Challenges in Nigeria" (2015) 6(1) *Indian Journal of Commerce and Management Studies* 98.
[570] WHO, *Tobacco Increases the Poverty of Individuals and Families* (WHO 2004).
[571] *Ibid.*

Several institutions and organisations have been designated to conduct activities that could facilitate the protection of the environment. The Federal Ministry of Environment coordinates the activities of these institutions. The Ministry was established to address environmental issues free from duplication of efforts and competition among other government agencies. The Federal Ministry of Environment has the responsibility to control land degradation, desertification, pollution, reforestation, and conservation of biological diversity. The Ministry has the overall responsibility for the protection and conservation of the environment and its sustenance. At the state level, equivalent bodies have been established for the protection of biological diversity and general environmental management. A marked increase in the number of Non-Governmental Organisations (NGOs) are also concerned with protecting the environment. Sections 4.6.1 – 4.6.4 examines how adequate are the laws and governmental agencies in protecting the environment from the impact of the activities and products of TTCs.

4.5.1 National Environmental Standards and Regulatory Enforcement Agency (NESREA) Act

NESREA Act was assented to by the President of Nigeria on 30 July 2007.[572] A precursor to the Act was the Federal Protection Agency (FEPA) Act promulgated in 1988,[573] which established the Federal Protection Agency (FEPA), an agency charged with the responsibility of protecting and developing the environment. In 1999, FEPA and other relevant departments in other Ministries were merged to form the Federal Ministry of Environment. However, the new entity lacks an appropriate enabling law to enforce compliance.[574] This situation discontinued the effective enforcement of environmental laws, standards and regulation in Nigeria. To address this lapse, the Federal Government in line with section 20 of the 1999 Constitution of the Federal Republic of Nigeria, established the National Environmental Standards and Regulations Enforcement Agency (NESREA), a parastatal of the Federal Ministry of

[572] FRN official gazette, Government Notice No. 61, Act No. 25.
[573] Cap. F10 LFN 2004; Decree 58 of 1988 and 59 (amended) of 1992.
[574] NESREA, 'about us' (NESREA, date unknown) <http://www.nesrea.gov.ng/about/index.php> accessed 11 March 2016.

Environment. A notable provision of the NESREA Act is section 7(c). It mandates the Agency to enforce environmental compliance with the provisions of international agreements, protocols, conventions and treaties, and such other agreement as may from time to time come into force. This provision should be read in line with Section 12(1) of the 1999 constitution FRN, which mandates the domestication of international instruments to 'have the force of law'.[575] Nigeria has ratified several international agreements on the environment, including matters on climate change, biodiversity, desertification, hazardous waste, and pollution.

The environment, according to the Act, includes water, air, land, all plants and human beings or animals living therein, and the inter-relationships which exist among them.[576] For the protection and advancement of the environment, the Agency recognised that the regulations were inadequate to protect the environment. The Federal Government through NESREA, therefore, implemented thirty-three Environmental Regulations, including the National Environmental (Food, Beverages and Tobacco Sector) Regulations,[577] which was established to prevent and minimise pollution to the Nigerian environment from all operations and ancillary activities of food, beverages and the tobacco sector.[578] NESREA is responsible for the overall protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources and environmental technology.[579] The objectives of the Agency include coordination and liaison with relevant national and international stakeholders on matters of enforcing environmental standards, regulations, rules, laws, policies and guidelines[580], except for matters in the oil and

[575] s12(1) Constitution FRN provides: 'No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly where the treaty deals with matters not included in the Exclusive legislative list, it must in addition be ratified by a majority of all the state Houses of Assembly in the federation'.
[576] s37.
[577] 2009. S. I. No. 33. See also section 4.6.3 of this thesis for further information on the National Environmental (Food, Beverages and Tobacco Sector) Regulations.
[578] MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8(1) Law, Environment and Development Journal 116, 133.
[579] s7 NESREA Act.
[580] s2 NESREA Act.

gas sector.[581] One of the Agency's enforcement powers is the establishment of mobile courts to expeditiously decide cases of violation.[582]

Researchers have reiterated the lack of the far-reaching effect of the Act. Ladan proclaims that there is the added need for information and public environmental education, as the best form of prevention of environmental harm.[583] Other notable challenges highlighted by the former Director-General of the Agency include inadequate human and institutional capacity, inadequate baseline information data, budgetary constraint, lack of public awareness and education, and ineffective exchange and feedback mechanisms between relevant stakeholders and the Agency.[584]

4.5.2 Biodiversity Laws

> *We recognise that we have both an impact and a dependence on biodiversity, through our business operations and use of ecosystem services, such as forest products, soil and water— BAT.*[585]

Nigeria signed and ratified international treaties and agreements on biodiversity conservation, including the Convention on Biological Diversity (CBD) 1992,[586] the Ramsar Convention[587], the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973,[588] the African Convention on the Conservation of Nature and Natural Resources 1968.[589] All of which impose various duties and responsibilities in Nigeria to pursue conservation policies. Article 6(a) of the CBD for instance, provides that each contracting party develop 'national strategies, plans or programs for the conservation and sustainable use of biological diversity…' In

[581] O Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Intersentia 2014) 146.
[582] s8(f) NESREA Act.
[583] MT Ladan (note 578) p126.
[584] M Suleiman, 'NESREA highlights achievements, challenges' in O Oluduro (n559) 146.
[585] BAT, *biodiversity statement* (BAT, unknown date); BAT *et al.*, *Biodiversity risk and opportunity assessment* (BAT 2012).
[586] The Convention was signed and ratified in June 1992 and 29 August 1994 respectively.
[587] Nigeria became a party to the Convention in 2000 and entered into force on 2 Feb 2001.
[588] This was signed in Feb 1974, ratified in May 1974 and came into force on 1 August 1975.
[589] This convention was revised on 11 July 2003 at the Second Ordinary session of the Assembly of the AU in Maputo, Mozambique. The revised version is yet to be ratified.

recognition of the need to protect biological resources, Nigeria promulgated specific legislations such as The National Park Decree 1991,[590] the Sea Fisheries Decree 1992[591] and the Endangered Species (Control of International Trade and Traffic) Act 1985,[592] and others.

The Endangered Species Act 1985 (CITT) contains a list of endangered species that needs protecting, but the Act excludes plants (the Act provides only for animals) and habitat destruction by human activities, such as deforestation, contrary to the UN Convention on Biological Diversity.[593]

The National Park Service Decree[594] stipulates, *inter alia*, that a person shall be guilty, unless authorised to do so under the Decree or Regulations, if the person(s): 1) introduces a chemical or otherwise causes any form of pollution; 2) carries out an undertaking connected with forestry, agriculture; 3) alters the configuration of the soil or the character of the vegetation; 4) perpetrates any act to harm or disturb the fauna or flora, in the National Park.[595] The Decree provides for imprisonment and/or fine any violation perpetrated by any individual or corporation.

The National Policy on Environment, launched in 1989 and revised in 1999, provides strategies for the biological diversity and conservation of natural resources, including the promotion of *in situ* and *ex situ* biodiversity conservation, and the implementation of a National Strategy and Action plan for biodiversity conservation, among other strategies. The purpose of the National Policy on the Environment is to define a suitable framework for environmental governance in Nigeria.

[590] Decree No. 36 0f 1991 (repealed by the National Park Service Decree No.46 1999, now Cap. No.65 LFN 2004) the decree established five National Parks e.g. the Chad basin National Park and the Cross River National Park. There are also 445 forest reserves, 12 strict nature reserves and 28 game reserves.
[591] Decree No 17, 1992.
[592] Cap. E9, Laws of the Federation of Nigeria (LFN) 2004.
[593] The Draft Decisions of the 13th COP on Biodiversity to be held in Cancun, Mexico, 4-17 December 2017, at p18. See also UN 2030 Agenda. Art 8(d) of the CBD states contracting parties to the Convention to promote the protection of ecosystems, natural habitats and the maintenance of viable population of species in natural surroundings.
[594] National Park Service Decree No.49 1999, now Cap. N.65 LFN 2004.
[595] *Ibid,* section 30(g), (m), (n) & (o).

4.5.3 National Environmental (Food, Beverages and Tobacco Sector) Regulations, 2009.[596]

NESREA implemented thirty-three Environmental Regulations. One of the regulation is directed towards the tobacco sector: National Environmental (Food Beverages &Tobacco sector) Regulations, 2009. It aims to provide, amongst others, the effective enforcement of environmental standards, regulations, rules, and laws. The thirty-three Regulations are based around environmental challenges evaluated as having pre-eminence in ensuring both industrial and generally sustainable use of natural resources and includes, also, the adoption of sustainable and environmentally friendly practices.[597]

The Regulations have been divided into nine parts and thirteen schedules. Part one relates to environmental governance,[598] including chemical usage,[599] emission control and treatment technologies.[600] Part two identifies sampling procedures concerning the collection and analysis of samples;[601] and sampling for licence classification, microbiological analysis and air analysis.[602] Parts three to nine deals with—licensing and permit; industrial effluent or air emission monitoring and reporting requirements; duty of the Agency to ensure compliance with conditions, enforcement[603], offences[604] and penalty;[605] incentives; interpretation and citation. Finally, the schedules provide for the effluent standards for food, beverages and

[596] Federal Republic of Nigeria, Abuja, Regulations No. 33 of 2009, Official Gazette, Vol. 96, No. 65, 14 October 2009.
[597] MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: a new dawn in environmental compliance and enforcement in Nigeria' (2012) 8(1) Law, Environment and Development Journal 116, 127-137.
[598] The purpose of these Regulations is to prevent and minimise pollution from all operations and ancillary activities of Food, Beverages and Tobacco Companies to the Nigerian Environment. See Regulation 1.
[599] This term is defined under Regulation 54 as "liquid or solid-sediments and other residue from a municipal sewage collection and treatment system and liquid or solid and other septic from septic or holding tank pumping from commercial, industrial or residual establishments.
[600] Regulations 1-25.
[601] The term "spot sampling" has been defined under Regulation 54 as "sample of liquid or sediments obtained at a specific depth inside a tank using a bottle. Spot samples are analyzed to determine the gravity of the oil, base sediment and water of the fluid in the tank".
[602] Regulations 26-33.
[603] This includes enforcement notices and reminder as well a suspension of permit under Regulations 41-43
[604] The offences under Regulations 44-48 include: contravention of permit condition, false statement, discharge of effluent beyond permissible level.
[605] See Regulation 49.

tobacco, including sludge disposal permissible limit; air emission guidelines; and soil quality standards; amongst other best practice and regulatory provisions.[606]

4.5.4 Environmental Impact Assessment Decree 1992 (EIA)[607]

The EIA started as an apparatus for environmental appraisals in the early 1980s under the 1981-1986 National Development plan. The plan recommended all public and private projects be accompanied by an environmental impact assessment.[608] Before its promulgation, the EIA was incoherent in major developmental projects.[609] The Decree established a legislative framework for EIA in Nigeria.[610] The objective of the Decree is:

> *'to establish before a decision taken by any person, authority corporate body or unincorporated body including the Government of the Federation, State or Local Government intending to undertake or authorise the undertaking of any activity that may likely or to a significant extent affect the environment or have environmental effects on those activities shall first be taken into account*'.[611]

Section one and two of the Decree institutes a duty to establish environmental concerns in any proposed interests by person(s), or governmental body that may have a significant impact on the environment. It requires that before the commencement of any project, its environmental impacts must be evaluated in other to mitigate its effects on the environment. The EIA is a process that involves various stages a project undergoes, from proposal to approval, before the release of an Environmental Impact Statement (EIS) and certificate.[612] Where no adverse environmental effects exist, the

[606] See MT Ladan (note 578).
[607] Decree No.86 of 1992, now Cap E12, LFN 2004.
[608] See F Olokesusi (note 522).
[609] F Olokesusi, 'Legal and Institutional Framework of Environmental Impact Assessment in Nigeria: An Initial Assessment' (1998) 18 Environmental Impact Assessment Review 159, 160.
[610] O Oluduro, *Oil Exploitation and Human Rights Violations In Nigeria's Oil Producing Communities* (Intersentia 2014) 155.
[611] s1(a) EIA Decree.
[612] AA Ibrahim *et al.,* 'Environmental impact assessment in Nigeria: a review' (2020) 8(3) World Journal of Advanced Research and Reviews 330.

EIA is issued, and the project commences with appropriate mitigation and monitoring measures. Through newspaper advertisement, the Agency invites stakeholders to participate in discussions, before the Agency makes a final proclamation.[613] Section 4 prescribes the minimum content of the EIA, including the description of the proposed activities to the potential impact on any other state(s) outside Nigeria.[614] The Agency's findings must be impartial and transparent.[615] However, section 15(1) establishes some exemptions from EIA, such as when the President believes that the environmental effects of the project are likely to be minimal, or the project is to be carried out during a national emergency, or the project is in the interest of public health or safety.

Furthermore, the Decree has a Mandatory Study List. The list itemised the industry where EIA must be initiated before projects are commenced. Tobacco processing and agriculture are included on the Mandatory list.[616] The implication on the tobacco industry is that an EIA requirement for most activities or projects involving tobacco processing is compulsory. In sum, the EIA and the Agency (Federal Ministry of Environment) generate a form of consistency in relation to the tobacco process.

Critically, the Decree is not without its shortcomings, most especially, the conundrum of poor legislative drafting and incorrect cross-referencing. Section 14(1), for instance, states that 'where a Federal, State or *Local Government Agency Authority*[617] established by the Federal, State or Local Government Council …', when there is no such body as a 'Local Government Agency Authority'. The section could have been drafted as 'where an Agency established by the Federal, State or Local Government…' One can only infer because the actual meaning of the section is unclear. The Decree also has no section 12, only an editorial note stating that 'there is no section 12 within this Decree'. As indicated earlier, the Decree is fraught with erroneous internal cross-referencing. For instance, section 17 states that 'the case of projects referred to in section (sic) 43 - 45…' but s44 - s45 does not have the case of project. Another example is the cross-referencing in section 56(1) & (2) to section 15(b) & (c); while the former deals with international agreement, the latter deals with

[613] *Ibid.*
[614] s7.
[615] See s6, 7, 8 & 9.
[616] AA Ibrahim (note 612).
[617] Italics inserted by author.

'excluded projects'. Commenting on the poor legislative drafting, Ajai proclaims that the Decree 'may be worse than no legislation at all' because it encourages unnecessary litigation and compels the courts to embark on a judicial process on ineffective and redundant provisions.[618] The blunder, consequently, weakens the protection of the environment.

Another unresolved deficiency of the Decree is section 15 (1):

> *An environmental assessment of project shall not be required where -*
>
> *(a) in the opinion of the Agency the project is in the list of projects which the President, … is of the opinion that the environmental effects of the project is (sic) likely to be minimal;*

Such provisions are susceptible to political influence and exploitation. In addition, research suggest that EIA enforcement compliance in the public or government sector is almost nonexistence. Ogunba admonish the lack of EIA in public projects,[619] since government have persistently refused to initiate EIAs for their projects even though environmental impacts are imminent.[620] Similarly, research carried out by Adomokai and Sheate suggest that community participation with the governmental project is mostly initiated under pressure from NGOs and the regulating bodies.[621]

Furthermore, section 62 highlights the disproportionate punitive measure of the Decree. The failure of transnational tobacco corporation to comply with the Decree will only result in a fine of not less than N50,000 and not more than N1,000,000.[622] This amount is inadequate to serve as a deterrent in comparison with the potential financial returns from investing in such projects.[623] The inclusion of a Variable Monetary Penalty

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[618] O Ajai, 'Environmental Impact Assessment and Sustainable Development: A Review of the Nigerian Legal Framework' (1998) 2&3 Nigerian Current Legal Problems 24.

[619] O Ogunba, 'EIA Systems in Nigeria: evolution, current practice and shortcomings' (2004) 24 Environmental Impact Assessment Review 643, 652.

[620] *Ibid.*

[621] Rosemary Adomokai & anor 'Community participation and environmental decision-making in the Niger Delta' (2004) 24(5) Environ Impact Assessment Rev 495, 512.

[622] Approximately £100 - £2000 at the rate of £1=N500 on 8 Oct 2016.

[623] PC Ogbonna and ors, 'Environmental Impact Assessment of Coal Mining at Enugu, Nigeria' (2015) 3(1) Impact Assessment & Project Appraisal 73-79: coal mining activities have led to water contamination, blindness, and considerable loss of plants, trees and animals, detrimental to residents of the community; similarly see, DE Ezemokwe & ors, 'Environmental Impact Assessment of Onyeama Coal Mine in Enugu,

(VMP) and the imprisonment of corporate offenders for some categories of offences is therefore recommended. The VMP should consider certain conditions, including the cost of restoration, the financial benefit gained by the offender in committing the offence, and a deterrent component.

Another deficit of the Decree is the area of public participation and awareness. Section 25 provides guidelines for notification to the public, and s7[624] to s9 instructs the Agency to disseminate information about EIA in respect of proposed activities. However, Femi Olokesusi argues that the provision for public involvement under the Decree is limited. He maintains that the public scrutiny of the screening report of the project only takes place after the submission of the final EIA report.[625] Adomokai & Sheate also believe that the impact of EIA on the decision-making process is low;[626] Besides, they argue that many communities distrust corporations and government to adequately protect the environment,[627] and corporations are apprehensive about public participation, because it could potentially lead to delays and conflict with the community.[628] Most of the underpinning issues of participation could be avoided when the participation phase is included in the business case of the project and initiated before the commencement of the project. There should be a reinvigoration of political will and the augmentation of all stakeholders, including NGOs, towards environmental sustainability.

Other EIA lapses identified in Nigeria include the general lack of awareness;[629] multiplicity of designated authorities for EIA approval;[630] Agency's financial and other

Southeastern Nigeria' (2016) 4(4) International Journal of Basics and Applied Science 36. See also OO Adelowo & ors, 'Environmental impact assessment of Attenda abattoir, Ogbomoso southwestern Nigeria on surface and groundwater quality using geo-electrical imaging and microbiological analysis' (2012) 184(7) Environmental Monitoring Assessment 4565.

[624] S7 states, 'Before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity'.

[625] Femi Olokesusi, 'Legal and Institutional Framework of Environmental Impact Assessment in Nigeria: an initial assessment' (1998) 18 Environmental Impact Assessment Review 159, 171.

[626] Rosemary Adomokai & anor 'Community participation and environmental decision-making in the Niger Delta' (2004) 24(5) Environmental Impact Assessment Review 495, 516.

[627] *Ibid.*

[628] *Ibid.*

[629] O Ogunba (note 619) 654.

[630] *Ibid.*

resource constraints;[631] institutional and procedural 'controversies';[632] the conducting of EIA after project commencement;[633] lack of provision for 'environmental audit' for projects commenced prior to the promulgation of the EIA Decree;[634] constricted definition of the word environment under the provision of the Decree;[635] and in some sectors, the total disregard of EIA and perceived negligence on the part of the regulators.[636] Addressing these shortcomings is crucial for the EIA Decree to fulfil its mandate of regulating and controlling environmental degradation arising from tobacco industry operations.

4.6 National Tobacco Control Committee and the Tobacco Control Fund

The National Tobacco Control Committee (Committee) was established by the National Tobacco Control Act 2015 (herein referred to as the Act).[637] Section 5(a)-(i) of the Act stipulates the functions of the Committee, including to advise and make recommendations to the Minister of Health on the development and implementation of tobacco control policies, strategies, plans, and projects in accordance with the WHO Framework Convention for Tobacco Control; to administer and manage the Tobacco Control Fund; to exercise control over the dispensation of licences to manufacture, import or distribute tobacco products; to propose regulations for the approval of the Minister of Health; to coordinate, support or fund public tobacco cessation or sensitisation programmes on crucial provision of the Act; to develop strategies for the counselling and rehabilitation of smokers; and to collaborate with the Federal Ministry

[631] *Ibid.* at p655.
[632] F Olokesusi (note 625) 170.
[633] JO Kakonge & AM Immevbore, 'Managing the EIA Process' (1993) 13 Environmental Impact Assessment Review 299, 300. See also R Adomokai (note 626).
[634] O Oluduro, *Oil Exploitation and Human Rights Violations In Nigeria's Oil Producing Communities* (Intersentia 2014) 159.
[635] *Ibid.* p158.
[636] ZA Elum & ors, 'Oil Exploitation and its Socioeconomic Effects on the Niger Delta Region of Nigeria' (2016) 23(13) Environmental Science and Pollution Research 12880 – 12889.
[637] s2 NTCA 2015.

of Agriculture and other Agencies in advocating alternative crops to tobacco farmers. The Committee is headed by the Chairperson or Chief Executive appointed by the Federal Minister of Health. The Committee also consists of representatives of other agencies specified under the Act, including the Standards Organisation of Nigeria (SON) and the Manufacturers Association of Nigeria (MAN). The Committee and its members should always maintain its independence from the tobacco industry as provided under the Act;[638] however, the tobacco industry is a member of the Committee through its membership with MAN,[639] contravening Article 5.3 of the WHO FCTC.

The Tobacco Control Fund (referred to as the Fund) was established under the Act.[640] The fund is administered and managed by the Committee. It consists of the Federal Government budgetary allocation;[641]gifts, donations, and testamentary dispositions, consistent with the objectives of the Act;[642] and government subventions to meet the objectives of the Act.[643] The purpose of the Fund is to support projects that contribute to the national tobacco control strategy.

Aside from the Tobacco Control Fund, Nigeria can access funds and other resources through international tobacco control charities. As more countries adopt stronger measures to reduce tobacco prevalence, the tobacco industry is challenging these measures, such as through international trade and investment agreements. In response to this growing threat from the tobacco industry, global charities are providing resources to assist nations in areas such as human and financial resources. For instance, Bloomberg Philanthropies and the Bill and Melinda Gates Foundation have launched the creation of the Anti-Tobacco Trade Litigation Fund.[644] The fund supports low- and middle-income countries that are in arbitration or in litigation with the transnational tobacco corporations.[645] Governments that have their tobacco control laws challenged in international trade tribunals are eligible to access the fund

[638] s2(2), s27 & s28.
[639] CO Egbe *et al.*, 'Framework Convention on Tobacco Control Implementation in Nigeria: Lessons for Low- and Middle-Income Countries' (2019) 21(8) Nicotine and Tobacco Research 1122.
[640] s8 NTCA 2015.
[641] s8(a).
[642] s8(c).
[643] s8(b).
[644] J Dreaper, 'New global funds to help countries defend tobacco control' (BBC NEWS, 18 March 2015) <http://www.bbc.co.uk/news/health-31944575> accessed 12 Oct 2016.
[645] *Ibid.*

for expenses directly related to the conduct of the litigation, such as legal costs, expert fees and other litigation-related costs.[646] Technical assistance is also available to governments or their representatives threatened by the tobacco companies or to government that are moving ahead with strong legislation that might prompt trade-based litigation. This assistance includes consultation with lawyers and other experts, as well as access to guides and manuals that summarise vital trade issues.[647] The assistance from such global charities could advance the course of the Committee's tobacco control objectives.

It is recommended that the Committee establish a framework to evaluate supported projects and provide public access to all the necessary framework documents, information, and tools. It should also provide details of approved projects, the organisations behind them, the level of funding, and the publication of the Fund's annual report. In addition, the Committee should be adequately funded to enable it to advance its objectives. Another way of funding the tobacco regulatory agencies and projects is to increase taxation on tobacco products; a percentage of the tax income could be dedicated to the Committee and the Fund. Research suggests that the surge in the price of tobacco due to tax rise could reduce tobacco prevalence: for every 10% increase in the retail price of tobacco, consumption is reduced by about 8% in low- and middle-income countries, considering variables associated with income, age, and other demographic factors.[648]

4.7 Ministry of Health and the Tobacco Control Unit

The Federal Ministry of Health is tasked with reducing the risk associated with tobacco production and tobacco use through policy interventions, legislations, and regulations.[649] The Minister of Health is the head of the Health Ministry. Apart from appointing the Head of the Committee, the Minister also appoints a representative from any tobacco control civil society organisation as one of the prescribed members

[646] *Ibid.*
[647] *Ibid.*
[648] WHO (note 381) 27.
[649] F Muhammad *et al.,* 'Major public health problems in Nigeria: a review' (2017) 7(1) South East Asia Journal of Public Health 6-11.

of the Committee.[650] The Minister is authorised to remove a member of the Committee for reasons stipulated under section 3 of the NTCA. Importantly, the Committee advises the Minister on tobacco policies and strategies, and any regulations made by the Committee has to be approved by the Minister.[651] The Minister is authorised to generate regulations under section 39 of the Act; however, under sub-section 2, any regulation by the Minister shall be subject to the approval of both houses of the National Assembly, creating a cumbersome process for the Minister to initiate regulations. For monitoring and compliance purposes, the Ministry can demand an annual report from Tobacco Corporations in a prescribed format, content and frequency published in the Official Gazette.[652] The Ministry is also charged with the portfolio to establish an appropriate mechanism for monitoring, evaluating, inspecting, and enforcing the provisions of the Act.[653] Finally, the Minister can expand the list of public places where smoking is prohibited.[654]

The Tobacco Control Unit (the Unit) is under the remit of the Ministry of Health. It is charged with the responsibility of executing the plans and projects of the Committee and the Ministry.[655] The Unit, comprising of a Chairperson and other staff, is appointed by the Minister.[656] It has various functions stipulated under the NTCA, including to implement the decisions of the Committee; to coordinate the activities of the Ministries, Departments and Agencies responsible for the implementation of the Act; to collate and furnish all required annual or other periodical reports; to coordinate all enforcement activities under the Act; and to execute other duties and responsibilities assigned by the Minister or the Committee.[657]

Again, the recommendations proffered in section 4.7—National Tobacco Control Committee and Fund—are applicable under this section.

[650] s2(f) NTCA 2015.
[651] s5.
[652] s13.
[653] s40.
[654] s13 2nd Schedule.
[655] s6(1).
[656] s6(2).
[657] *Ibid.*

Standards Organisation of Nigeria (SON) and Nigerian Industrial Standard (NIS).

The Standard Organisation of Nigeria (SON) is a Federal Agency instituted to organise tests and ensure the compliance of designated and approved standards; to undertake investigations as necessary into the quality of facilities, materials and products in Nigeria, and to establish a quality assurance system including certification of factories, products and laboratories; to ensure reference standards for calibration and verification of measures and measuring instruments; to compile an inventory of products requiring standardisation; to compile Nigerian standards specifications; undertake investigations as necessary into the quality of facilities, materials and products in Nigeria; among other functions.[658] A person who manufactures or imports tobacco or tobacco products is prescribed by the Act to submit reports on tobacco or tobacco product contents and emissions as may be stipulated by SON.[659] Such standards are detailed under the NIS report approved by SON.

The Nigerian Industrial Standard (NIS) is the prefix given to all standards elaborated as Nigerian standards. The NIS specifies a standard for tobacco and tobacco products under the direction of the technical committee on tobacco and tobacco products.[660] NIS covers packaging and labelling, quality requirements such as level of ingredients, reference sampling, and test methods for tobacco products imported, distributed, manufactured for local sale or marketed in Nigeria.[661] Any person engaged in the production of a tobacco product using ingredients at levels above the recommended standard shall be liable to sanctions – fine or imprisonment – under the Act.[662]

Members of the technical committee include representatives of the tobacco industry.[663] However, a significant observation is that the tobacco industry participated in framing the "2014 Standard for Tobacco and Tobacco Products" policy. The Standard Organisation of Nigeria justified the involvement of the tobacco industry because the policy is expected to guide the manufacturing activities of the tobacco

[658] SON, 'About Us' (SON, unknown date) <http://son.gov.ng/> accessed 14 Oct 2016.
[659] s18(1) NTCA 2015.
[660] SON, 'NIS: Standard for tobacco and tobacco products' (SON, 2014) <http://www.tobaccocontrollaws.org/files/live/Nigeria/Nigeria%20-%20NIS%204632014%20-%20national.pdf> accessed 15 October 2016.
[661] *ibid.*
[662] s24 NTCA 2015; *Ibid.* p9.
[663] The NIS 2014 report (NIS 46:2014) has 7 representatives from British American Tobacco, as an example.

companies.[664] This arrangement runs contrary to s27 and s28 of the NTCA and article 5.3 of WHO FCTC. Guiding Principle 1 of the FCTC states,

> there is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests and, considering tobacco industry produces a product scientifically proven to be addictive, to cause disease, death and a variety of social ills, it is pertinent under the Guiding Principle, therefore, authorities should protect the formulation and implementation of public health policies for tobacco control from the tobacco industry to the 'greatest extent possible.

It is recommended that for the success of tobacco control, there should be a strong political will for tobacco control agencies, including support for the Ministry of Health and the Committee, because the Act delegates significant regulatory functions to them. Under the legislative framework of the Act, health authorities (and not legislatures) are primarily responsible for the designing, regulating, and implementation of tobacco control policies. Regulations initiated by the Minister of Health and health authorities should, therefore, not be subjected to the approval of the National legislative body.

4.8 Conclusion

This chapter illustrates that the legislative instruments highlighted in this chapter could enable tobacco control efforts. This is in accordance with Article 18 of the WHO FCTC, which requires members to protect the environment and the health of persons from the impact of tobacco cultivation and manufacture. After drawing insights from different jurisdictions, the chapter underscores the relevance of domestic law in controlling the activities of transnational tobacco corporations. However, the examination of these laws and regulatory bodies revealed that the law and the different government agencies are inadequately equipped in protecting the environment and regulating the

[664] O Oladepo *et al.,* 'Analysis of tobacco control policies in Nigeria: historical development and application of multi-sectoral action' (2018) 18(supplement 1) (959) BMC Public Health 78.

tobacco industry, partly due to poor legislative drafting, incommensurate punitive measures, the lack of enforcement, among other inadequacies.

The chapter went further to identify the areas of the Nigerian law that needed reform to deal adequately with tobacco control. The findings and recommendations identified under this chapter to enable tobacco control and inform policy are:

a) Delays in issuing regulations - The Ministry of Health receives recommendations from the Tobacco Control Committee, forming the basis for regulations to address tobacco control policies. To date, no regulations have been issued for the implementation of the Tobacco Control Act. This is further compounded by the fact that any regulation must receive approval from both Houses of the National Assembly of Nigeria.[665] It presents ongoing challenges for the Ministry and delays full incorporation of the WHO FCTC into the Nigerian law and regulatory processes, allowing TTCs to proceed without a clear regulatory framework and to influence tobacco control policies. Bottlenecks delaying the pronouncement of regulations need to be addressed. There is also a wider issue on the length of time needed for regulatory approval within both Houses of Assembly.

b) NESREA Act and the adoption of article 18 WHO FCTC — The WHO FCTC requests members to protect the environment and the health of persons in relation to tobacco control and manufacture. The NESREA Act addresses the issue of environmental governance in Nigeria with specific regulations for the Tobacco industry; however, there is a perceived lack of a far-reaching effect. Challenges on budgetary constraint, lack of public awareness and education, weak enforcement and communication with relevant stakeholders, all aim to generate a weak legislation. Other tobacco control regulatory bodies and regulations are also affected by the same gaps associated with the NESREA.

c) Voluntary initiatives on the part of the tobacco industry have a role to play in minimising pollution through tobacco farming, where pesticides are actively used. In this case, pollution of groundwater supplies and biodiversity around tobacco growing areas have the potential to end up in the food chain, having a detrimental effect on public health. This may require the agency, NESREA, to seek alternative

[665] Section 39 NTCA 2015.

methods towards achieving its goals of environmental protection, rather than using enforcement through its regulatory authority. One recommended method is for TTCs to drive change over their supply chain, such as educating tobacco farmers on the use of pesticides, providing training on the rules and procedures, and creating a sense of awareness and responsibility for the environment.

d) The existing laws and regulations mentioned in this chapter could serve as an auxiliary benefit to the primary tobacco legislation, in accordance with Article 19(1) WHO FCTC: ‘For tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate’.

e) Even though corporations can be held accountable in civil actions for violations through tort claims, this area is, however, underutilised. During the time of research, there appears to be no conclusive reported case law on TTCs in Nigeria. Further research into this underdeveloped area is therefore recommended.

Chapter Five. Anti-Corruption and Tobacco Regulation.

5.1 Introduction

Corruption is one of the significant challenges in regulating TTCs in Nigeria.[666] Research suggests that corruption has an impact on the implementation or enforcement of tobacco control policies.[667] This chapter explores the relationship between corruption and the adequacy of tobacco regulatory policies in Nigeria. To this end, it examines the impact of corruption on the tobacco industry, and Nigeria's effort in combatting corruption. It also examines the activities of TTCs that undermine their effort in keeping to their voluntary contract of corporate social responsibility. Finally, the chapter will discuss efforts of the international community in restraining corruption and the challenges faced thereof.

5.2 Corruption and the Search for Scope.

There is no accepted definition of what constitutes a corrupt act. The understanding and interpretation of corruption vary with time, location, and discipline.[668] To an extent, this may be attributed to what is included under the term and the public perceptions on corruption that differs considerably from one country and culture to another. In Nigeria, for instance, the leading anti-corruption Act, the Corrupt Practices Act 2000, did not define corruption, instead it states what corruption should include: 'bribery, fraud and other related offences'.[669] According to Transparency International (TI), acts such as bribery, embezzlement, money laundering, extortion, amongst others, constitute the term corruption.[670] Furthermore,

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[666] World Health Organization, 'Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization', Report of the Committee of Experts on Tobacco Industry Documents, July 2000; DK Sy *et al.*(eds), *Anti-corruption and Tobacco Control*, (Southeast Asia Tobacco Control Alliance, Bangkok, Nov 2017).

[667] DK Sy, *Ibid.;* see also, Ilze Bogdanovica, 'Tobacco control in the European Union' (Doctoral thesis, University of Nottingham 2012).

[668] S Rose-Ackerman & BJ Palifka, *Corruption and Government: Causes, Consequences, and Reform* (2nd edn, CUP 2016) 7.

[669] Section 1, The Corrupt Practices and other Related Offences Act 2000, Act No 5, Laws of the Federal Republic of Nigeria.

[670] Transparency International, 'Glossary: corruption offences' (Transparency International, 2016) <http://www.transparency.org/glossary/> accessed 30 Oct 2016; See also s8-s25 of The Corrupt Practices and

the intricacy of this 'modern phenomenon',[671] underpinned by the complexity and accuracy of measuring corruption obtained from self-survey,[672] only lends itself to an ambiguous definition. Corruption comprises of a wide range of behaviours whose economic and political effects vary greatly, with no accepted vocabulary for distinguishing between its different forms. The attempts of individual authors and institutions to provide workable definitions of corruption within the context of their understanding of what constitutes a corrupt behaviour have also been an arduous task.[673] Despite the array of controversies, corruption has been defined and classified in different forms and sub-forms, as different authors and agencies have attempted to operationalise the term for practical analyses and actions.[674] For instance, TI defines corruption as 'the abuse of entrusted power for private gain'.[675] Arguably, this definition is not without its flaw because power that is not entrusted seems to fall outside the confines of corruption in the definition.[676] Another definition by the World Bank President, Jim Yong Kim, is that corruption is simply 'stealing from the poor'.[677] A critic of this definition will only fall under the realm of semantics since the underlying meaning is the economic multiplier effect. Hope's panoptic definition of corruption, however, appears to capture the major elements of the concept:

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other Related Offences Act 2000, Act No.5 Laws of the FRN. See also Chapter 3, UN Convention Against Corruption, criminalising bribery, embezzlement, money laundry, trading in influence, etc.

[671] Corruption as a 'modern phenomenal' see: Francis Fukuyama, ' What is Corruption' in PM's Office, 10 Downing Street, *Against Corruption: a collection of essays* (Policy paper, 12 May 2016) <https://www.gov.uk/government/publications/against-corruption-a-collection-of-essays/against-corruption-a-collection-of-essays#paul-collier-how-to-change-cultures-of-corruption> accessed 28 October 2016.

[672] A Kraay and P Murrel, 'Misunderestimating Corruption', (2016) 98(3) Review of Economics & Statistics 455.

[673] *Ibid.*

[674] For the classification of corruption as grand, petty and political, depending on the amounts of money lost and the sector where it occurs see, TI (note 670). Corruption as a deviation from public interest see, S Morris, *Corruption and Politics in Contemporary Mexico* (Uni of Alabama Press 1991); for the conceptualisation of corruption as a deviation from moral standards see, R Brooks, 'The Nature of Political Corruption' in J Arnold (ed), *Political Corruption: Reading in Comparative Analysis* (Holt, Reinhart & Winston 1970) 56-61; For Corruption apprised from a legalistic and moral discourse see, M Khan, 'A Typology of Corruption Transaction in Developing Countries' (1996) 8(5) IDS Bulletin 12; and JS Nye, 'Corruption and Political Development: A case-benefit analysis' (1967) 61(2) American Political Science Review 416; respectively.

[675] TI (note 670).

[676] Examples of military corruption see the following articles: Julius O Ihonvbere, 'Are Things Falling Apart? The Military and the Crisis of Democratisation in Nigeria' (1996) 34(2) The Journal of Modern African Studies 193; Okori Uneke, 'Corruption in Africa South of the Sahara: bureaucratic facilitator or handicap to development?' (2010) 3(6) Journal of Pan African Studies 111; Zafarullah Habib and MY Akhter, 'Military rule, civilianisation and electoral Corruption: Pakistan and Bangladesh in perspective' (2001) 25(1) Asian Studies Review 73-94.

[677] Jim Yong Kim, World Bank Group President, 'Tackling Corruption to Create a More Just and Prosperous World' (Speech at the Anti-Corruption Summit, London, 12 May 2016).

'it involves the behaviour on the part of officeholders or employees in the public and private sector, in which they improperly and unlawfully advance their private interests of any kind and/or those of others contrary to the interest of the office or position they occupy or otherwise enrich themselves and/or others or induce others to do so, by misusing the position in which they are placed'. [678]

Corruption, generally, is the improper and usually unlawful conduct intended to secure a benefit for oneself or another.[679]

The issue with corruption, to a considerable extent, is not with the meaning or conceptualisation but with the scope; that is, the boundary of what should be encompassed under the term − corrupt practice. For instance, 'facilitation payments' according to TI, is a form of bribery and should be prohibited.[680] Likewise, the International Chambers of Commerce (ICC)[681] describes facilitation payments as 'unofficial' and 'improper'. In contrast, the US Foreign Corrupt Practises Act 1977, as amended, did not prohibit facilitation payment, rather it created an exemption by recognising facilitation payments to foreign officials as payment to expedite or secure the performance of routine government action by a foreign official.[682] No such exemption exists under the UK Bribery Act, 2010 (UKBA) because facilitation payment perpetuates an existing 'culture' of bribery and have the potential to be abused.[683] Scope and interpretation of corruption may also differ in relation with the form of government. That is, corruption in a democratic society may differ in scope and interpretation than in a monarchical regime.[684] This issue was evidenced between the United Kingdom and the Kingdom of Saudi Arabia in *Corner House Research v Director of the Serious Fraud Office (SFO).*[685] In the case, the SFO and police officers carried out an investigation into allegations of bribery by BAE Systems plc (BAE),

[678] KR Hope snr, *Corruption and Governance in Africa: Swaziland, Kenya, Nigeria* (Springer Nature 2017) 2.
[679] Corruption as defined by the Encyclopaedia Britannica.
[680] TI (Note 670).
[681] Art 6, ICC Rules on Combating Corruption.
[682] §78dd-1(b), The US Corrupt Practices Act 1977.
[683] MoJ, UKBA Guidance, para 45, p18.
[684] Under this paragraph, the example used is the French Monarch, and the period of 'gift giving' is from the 15th – 17th Century France.
[685] *Corner House Research v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin); [2008] NPC 42.

concerning military aircraft contracts with the Kingdom of Saudi Arabia. According to the UK Attorney General's evidence, BAE has always contended that any payments were nothing short of 'lawful commission' *approved* by the Kingdom of Saudi Arabia,[686]and the continued investigation into the bribery allegations would result to an 'offence caused to the Saudi Royal Family'.[687] This case goes to show how corruption is perceived differently by independent nations.

In addition, the exclusion of corrupt practises from certain professions or for the benefit of public interest produces a condition for inconsistency in scope. Section 13 UKBA, for instance, creates a defence for bribery offences where the person charged proves that the conduct was necessary for the proper excise of an intelligence service, or by the armed forces when engaged on active service. Section 13(6)(c) UKBA defines active service as the military occupation of a foreign country or territory. In *R v Director of the Serious Fraud Office*[688], the necessity to balance the need to maintain the rule of law against the broader public interest was at the forefront of the case. It was considered that the continued investigation of the alleged bribery would, consequentially, risk grave harm to the UK's national and international security.[689] In the case, the Prime Minister referred to the security threat as a 'higher consideration',[690] attributing greater importance to the security threat over corruption due to public interest.

Furthermore, an emotive case may not be a justified corruption case. As an illustration, if P and her children were on holiday abroad, and P pays money to ensure that her sick child receives treatment which, were the payment not made, the child would not receive treatment, Should P then be prosecuted for paying a bribe? As per Collins J. in *Daraydan Holdings Ltd v Solland International Ltd*, bribery 'corrupts not only the recipient but also the giver of the bribe'.[691] If left undefined, P would be guilty of an offence; however, the decision by the crown prosecution service or similar service in other jurisdictions not to prosecute such act could be regarded as an equitable attempt to redress the law. A real-life example of 'P' could be in Mexico

[686] *Ibid* [47].
[687] *Ibid* [34].
[688] *R v Director of the Serious Fraud Office* [2008] 4 All England Law Reports 927.
[689] *Ibid* [22].
[690] *Ibid* [18].
[691] *Daraydan Holdings Ltd v Solland International Ltd* [2005] Chancery 119 [1].

where a family spends on average 14% of its income on bribes for basic services to which they are already entitled to, such as water, medicine, and education.[692] These are some of the grey areas illustrating the complexity of corruption.

5.3 Anti-Corruption, Unethical Practises, and TTCs.

> [T]he actions of tobacco companies in their participation and interference in the political and economic systems of developing nations, and widespread cases of corruption and manipulation, significantly impede the development of equitable health and economic infrastructure.[693]

The multiple nationalities of TTCs create ambiguities in the area of accountability and transparency by actions of some host states to relax business rules in order to encourage foreign direct investment.[694] To combat this issue, British American Tobacco (BAT), for instance, have adopted a unilateral 'standards of business conduct (SoBC)' for all subsidiaries or companies under the BAT group, except where the SoBC conflicts with local laws, then the local laws take precedence.[695] Under the SoBC, whistleblowing is encouraged against unlawful acts at work, including bribery, improper unauthorised payment, facilitation payment, 'turning a blind eye' or failing to report any improper payment or other inducements.[696] Despite these measures, there have been damaging revelations on the conduct of TTCs.

In *United States of America v. Philip Morris et al.*[697], damaging unethical activities of TTCs were revealed. The US Department of Justice (DoJ) brought the

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[692]Forward given by Ex PM David Cameron, *The policy paper against corruption: a collection of essays* (note 671).

[693] C Dresler et al., 'Assessment of short reports using a human rights-based approach to tobacco control to the Committee on Economics, Cultural and Social Rights' (2018) 27(4) Tobacco Control 385,388; SO Nwhator, 'Nigeria's costly complacency and the global tobacco epidemic' (2012) 33(1) Journal of Public Health Policy 16.

[694] JR Branston and AB Gilmore, 'The failure of the UK to tax adequately tobacco company profits' (2020) 42(1) Journal of Public Health 69; AB Gilmore and M McKee, 'Exploring the impact of foreign direct investment on tobacco consumption in the former Soviet Union' (2005) 14 Tobacco Control 13.

[695] BAT, 'Standards of Business Conducts' available at <http://www.batnigeria.com/group/sites/bat_7ykm7r.nsf/vwPagesWebLive/DO7YLFTQ/$FILE/medMD9PFFPW.pdf?openelement> accessed 13 May 2017.

[696] *Ibid.*

[697] *United States v. Philip Morris USA Inc*., 9F. Supp. 2d 1 (D.D.Cir. 2006); Civil Action No. 99-CV-2496 (2017).

claim under the Racketeer Influenced and Corrupt Organisations Act (RICO). The DoJ sued on the grounds that the tobacco companies had engaged in a decades-long conspiracy to (1) mislead the public about the risks of smoking; (2) mislead the public about the danger of second-hand smoke; (3) misrepresent the addictiveness of nicotine; (4) manipulate the nicotine delivery of cigarettes; (5) deceptively market cigarettes characterised as "light" or "low tar," while knowing that those cigarettes were at least as hazardous as full flavoured cigarettes; (6) targeting the youth market, and (7) not producing safer cigarettes. The facts of the case suggest that the defendants knew from the 1960s that smoking causes serious adverse health effects. In spite of their internal knowledge, the defendants continued from 1964 onwards to falsely deny and distort information and research outcomes of health effects due to the fear of litigation.[698] Despite increasing consensus in the scientific community that smoking caused lung cancer and other diseases, the defendants embarked on a 'campaign of proactive and reactive responses to scientific evidence that was designed to mislead the public about the health consequences of smoking'.[699] Again, the Court found that the '[d]efendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction' necessary to ensure commercial success,[700] but the defendants continued to make false and misleading public statements regarding the control of nicotine content and delivery.[701] With regard to passive smoking, the court found that the tobacco companies implemented a broad strategy to undermine the evidence that passive smoke is a health hazard,[702] even though research funded by tobacco companies provided evidence to the contrary. The tobacco companies made numerous public statements denying the connection between second-hand smoke and disease in non-smokers, and the court found that the conduct is still ongoing.[703] In addition, the court discovered that the tobacco companies were involved in the suppression, concealment, destruction of material evidence, and the improper use of lawyer-client privileges in restricting disclosures.[704] In sum, Judge Gladys Kessler declared that the

[698] *Ibid.* Pages 279-93.
[699] *Ibid*. at 187-88.
[700] *Ibid* at p309.
[701] *Ibid*. at pages 515-16 & 636.
[702] *Ibid* at p693; see also UK Health Select Committee, *Memorandum by British American Tobacco* (HC 1999-2000 TB-28).
[703] *Ibid.*
[704] *USA* (note 697) [4034].

tobacco companies 'marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs'[705].

There have been other strings of allegations and unethical behaviour levied against the TTCs.[706] The BAT whistleblower allegation, for example, involves an ex-employee of BAT Kenya, Paul Hopkins, who revealed he had facilitated venal acts for BAT, including bribery, because it was explained to him that "in Africa, that's the cost of doing business". He further disclosed that all the ethical statements proclaimed by BAT were mere 'PR'.[707] Hopkins exposé includes several allegations: an alleged bribe to a local MP in Uganda to amend a report against a rival company; an alleged bribe to representatives of Burundi, Rwanda, and the Comoros Islands to the WHO FCTC to undermine its efforts; and an alleged bribe to an MP in Uganda to undermine the country's anti-tobacco control laws, among other allegations;[708] however, BAT denies any involvement in these allegations.

In *United States of America v. Universal Leaf Tabacos*[709], court documents disclosed the Brazilian defendant, a subsidiary of Universal Corporation, a global tobacco leaf supplier to TTCs and headquartered in the US, pleaded guilty of bribing foreign officials and falsifying accounting records, among other criminal acts. Universal and Universal Brazil entered into a non-prosecution plea agreement with the US Department of Justice, including a $4.4 million criminal fine, and the retainment of an independent compliance monitor for a minimum of three years to oversee the implementation of an anti-bribery and an anti-corruption compliance program.[710] Similarly, two subsidiaries of Alliance One International, a global tobacco leaf

[705] *United States of America v. Philip Morris et al.,* (note 697)4.
[706] AB Gilmore *et al., '*Exposing and addressing tobacco industry conduct in low-and middle-income countries' (2015) 385(9972) Lancet 1029-1043; M Bigwanto, *Tobacco industry interference undermined tobacco tax policy in Indonesia* (2019 SEATCA); R Hiscock *et al.*, 'Tobacco industry strategies undermine government tax policy: evidence from commercial data' (2018) 27 Tobacco Control 488-497.
[707] R Bilton, 'The secret bribes of big tobacco' (BBC Panorama, 30 November 2015) <http://www.bbc.co.uk/news/business-34964603> accessed 13 May 2017.
[708] *Ibid*.
[709] *United States of America v. Universal Leaf Tabacos* Criminal Case No. 3:10-cr-00225 REP, Document 1, Filed 08/06/10 (USA). The defendant was charged under the Foreign Corrupt Practices Act violation (15 U.S.C § 78dd-3) and Conspiracy to commit offense or to defraud United States (18 U.S. Code § 371).
[710] The US Department of Justice (DoJ), 'Alliance One International Inc and Universal Corporation resolve related FCPA matters involving bribes paid to foreign government official' (DOJ, 6 August 2010) <https://www.justice.gov/opa/pr/alliance-one-international-inc-and-universal-corporation-resolve-related-fcpa-matters> accessed 20 May 2017.

merchant, pleaded guilty in the US to the bribery of foreign officials, among other unethical practices.[711]

Transnational Tobacco Corporations have been accused of complicity in tobacco smuggling.[712] The practice of flooding low-tax foreign markets with more tobacco than they are capable of consuming has sparked concerns that much of the product can find its way back into the highly taxed countries, thus, circumventing taxation and increasing sales profit for TTCs. For example, during the early 1990s, the United States imposed a much lower tax on cigarettes and cigarette tobacco than Canada. To avoid paying high tax in Canada, the cigarettes manufactured in Canada were labelled for export to the United States. On reaching the United States, the products were then smuggled back and sold in Canada.[713] The difference was so profound that in some areas, a Canadian cigarette was sold for a price three times higher than the price across the border.[714] Imperial Tobacco Canada (a subsidiary of BAT) and Rothmans Inc. pleaded guilty to aiding smuggling during the early 1990s and were both fined a combined sum of over one billion Canadian dollars.[715]

In the UK, HM Revenue and Customs fined BAT for its complicity in tobacco smuggling, reported in the 2017 case between British-*American Tobacco (Holdings) Ltd v The Commissioners for HM's Revenue & Customs.*[716] The Tribunal found BAT in breach of its duties to stop facilitate tobacco smuggling under section 7A (1) of the Tobacco Product Duty Act 1979.[717] According to the Tribunal's document, BAT is a member of a group of companies that manufactures tobacco products, including a brand of hand-rolling tobacco (HRT) called Cutters Choice (CC). CC is manufactured by a Dutch BAT group company in the Netherlands and then exported directly to Belgium upon its purchase by a Belgian BAT group company. In fact, the Dutch BAT

[711] US DoJ, *ibid.*
[712] E Legresley *et al*., 'British American Tobacco and the "insidious impact of illicit trade" in cigarettes across Africa' (2008) 17(5) Tobacco Control 339; V Skafida *et al.* 'Change in tobacco excise policy in Bulgaria: the role of tobacco industry lobbying and smuggling,' (2014) 23 Tobacco Control e75-e84.
[713] M Beare, 'Organized corporate criminality – Tobacco smuggling between Canada and the US' (2002) 37(3) Crime, Law & Social Change 225-243.
[714] *Ibid.*
[715] Marina Walker Guevara, 'The World's Most Smuggled Legal Substance', (2008) in DE Kaplan et al. (eds) *Tobacco Underground: the global trade in smuggled cigarettes* (The Center for Public Integrity 2009) 8; David Ljunggren, 'Canada Tobacco Firms Admit Aiding Tobacco Smuggling' (Reuters, 31 July 2008).
[716] British-*American Tobacco (Holdings) Ltd v The Commissioners for HM's Revenue & Customs* [2017] UKFTT 190 (TC).
[717] *Ibid.* [604].

entity sells the tobacco to a UK BAT company which then sells it to the Belgian BAT group company, but the goods move directly from the Netherlands to Belgium. The Belgian BAT company sells the product to independent Belgian wholesalers; this is the first supply outside the BAT group. The Belgian wholesalers then sold the tobacco to Belgian retailers who in turn sold it to consumers.[718]

HRT, as well as CC, is liable to excise duty. All EU Member States are obliged to charge a minimum rate of excise duty on HRT, but some Member States have higher excise rates than others. The rate of excise duty in the UK is significantly higher than in Belgium. That difference created an opportunity for legitimate wholesale and retail businesses in Belgium who purchase HRT (such as CC and competitor products manufactured by or for other Tobacco Manufacturers) for sale in Belgium. The lower rate of excise duty on HRT in Belgium, in turn, created a demand from consumers in the other Member States where rates of excise duty are higher, such as the UK, France and the Netherlands.[719] By supplying excess HRT into the Belgium market in an amount above legitimate demand, the Tribunal agreed it is 'more likely that BAT's products would be resupplied to persons who were likely to smuggle'.[720] Further, the Tribunal rejected BAT's submission that 'little and often' smuggling was outside the scope of its statutory duty contained in section 7A (1)',[721] despite their Standard of Business Conduct (SoBC)[722] and the Memorandum of Understanding (MoU) between BAT and HMRC stating otherwise.[723]

The complicity of TTCs with cigarette smuggling takes place globally, including Europe, China, South Africa, Latin America and Vietnam, sometimes in alliance with criminal gangs.[724] Internal correspondence from the 'truth tobacco industry

[718] *Ibid*. [24].
[719] *Ibid*. [26].
[720] *Ibid.* [596].
[721] *Ibid.* [416].
[722] BAT SoBC (note 695) 23 states, 'we must do everything we can to stop it'; 'it' is about the illegal trade in smuggled or counterfeit products. 'We collaborate pro-actively with authorities in any investigation of illicit trade'.
[723] Tribunal rulings in *BAT v HMRC* (note *716*) [240] – [267] reveals the MoU between HMRC and BAT. In Clause 1.5 of the MoU, for instance, BAT recognised the need to assist HMRC in its efforts to combat all forms of the illicit trade in tobacco products [253]; Clause 2.5 provided that if HMRC believed that there was a serious problem concerning illicit trade in BAT's products entering the UK, HMRC and BAT were to meet and discuss as soon as reasonably possible any appropriate measures [257].
[724] William Marsden *et al.*, 'Tobacco Companies Linked to Criminal Organisations in Lucrative Cigarette Smuggling' (The International Consortium of Investigative Journalists, 3 March 2001); Marina Walker Guevara,

documents' suggests an established vocabulary and a calculated system to manage the illegal cigarette trade by some TTCs. The revelation indicates legal import was referred to as "DP" (Duty Paid) while illegal import was known as "DNP" (duty not paid), "transit", or "GT" (general trade) shipments.[725] Euphemisms for smuggled cigarettes also include "the parallel market", "second channel" and "border trade".[726] In a statement made by Kenneth Clarke when he was the deputy chairman of BAT, he blamed both the competition and the government for making it necessary that his company, BAT, partnered with smugglers:

> *Where any government is unwilling to act or their efforts are unsuccessful, we act, completely within the law, on the basis that our brands will be available alongside those of our competitors in the smuggled as well as the legitimate market…*[727]

Africa is vulnerable to the smuggling activities of TTCs,[728] with Nigeria serving as a strategic 'key market';[729] Nigeria is one of the main transit and transit destinations for illicit tobacco products.[730] The revelation of the UK Select Committee on Health in 2002 unmasked the involvement of TTCs in the smuggling trade across Africa, particularly in Nigeria.[731] The documentary evidence presented to the health committee was taken entirely from BAT files made available to the public as part of the tobacco settlement agreement. The files exposed the planning, organisation, and

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'The World's Most Smuggled Legal Substance', (2008) in DE Kaplan *et al.* (eds) *Tobacco Underground: the global trade in smuggled cigarettes* (The Center for Public Integrity 2009).

[725] W Marsden, *ibid.* See also Maud Beelman *et al.*, "Major Tobacco Multinational Implicated In Cigarette Smuggling, Tax evasion, p2 cited in M Beare, 'Organized corporate criminality – Tobacco smuggling between Canada and the US' (2002) 37(3) Crime, Law & Social Change 225, 236. See also, memo by Duncan Campbell (TB 51A), 'Smuggling in Africa by British American Tobacco plc, obstruction of access to evidence', House of Commons select committee on Health (note 728).

[726] W Marsden, *Ibid.; See also* M Beelman *et al.,* 'how billions of cigarettes end up on black markets' (Int'l Consortium of Investigative Journalists, 31 Jan 2000) <*https://www.icij.org/project/big-tobacco-smuggling*> accessed 23 May 2017.

[727] Kevin Maguire, 'Clarke admits BAT link to smuggling', (*the Guardian.com*, 3 Feb 2000). <https://www.theguardian.com/uk/2000/feb/03/kevinmaguire> accessed 23 May 2017.

[728] Health Select Committee, *smuggling in Africa by British American Tobacco plc: obstruction of access to evidence* (HC 1999-00 TB 51A).

[729] BAT, 'Unit 1 Business Plan 1992 – 1996', available from the Truth Tobacco Industry Documents <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=klwv0194> p3, accessed 23 May 2017.

[730] See WHO FCTC, 'The Protocol to Eliminate Illicit Trade in Tobacco Products: Questions and Answers' (WHO, 2019) 2 <https://www.who.int/fctc/protocol/faq/en/index1.html> accessed 13 November 2019.

[731] Health Select Committee (note 728).

management of BAT smuggling in Africa, including Nigeria, Cameroons, and other countries in Francophone Africa.[732] "Unit 1" and "Unit 2" were the code given to the departments responsible for organising this activity. These “Units” were based at the then BATCo UK headquarters in Staines, Middlesex. According to the files, cigarettes smuggled to these African countries were manufactured in Southampton and then shipped to Antwerp or Marseille. A Liechtenstein based BAT agent called Soropex then forwarded the containers on to a network of smugglers using a variety of routes, including Benin Republic.[733] Documents further revealed that even if legal imports were feasible, ‘GT shipments will remain the mainstay of our activity’.[734] Another damaging revelation was the meeting between BATUKE and Sorepex executives that took place on the 1st of July 1987 at BATUKE[735] headquarters in the UK. An internal BAT document revealed the content of the discussion on Africa sales and suggested smuggling into Nigeria:

> The discussion was held concerning direct imports to Nigeria through Mr Adji who . . . would disguise the cigarette importation by calling the shipment something else, e.g. matches[736]

The plan to conceal tobacco products and falsify documents on the origin of stock were made known to BAT. The revelation demonstrates how TTCs recruited intermediaries, as distributors, to enable the smuggling trade. The distributors purchased cigarettes from BATUKE then supplied them to ‘transiteers’ – a term used for smugglers that physically transport contraband across borders.[737] A vital function of the distributors or middlemen was to insulate BAT from direct contact with the

[732] *Ibid.*
[733] *Ibid.*
[734] JL Green, ‘Visit of Sir Patrick Sheehy November 1991’ (Truth tobacco industry documents, 01 December 1991) British American Tobacco Records available at Truth Tobacco Industry Documents at https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/yswb0194 accessed 23 May 2017. GT is a reference for illegal shipment, see note 724.
[735] BATUKE stands for BAT UK and Export.
[736] William Marsden *et al.* (note 724).
[737] O Emmanuel, ‘Tobacco giant, British American Tobacco, caught in intensive smuggling, corporate espionage’ *Premium Times* (6 July 2012).

'transiteers', reducing the risk of detection and prosecution. One of the documents, for instance, described how Sorepex, 'provided cover' for BAT.[738]

Against this backdrop, smuggling in Nigeria and elsewhere could perhaps be part of TTCs' strategy to increase market share and, ultimately, profits.[739] It is apt to conclude with the pronouncement of Green J., which sums up the activities of tobacco corporation:

> The conclusions which have arisen from the US courts about the sharp discord between what the tobacco companies think inside their own four walls and what they then say to the outside world (especially through experts), are so damning and the evidence of the discord so compelling and far-reaching that it is not at all surprising that the WHO concluded that there was an evidence base upon which to found their recommendations to contracting states to apply vigilance and demand accountability and transparency in their dealings with the tobacco companies.[740]

5.4 Nigeria's Efforts in Combatting Corruption and Its Impact on Tobacco Regulation.

This section identifies some of the root causes of corruption in Nigeria and discusses cases of corrupt practices in Nigeria.

Ex-British Prime Minister, David Cameron, referred to Nigeria as "fantastically corrupt", describing Nigeria as, "possibly the…most corrupt countries in the world".[741] The ex-PM, however, failed to acknowledge Nigeria's progressive anti-corruption accomplishments and the fact that corruption is transnational and interconnected.[742] Western countries are embroiled in the complexity of corruption, mainly in twofold. First, Western organisations perpetrate the act of bribery and other nefarious activities

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[738] *Ibid.*

[739] See Sarah Boseley, 'Threats, bullying, lawsuits: tobacco industry's dirty war for the African market' (the guardian.com, 12 July 2017) <https://www.theguardian.com/world/2017/jul/12/big-tobacco-dirty-war-africa-market?CMP=Share_iOSApp_Other> accessed 14 July 2017.

[740] R (on the application of BAT & ors, Philip Morris Brands SARL & ors, JT International SA and another) v Secretary of State for Health [2016] EWHC 1169 (Admin) [21].

[741] H Mance and M Fick, 'Cameron calls Nigeria and Afghanistan as 'fantastically corrupt', *Financial Times* (10 May 2016).

[742] Sarah Chayes, 'Corruption and terrorism: the causal link' (2016) *Policy paper against corruption: a collection of essays* (note 671).

in countries such as Nigeria for the exchange of lucrative benefits or contracts.[743] Second, corrupt funds or proceeds of crime flow into western economy through banks to purchase bonds[744], prime properties, and other commodities.[745] President Obasanjo condemned foreign western government and banks for not providing adequate measures to stop such actions, as morally reprehensible and asserts that 'the thief and the receiver of stolen items are guilty of the same offence'.[746]

In 1996, Nigeria was the most corrupt country according to Transparency International CPI[747]. Twenty years later, the trajectory score reveals improvement in the fight against corruption.[748] The social impact of corruption on a nation can be profound, including the distortion of the market economy, and the creation of a non-enabling environment for CSR to thrive.[749]

In 1999,[750] the executive government of Nigeria approached the World Bank to undertake significant governance and corruption diagnostic survey of Nigeria.[751] The research was in conjunction with several Nigerian institutions including, the Centre for Development Studies (CDS) of the University of Jos and the University of Port Harcourt.[752] The corruption survey was to highlight the magnitude and effects of corruption and corrupt practices in Nigeria from three critical segments of the society: households, enterprises, and public officials. The findings were to serve as a

[743] H Berghoff, 'Organised irresponsibility? The Siemens corruption scandal of the 1990s and 2000s' (2017) 60(3) Business History 423: the Germany company Siemens identified a total of $1.6 billion in 'questionable payments' payments from 2000-2006 when it uncovered a bribery schemes which included, amongst others, selling telecommunications infrastructure in Nigeria.
[744] US Department of Justice, 'U.S. forfeits over $480 million stolen by former Nigerian dictator in largest forfeiture ever obtained through a kleptocracy action' (DoJ, 7Aug 2014).
[745] Tom Burgis, 'US prime property is magnet for illicit wealth, warns Treasury' *Financial Times* (23 Feb 2017): US Treasury investigation confirmed that top-end property in New York, Miami and other cities is being used to channel illicit wealth. FT, 'London's housing crisis is abetted by illicit funds' *FT.com* (17 April 2017).
[746] Lawsuit delays repatriating $1.3 billion stolen Nigerian funds. *Pan African News Agency* (21 June 2005) in Daniel Scher, 'Asset Recovery' (2005) 14(4) African Security Review 17, 20.
[747] The variance score is 0.69/10 but multiplied by 10 to give it a score over 100. Where 100 is not corrupt and 0 is most corrupt, according to transparency international, *corruption perception index 2019*, (transparency Int'l 2020).
[748] *Ibid.*
[749] JM Luiz and C Stewart, 'Corruption, South Africa Multinational Enterprises and Institutions in Africa' (2014) 124(3) Journal of Business Ethics 383.
[750] The executive government was headed by President Olusegun Obasanjo.
[751] World Bank (2001) Nigeria Governance and Corruption Diagnostic Study: Analysis of Survey Results Households, Enterprises, Public officials. Casals/IDR, October, in IR Akhigbe, 'Governance, corruption and economic development: reflections on corruption and anti-corruption initiatives in Nigeria' (Doctoral Thesis, Loughborough University 2011) 147-151.
[752] *Ibid.*

benchmark for subsequent reviews to occur every two to three years. The national survey was designed to reflect the multi-ethnicity of Nigeria. Overall, five thousand randomly selected respondents participated in the survey. Two thousand five hundred households were sampled, one thousand five hundred respondents across the three tiers of government participated in the public official's sample, and one thousand respondents were interviewed in the Business enterprises survey.

The three surveys were undertaken in 2001, and they were intended to provide an understanding of the perception of the major problems militating against development in Nigeria. The surveys identified endemic corruption to have shaped the level of social-economic development in Nigeria.[753] For example, in one of the surveys, households were asked to identify the degree of seriousness of each of the research indicators. The respondents identified unemployment as the most challenging concern facing Nigeria, followed closely by corruption and the prohibitive cost of living.[754] In a similar vein, households were interviewed to capture their perceptions of corruption in Nigeria. The figure reveals that 80% considered corruption as a severe challenge. Public officials were also asked in the survey to measure the extent of corruption in Nigeria, and the survey indicated an elevated level of corruption perception among public officials.[755] The Business enterprise survey disclosed crime and corruption as a significant obstacle in conducting business in Nigeria.

Corruption is a major challenge in Nigeria, and there is no shortage of academic research on this issue.[756] According to Osoba, corruption is 'a way of life in Nigeria'.[757] Salisu, from an economic standpoint, concludes that '[t]he statistical exercise in Nigeria suggests that the magnitude of corruption is quite considerable.'[758] Likewise, Hope avers that Nigeria has developed a national and international reputation as a

[753] *Ibid.*
[754] IR Akhigbe (note 751).
[755] *Ibid.*
[756] T Lawal & anor, 'Combatting Corruption in Nigeria' (2012) 1(4) Int'l Journal of Academic Research in Economics and Mgt; OO Umoh, 'Corruption in Nigeria: Perceived challenges of the EFCC in the fourth Republic' (2012) 3(3) Int'l Journal of Advance Legal Studies & Governance; KR Hope, *Corruption and Governance in Africa* (Springer 2017); TR Lituchy *et al.*, *LEAD: Leadership Effectiveness in Africa and the African Diaspora* (Palgrave Macmillan 2017) 89-106; IR Akhigbe *ibid.*
[757] SO Osoba, 'Corruption in Nigeria: historical perspectives' (1996) 23(69) Review of African Political Economy 371.
[758] M Salisu, 'Corruption in Nigeria' (Working paper, Lancaster University Management School 2000/006) 15.

real menace of corruption.[759] Tignor contends that 'no country in the continent has devoted more attention and energy to continuing allegations of corruption than Nigeria.'[760] Ocheni and Nwankwo attributed these failings to culture, and a poor reward and value system,[761] while others have taken a historical approach as to the cause and understanding of corruption in Nigeria.[762] However, there is an underpinning consensus amongst academics and commentators that *political will* is a profound factor in eradicating corruption in Nigeria.[763] Political will, according to Bamidele *et al.*[764], is partly why anti-corruption agencies in Nigeria have mostly been unsuccessful.

The elevation of Nigeria to a state where corruption is 'a way of life' can be much appreciated from a historical perspective. Corruption in Nigeria can be traced to the pre-colonial era of slave raiding and trading, where captured individuals were exchanged for gifts by the rulers of some districts.[765] This act continued long after the trade was outlawed under the British protectorate until an aggressive effort by the colonial administrators eventual brought the practice to an end.[766] One of Britain's last legacy to Nigeria was to open the discussion concerning governmental impropriety and to make it a prominent issue. This concern about corrupt acts in Nigeria had deep roots in the nineteenth century, and colonialism was extolled for providing the *good government* in place of oppression and chaos. To justify their conquest of West Africa, the British claimed to be agents of law and order. They believed that powerful chiefs

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[759] KR Hope (note 678*)*. See also EO Lawrence, 'The Missing Links: towards the effective management and control of corruption in Nigeria, Africa and the global south' (2016) 5 Int'l Journal of Criminology and Sociology 25.

[760] RL Tignor, 'Political Corruption in Nigeria before Independence' (1993) 31(2) The Journal of Modern African Studies 175.

[761] S Ocheni & BC Nwankwo, 'The Effectiveness of Anti-Corruption Agencies in Enhancing Good Governance and Sustainable Developmental Growth in Africa: The Nigeria Paradox Under Obasanjo Administration, 2003-2007' (2012) 8(3) Canadian Social Science 16, 17-18.

[762] Tignor (note 760) and Osoba (note 757).

[763] For instance, NS Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria, (2006) 13(1) Journal of Financial Crime 92: indicates there has to be a strong and compelling political will in curbing corruption; OO Oluwaniyi, 'Police and the Institution of Corruption in Nigeria (2011) 21(1) Journal of Policing and society 67-83: suggests political will is the gateway to combating corruption; EO Lawrence (note 759) 33. See also T Lawal & KV Ogunro, 'Combating Corruption in Nigeria' (2012) 1(4) Int'l Journal of Academic Research in Economics and Management 1.

[764] O Bamidele & ors, 'Seized by Sleaze: The Siege of Corruption and a Search for Workable Options in Nigeria' (2015) 90(1) Int'l Social Science Review 13: 'The anti-corruption agencies (EFCC, ICPC and Judiciary system) have been unsuccessful due to a lack of commitment, the lack of cooperation between the principal agencies, and the lack of *political will* to combat corruption.'

[765] CN Ubah, 'Suppression of the Slave Trade in the Nigerian Emirate' (1991) 32(3) Journal of African History 447.

[766] *Ibid.*

and Emirs, like those in Northern Nigeria, were inherently aggressive, salvage and corrupt.[767] In a speech given in Sokoto in March I903, Lord Frederick Lugard asserted that the Fulani rulers would not be removed from their offices under British indirect rule: 'but bribes are forbidden, and mutilation and confinement of men in inhuman prisons are not lawful'.[768]

Temple also wrote that the lack of honesty is the first significant flaw of many of his African friends.[769] In Northern Nigeria, especially between 1900 and 1920, the British removed those Northern office-holders whom they regarded as the most corrupt.[770] The Southern part of Nigeria, those territories south of the Northern Protectorate, was not spared of the accusation of corruption by the British colonial ruler.[771] The British administrators were so alarmed by the level of corruption and abuse of power by local politicians that they asserted that Nigeria was not yet ready for independence during the agitation for self-rule by local politicians.[772] Ogunyemi's analysis of Nigerian laws against corruption and the actual reporting of corrupt practices reported by the Director of Audit from 1950–1960 (decolonisation period), concludes that many of the proven cases of fraud were, however, not sanctioned as required by law. This attitude laid the foundation for a culture of impunity in the management of public resources in the immediate post-independence period.[773]

Individual ethnic groups to promote their interests over those of any national agenda has led to poor governance. Idemudia believes that the consequences of the 1914 forced amalgamation of the southern and northern protectorates driven by the British colonialist's political and economic interests, as opposed to the concerns or aspirations of the indigenous people, which led to the Federal government investing in 'projects that are driven by ethnic politics at the expense of rational economic

[767] RL Tignor (note 760).
[768] AHM Kirk-Greene (ed), *The Principles of Native Administration in Nigeria: selected documents, 1900-1947* (London 1965) at p43 in RL Tignor (note 760) 177.
[769] CL Temple, *Native Races and their Rulers* (London, 1918, republished in 1968) 41, in RL Tignor (note 760) 178.
[770] Tlignor (note 760) 179.
[771] *Ibid.*
[772] *Ibid.*
[773] AO Ogunyemi, 'Historical Evidence of Corruption in Colonial Nigeria: An Analysis of Financial Records in the Decolonisation Period, 1950–1960 (2016) 51(1) Journal of Asian and African Studies 60, 73.

decision'.[774] Likewise, Akinwunmi states that in pre-colonial Nigeria, each of the ethnic groups that colonialism forcefully brought together under one administration had their own unique political and administrative structures that best suited their society. However, this unique structure was obliterated after the amalgamation of 1914.[775] Akinwunmi avers that the British failed to foster the foundation for integration (evidenced by the introduction of the indirect rule system and several constitutional bargains) during decolonisation. [776] The opportunity presented by independence to redress the roots of these problems was, however, neglected by the new indigenous political elites who took over from the colonialists. Rather, they saw the opportunity to further their interests through ethnicity and religion, and this presented the elites, according to Akinwunmi, with the opportunity to plunder the national economy to the point of collapse, as successive Nigerian government failed due to a cycle of coups and counter-coups with the coup plotters citing corruption as part of the reason for the coup d'état.[777]

Against this backdrop, the 'unholy' amalgamation was a social contract forced on Nigerians without the will of the people. The failure of the colonial administration to create a legitimate social contract among the various groups divided the country along the lines of ethnicity, including language and regional dialect. Governance, therefore, was challenging and this evoked a famous phrase by one of the founding fathers of the Nigerian nation that 'Nigeria is merely a geographical expression', lumped together as an arbitrary collection of disparate groups.[778] Similarly, Agagu,[779] Rafiu et al.[780] argued that this 'fraudulent social contract' and the forceful consolidation of diverse peoples from different socio-cultural backgrounds without their formal consents to co-exist as a nation, created horizontal and polarised primordial loyalties that continue to

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[774] U Idemudia & ors, 'The Challenges and Opportunities of Implementing the Integrity Pact As a Strategy for Combating Corruption in Nigeria's Oil Rich Niger Delta Region' (2010) 30(4) Public Administration and Development 277, 278.
[775] O Akinwumi, *Crises and Conflicts in Nigeria: A Political History Since 1960* (LIT 2004) 9-22.
[776] *Ibid* p27-50. See also A Agagu, The Nigerian State and Development: A Theoretical and Empirical Exploration', in A Agagu and R Ola (eds) *Development Agenda of the Nigerian State* (Ibadan, Nigeria: FIAG Publishers 2005).
[777] *Ibid.*
[778] O Awolowo, *Path to Nigeria Freedom* (London: Faber & Faber 1947) 47-48.
[779] AA Agagu, 'The Nigerian State and Development: A Theoretical and Empirical Exploration', in AA Agagu and RF Ola, (eds) *Development Agenda of the Nigerian State.* (FIAG Publishers 2004).
[780] OO Rafiu & ors, 'The Nigerian State, political assassination and democratic consolidation: a historical exploration' (2009) 3(2) African Journal of Political Science and Int'l Relations 156-164.

pose considerable obstacles to the challenge of national integration. Moreover, the relationship between the Nigerian political leaders and the masses, according to Rafiu et al., have only continued the 'domination[781] and exploitation' system inherited from the colonialist[782].

Even though the unification of Nigeria is viewed as a 'fraudulent social contract', nonetheless, the colonial rulers equipped Nigeria with relevant tools to confront corruption, including Western-style education (early Nigerian leaders trained at British universities, and they returned to Nigeria to join the independence movement in the late 50s and early 60s, the best and brightest were employed in the civil service),[783] professional public service and working utilities,[784] standardisation of systems and structure, and the awareness of corruption and accountability in the polity and administration, especially during the decolonisation era, were all credible platforms the indigenous political elites should have embraced. However, it was clearly missed by the political elites, and the situation snowballed into a society whereby the lack of accountability is perceived as the norm.

After the discovery and the sole reliance of oil in Nigeria, corrupt practices took a worse turn, and oil became a resource curse.[785] A 'resource curse' situation is where resource-rich countries tend to have less economic growth and worse developmental outcomes than countries with fewer natural resources. With the discovery of oil, the nation plunged into a situation known as 'Dutch Disease;' that is, the dominance in an economy of a particular commodity export, usually oil, to the exclusion of the development of other sectors resulting in severe economic imbalance and vulnerability.[786] In the same vein, Oluduro stated that corruption is prevalent in the oil sector especially in the award of oil licences and contracts, but the most prevalent is bribery and embezzlement of oil rent, [787] and this situation permeates into the larger

[781] W Graf, 'Nigerian "Grassroots" Politics: Local Government, Traditional Rule and Class Domination' (2008) 24(2) Journal of Commonwealth & Comparative Politics 99.
[782] OO Rafiu & ors, 'The Nigerian State, political assassination and democratic consolidation: a historical exploration' (2009) 3(2) African Journal of Political Science and Int'l Relations 157.
[783] Pat Utomi, *Managing Uncertainty* (Lagos Business School 1998).
[784] O Adewole, *Judicial System in Southern Nigeria, 1854-1954: law and justice in a dependency* (Humanities Press Inc 1978).
[785] O Akinwumni (note 775) 116-32.
[786] JI Otaha, 'Dutch disease and Nigeria oil economy' (2012) 6(1) African Research Review 82.
[787] O Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's oil Producing Communities* (Intersentia 2014) 353.

society. It was estimated that in the late 1970s, $25million per day was transferred abroad on behalf of Nigeria's corrupt officials.[788] In 2008, KBR, a US oil service company and its former chairman and CEO, Albert J. Stanley, pleaded guilty to paying millions of dollars in bribes to senior Nigerian government officials to secure contracts worth $6 billion. KBR agreed to pay a $402 million in criminal fine,[789] while the former chairman was sentenced to thirty months imprisonment by a U.S district judge.[790]

Another major depravity in the oil sector is the $6.8 billion oil subsidy scam.[791] The House of Representatives' report revealed that the subsidy regime operated during the period under review, were fraught with endemic corruption and entrenched inefficiency.[792] The report uncovers a long list of alleged wrongdoings involving oil retailers, Nigeria's Oil Management Company, government officials as beneficiaries, and the state-owned Nigeria National Petroleum Corporation.[793] Under the oil subsidy scheme, oil retailers were paid for premium motor spirit (oil/fuel) that was never supplied. Investigators considering the subsidy found importers were being paid for 59 million litres per day, while the country only consumes 35 million litres per day. Mismanagement by government officials and fraudulent claims by fuel marketers cost the country $6.8 billion over three years – about a quarter of Nigeria's annual budget Prosecution of the offending firms is currently on-going in the Nigerian courts.[794] In *FRN v Wabgatoma & ors*[795], which was the first conviction of the oil subsidy scandal, the Lagos State High Court sentenced the chairman and the managing director of Ontario Oil & Gas Nigeria Limited to ten years imprisonment for their role in the oil subsidy fraud. Again, the Nigerian House of Representative Ad-hoc Committee is currently investigating an alleged seventeen billion US dollars stolen from undeclared

[788] James C Owen, 'Government failure in Sub-Saharan African: the international community's options' (2003) 43 Virginia Journal of Int'l Law 1003, 1011.
[789] U.S Department of Justice, 'Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine' (U.S. Dept. of Justice, 11 Feb 2009).
[790] U.S. Dept of Justice, 'Former Chairman and CEO of Kellogg, Brown & Root Inc. Sentenced to 30 Months in Prison for Foreign Bribery and Kickback Schemes' (U.S. Dept of Justice, 23 Feb 2012), *ibid*.
[791] Z Abdul-Baki *et al.,* 'The role of accounting and accountants in the oil subsidy corruption scandal in Nigeria' (2019) Critical Perspectives on Accounting, https://doi.org/10.1016/j.cpa.2019.102128; O Akanle *etal.*, 'Fuel subsidy in Nigeria: contexts of governance and social protest' (2014) 34(1/2) International Journal of Sociology and Social Policy 88-106. The period under review was from 2009-2011.
[792] Abdul-Baki and O Akanle, *Ibid*.
[793] *Ibid.*
[794] EFCC, 'High profile, oil subsidy, etc matters being prosecuted by EFCC' (EFCC, unknown date) <https://efccnigeria.org/efcc/images/HIGH%20PROFILE%20CASES%20BEING%20PROSECUTED%20BY%20THE%20EFCC%20FOR%20%20%20%20%20%20%20AG.pdf> accessed 5 April 2017.
[795] Case number: ID/115C/2012 *ibid* at no26.

crude oil and liquefied natural gas exports to global destinations.[796] The revenue loss to the government was estimated as fifty-seven million barrels of crude oil illegally exported and sold in the U.S. between January 2011 and December 2014 without remittance to the government. Accordingly, corruption in the oil industry distorts public policy, creates misapplication of resources, and hinders development; over, and above all, it undermines good governance and ultimately hurts the poor most.[797] Meanwhile the Speaker of the House, Yakubu Dogara, summaries it all when he declared that the 'incidence of money missing in the industry had become a recurrent decimal to the point that the news item in the media is incomplete without mention of the ills of the industry'.[798] Campbell and Page referred to Nigeria as a kleptocracy, 'a nation characterised by a type of corruption in which government or public officials seek personal gains at the expense of those being governed'.[799] Corruption, therefore, is 'deeply embedded in virtually all aspects of national life',[800] including the economy, political, judiciary, health and institutions all around the country.[801]

Corruption, recognised in most sectors of the Nigerian economy,[802] has a profound impact on tobacco regulatory effort. For the most part, weak institutions of which corruption is a manifestation[803] can result in inadequate promulgation and enforcement of tobacco control policies,[804] including the impediment to policy changes.[805] In a corrupt environment, resources for human capital and other needed investments, such as infrastructure and health, are often diverted through various

[796] See Abdul-Zaki (note 791); Akanle (note 791); See also W Wallis, 'Nigeria's central bank and state clash over 'missing billions' *Ft.com* (4 May 2014): The Governor of the central bank, Lamiso Sanusi (2009-2014) was ousted by the then President of Nigeria, Jonathan Goodluck, in part, for exposing an alleged $20bn shortfall in state revenues from the sale of oil between 2012 and 2013.
[797] *Ibid.*
[798] *Ibid*.
[799] J Campbell & MT Page, *Nigeria: what everyone needs to know* (Oxford University Press 2018) 2.
[800] *Ibid.*
[801] *Ibid.*
[802] TM Obamuyi *et al.,* 'Corruption and Economic Growth in India and Nigeria' (2019) 35(1) Journal of Economics and Management 81.
[803] JE Campos et al., 'The Impact of Corruption on Investment: Predictability matters' (1999) 27(6) World Development 1059.
[804] K Danishevski *et al.,* 'Public attitudes towards smoking and tobacco control policy in Russia' (2008) 17(4) Tobacco Control 276.
[805] TM Obamuyi *et al.,* 'Corruption and Economic Growth in India and Nigeria' (2019) 35(1) Journal of Economics and Management 81.

means.[806] Smuggling, another venal act associated with the tobacco industry, illustrated in section 5.3, undermines tobacco control effort.[807]

Moreover, the Nigeria Customs Service recognised the lack of intergovernmental cooperation as a barrier to the implementation of tobacco control laws.[808] One major way in restraining smuggling is to have an effective customs and border system; however, evidence suggests that Nigeria may be lacking in this regard.[809] Once there is a weakness in the tobacco regulatory framework, evidence suggests that the tobacco industry will interfere and influence the tobacco control agenda.[810] The tobacco industry in Nigeria, for instance, was involved in the development of the standards for Tobacco Control of 2014, contrary to the WHO guidelines against the engagement of the industry in policy formulation.[811] Measures preventing TTCs from interfering in tobacco control policies have been regarded as anti-corruption measures. According to the WHO Committee of Experts on Tobacco Industry Documents, TTCs have operated to subvert the efforts of the WHO in a manner that is elaborate, well-financed, sophisticated, and usually invisible.[812] Article 5.3 of the FCTC (Protection against Tobacco Industry Interference) are anti-corruption measures to prevent interference in tobacco control actions and policies.[813] The treaty obligates Parties to protect their health policies from the tobacco industry.

However, from 1960 to date, Nigeria employed several measures and approaches to eradicating corruption, including institutional approach, legal approach, and political education. The legal or constitutional approach includes: the promulgation of Decrees during the military era, Acts of Parliament during the civil rule periods, and

[806] Ngozi Okonjo-Iweala and Philip Osafo-Kwaako, 'Nigeria's economic reforms: Progress and challenges' (March 2007) Brookings Global Economy and Development Working Paper No. 6.
[807] FJ Chaloupka (ed), *Tobacco Control in Developing Countries* (OUP 2000).
[808] J Ishaku *et al., A Scoping Study of Nigeria's Tobacco Market and Policy Space* (CSEA 2019).
[809] O Agbu, 'Corruption and Human Trafficking: The Nigerian Case' (2003) 4(1) West Africa Review 1; N Munchi, 'Smuggled rice makes mockery of Nigerian quest to boost farming' *ft.com* (6 June 2019).
[810] WHO, *Tobacco Industry interference: a global brief* (WHO Press 2012); K Danishevski K et al.,'Public attitudes towards smoking and tobacco control policy in Russia' (2008) 17 Tobacco Control 276: this article reveals that the TTCs allegedly negotiated the overturn of a Soviet decree banning tobacco advertising.
[811] O Oladepo *et al*., 'Analysis of Tobacco Policies in Nigeria: historical development and application of multi-sectoral action' (2018) 18(suppl 1) British Medical Council Public Health 77.
[812] World Health Organization, 'Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization,' Report of the Committee of Experts on Tobacco Industry Documents, July 2000.
[813] Southeast Asia Tobacco Control Alliance (SEATCA) *et al.* (eds), *Anti-corruption and Tobacco Control* (Bangkok, Thailand Nov 2017); H Weishaar *et al*., 'Global Health Governance and the Commercial Sector: A Documentary Analysis of Tobacco Company Strategies to Influence the WHO Framework Convention on Tobacco Control' (2012) PLoS Med 9(6): e1001249. doi:10.1371/journal.pmed.1001249.

the establishment of legislative institutions empowered to arrest and prosecute corrupt officials[814] such as the Corrupt Practices Decree of 1975, The Public Officer (Investigation of Assets Decree No 5 of 1976), Forfeiture of Assets, etc. (Certain Persons) Decree No 53 of 1999. Other measures during the military era include the use of Tribunal such as the Failed Bank Tribunal set up by the Abacha military government. Constitutional measures include the Code of Conduct Bureau and the Code of Conduct Tribunals provided for in the 1979 and 1999 Constitutions.[815] Political education has also been employed, such as the Ethical Revolution between 1979-83, War against Indiscipline introduced by General Muhammad Buhari from1983-85, War against Indiscipline and Corruption implemented by General Sani Abacha from 1993-1998 and the National Orientation Agency under the civilian administration of Olusegun Obasanjo.

There are other measures implemented to deter corruption from 1999, when Nigeria returned to electoral democracy, to date: the establishment of the Independent Corrupt Practices Commission (ICPC), and the Economic and Financial Crime Commission (EFCC) (these two bodies are empowered by law to investigate, arrest and prosecute suspected corrupt public office holders and political appointees); the introduction of Due Process in all the federal Ministries and parastatals. All these measures, including the various socio-economic and political reforms, have been designed to curb the menace of corruption in the country. However, this thesis will limit itself to the anti-corruption measures that relate to corporations, especially multinational corporations.

5.4.1 The Corrupt Practices and Other Related Offences Act 2000.

In Nigeria, a corporation can be held criminally liable for corrupt practices under the Corrupt Practices and Other Related Offences Act 2000 (CPA).[816] It identifies a wide range of corrupt practices such as bribery, fraud, and other related offences. The Act is broad in scope and applies to both public officials and private persons, including

[814] IS Ogundiya, 'Political Corruption in Nigeria: Theoretical Perspectives and Some Explanations' (2009) 11(4) Anthropologist 281, 290.
[815] See Fifth Schedule Part 1 of 1999 Nigerian Constitution.
[816] 2000 Act No. 5, Laws of the Federal Republic of Nigeria.

private dealings between private businesses.[817] Under s1 of the CPA, 'person' includes a natural person, a juristic person or any body of persons corporate or incorporate. Section 2 of the Act, which is the interpretation section, offers only a vague definition of corruption, defining it as 'including bribery, fraud and other related offences'. [818] The CPA attempts to draw a line between private and public business. Sections 9, 17, 18, 21 and 22 are provisions of the CPA that may affect corporations. Section 9 CPA criminalised offences of giving gratification to public officers, while sections 17 and 18 proscribe the gratification of a public officer by and through agents. Sections 21 and 22 declare bribery unlawful in reference to auction and contracts, respectively.

The CPA, however, has its deficiency. It does not make provisions for those who have access to public funds but are not regarded as 'public officials' as defined under s2 of the CPA. According to Ocheje, the spouses and children of public office holders have used public funds in implementing various projects, so such quasi-public officer's position must be acknowledged in the CPA[819]. Furthermore, Ocheje highlights that the CPA does not go far enough concerning public officers who, although they probably do not corruptly benefit from their conduct, facilitate corruption through negligence. Acts such as culpable neglect of duties relating to controls of public expenditure, budget overruns, and extra-budgetary spending fall under this purview.[820] The UK Bribery Act 2010 and the US Foreign Corrupt Practises Act (FCPA)[821] have extraterritorial laws for the bribery of foreign public officials, but the CPA, nor any other Nigerian law, have no similar provision. This may be because of the historical background to the enactment of extraterritorial laws on foreign bribery that resulted from the Watergate scandals and several other disclosures of large illicit payments by US firms.[822] Thus, extra-territorial foreign bribery laws are perceived as laws relevant

[817] See O Olagoke, "The Extra-Territorial Scope of the Anti-Corruption Legislation in Nigeria" (2004) 38 Int'l Law 71, 78.
[818] PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45(2) Journal of African Law 173, 179.
[819] PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45(2) Journal of African Law 173, 180.
[820] *Ibid.*
[821] The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.
[822] JP Bialos & G Husisian, *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies* (Oceana Publications 1997) 2.

to MNCs headquartered in developed countries and conducting corporate practices in other developed and developing countries.

Another criticism facing the CPA is whether section 40 of the CPA runs contrary to the 1999 Nigerian Constitution, common law and international conventions. Section 40 of the CPA states that every person required to give any information by an investigative officer shall be legally bound to give information, failing to do so, the person shall be guilty of an offence on conviction liable to six months imprisonment or a fine of ten thousand naira. There are sections of the Nigerian constitution in contravention with s40 of the CPA: section 36(5), presumption of innocent until proven guilty; section 36(11), no person tried for a criminal offence shall be compelled to give evidence at trial; and section 39 safeguards the freedom of expression, including freedom to impart ideas and information without interference. The freedom of expression or free speech does not only safeguard speech in its positive aspect but safeguards negative free speech right, that is, the right not to speak. The U.S. Supreme Court in *West Virginia State Board of Education v. Barnette* gave recognition to the right not to speak: 'the freedom of thought … includes both the right to speak freely and the right not to speak at all…'[823] The right of silence is a common law principle.[824] In broad terms, it is the refusal to answer questions before, during, or after a trial without sanctions. The right protects all suspects, whether guilty or innocent.[825] It serves as a practical and symbolic expression of the presumption of innocent and fair trial guaranteed under sections 36(5) and 36(1) of the constitution FRN, respectively. Lord Mustill, in the English case of *R v. Director of SFO; ex parte Smith*[826] identifies six threads of the concept of the right to silence. One of the six, in direct opposition with section 40 of the CPA states that the right to silence is, 'a general immunity possessed by all persons and bodies from being compelled on pain of punishment to answer questions posed by other persons or bodies'.[827] In addition, the

[823] 319 U.S. at 645.

[824] The maxim, '*nemo tenetur seipsum accusare'* means no man is bound to accuse himself. Anthony Gray, 'The Right to Silence: Using American and European Law to Protect a Fundamental Right', (2013) 16(4) New Criminal Law Review: An International and Interdisciplinary Journal 527, 532; see also, AM Taruschio, 'The first amendment, the right not to speak and the problem of government access statutes' (1999) 27(3) Fordham Urban Law Journal 1001.

[825] For further reading of the right to silence, see: Hannah Quirk, *The Rise and Fall of the Right of Silence: principle, politics and policy* (Routledge 2017).

[826] *R v. Director of SFO; ex parte Smith* [1993] AC 1.

[827] Ibid at 30-31.

right to silence is a provision that can be found in international treaties in which Nigeria is a member, including the International Covenant on Civil and Political Rights (ICCPR)[828] and the African Charter on Human and Peoples' Right.[829] In sum, s36 of the CPA runs contrary to the spirit and the letter of the Nigerian constitution

5.4.2 The Independent Corrupt Practices and Other Related Offences Commission (ICPC) and The Economic and Financial Crimes Commission (EFCC).

The Independent Corrupt Practices Commission (ICPC) was established by the CPA.[830] Its duties are laid out under section 6(a) – (f) CPA: investigating corruption reports and where appropriate prosecuting offenders; examining the practices, systems and procedures of public bodies so as not to facilitate fraud or corruption; assisting on ways by which fraud or corruption may be eliminated or minimised; advising heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of the duties of the public bodies as the Commission thinks fit to reduce the likelihood or incidence of bribery, corruption, and related offences; educating the public on and against bribery, corruption and related offences, among other functions as prescribed under the Act. Under its mandate to educate the public on bribery and corruption, the ICPC established the Anti-Corruption Academy of Nigeria (ACAN), an educative training centre. The establishment of ACAN is partly in fulfilment of Nigeria's commitment to the global initiative for the successful implementation of the African Union Convention on Preventing and Combating Corruption (AUCPACC), as well as the United Nations Convention against Corruption (UNCAC).[831] The ICPC acts mainly upon petition or report of corrupt allegations received. Under its petition guidelines, a petition can be sent from anywhere in the world against any corporate or non-corporate person in Nigeria who is suspected of having committed or about to commit an offence under the Corrupt Practices and

[828] See article 14(g); Nigeria ratified the ICCPR on 29 July 1993 and came into force on 29 October 1993.
[829] Note, the African Charter does not include the right to silence in the main text, but it is included in the associated (non-binding) Principles and Guidelines under sections M, N and O.
[830] s3 CPA; established in September 2002.
[831] For more background of the Anti-corruption Academy of Nigeria, see institution's website.

Other Related Offences Act 2000.[832] In the discharge of their duties, officers of the ICPC, under section 5 CPA, are conferred with the powers and immunities of a police officer. Other investigative powers granted include (a) to seize movable or immovable property, where there is reasonable grounds the property is relevant to the offence (section 37); (b) upon attaining a court order, to search a property and its occupants and seize any evidence thereof; to remove by force any obstruction to any premises for purposes of investigation; and to detain any persons found in the premises or conveyances until the search is completed (section 36). In addition to these powers, the Chairman of the Commission is granted extensive powers to obtain information from persons reasonably suspected to have committed an offence under the Act (section 44). The information required may relate to the precise identification of properties that are the subject matter of the offence suspected to have been committed, whether such properties are within or outside Nigeria. The commissioner may compel information to be produced, including bank accounts, documents, and records relating to the business, travel or sources of income, earnings, gifts or other assets of suspected offenders.[833]

The ICPC was initially burdened with litigations challenging its constitutionality which almost paralysed its activities; however, the Supreme Court upheld the validity of the CPA and the ICPC.[834] Again, in 2003, the National Assembly sought to expunge the ICPC by repealing and replacing the CPA, but the Nigerian Supreme Court halted the process.[835] The ICPC has continued to investigate and prosecute cases under the provision of the CPA.

The EFCC was created in 2002 under the former President of Nigeria, Olusegun Obasanjo (1999-2007) to complement the efforts of ICPC. The EFCC is empowered under section 6 of the Economic and Financial Crimes Commission (Establishment, Etc) Act 2004 to investigate and prosecute all offences connected with economic and financial crimes, including those perpetrated by individuals, public bodies and private corporate organisations. Section 46 of EFCC Act defines 'economic

[832] ICPC, 'Petition Guidelines' available at http://icpc.gov.ng/petition/?doing_wp_cron=1492274177.0733129978179931640625 accessed 15 Apr 2017.
[833] PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45(2) Journal of African Law 173, 178.
[834] VAO Adetula (ed), *Money and Politics in Nigeria* (Petra Digital Press 2008) 48.
[835] *Ibid.*

and financial crimes' to include any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, illegal arms dealing, smuggling, human trafficking and child labour, illegal oil bunkering, illegal mining, tax evasion, looting, foreign exchange malpractices, and any form of corrupt malpractices. The EFCC under the pioneer chairmanship of Nuhu Ribadu, quickly emerged formidable against corruption in Nigeria. Public anticipations of the new institution were received with scepticism, given the Nigerian government's past track record of laxity in the implementation of previous anti-corruption programmes.[836]

However, in October 2005, the EFCC's credibility and public acceptance escalated when it recorded an unprecedented breakthrough in the nation's history of anti-corruption campaigns by securing the conviction of Nigeria's Inspector General of Police, Tafa Balogun (2002-2005), after it emerged that public funds were diverted to his accounts,[837] and the successful prosecution and conviction of the authors of the 'Brazilian bank' case fraud, where the accused defrauded a Brazilian bank, Banco Noroesta of Sao Paulo, of $242m.[838] Aside from the over $5 billion in stolen assets the institution helped to recover from corrupt officials and the securing of over 400 convictions, EFCC's investigations also led to the prosecution and subsequent removal of a Senate President, state governors, ministers, national assemblymen, bank executives, corporations and many other key personalities.[839] The EFCC prosecuted and conviction of some of the perpetrators of the $6.8billion oil subsidy scam narrated in section 5.4. During the time of writing, the EFFC indicted electoral officials (the Independent National Electoral Commission officials) over the ₦3.4billion bribery scandal during the 2015 general elections[840] and the $1.2billion Malabu

[836] L Lawson, 'The Politics of Anti-corruption Reform in Africa: Journal of Modern African Studies' (2009) 47(1) Journal of Modern African Studies 73.
[837] BBC, 'Nigeria ex-police chief jailed', (BBC News, 22 Nov 2005) available at http://news.bbc.co.uk/1/hi/world/africa/4460740.stm accessed 17 April 2017.
[838] BBC, 'Nigerian bank fraudsters guilty' (BBC News, 19 Nov 2005) available at http://news.bbc.co.uk/1/hi/world/africa/4451766.stm accessed 17 April 2017.
[839] E Byrne et al. (2010) *Building Public Support for Anti-corruption Efforts: Why Anti-Corruption Agencies Needs to Communicate and How*'. (The International Bank for Reconstruction and Development/The World Bank Communication for Governance & Accountability Program, CommGAP, 2010) 2.
[840] EFCC, 'EFCC Vows to Prosecute All INEC Staff Indicted for Corruption in the Conduct of 2015 election' (EFCC, 13 April 2017) <https://efccnigeria.org/efcc/news/2468-efcc-vows-to-prosecute-all-inec-staff-indicted-for-corruption-in-the-conduct-of-2015-election> accessed 19 April 2017.

scandal,[841] to mention but a few. Furthermore, the EFCC gained both technical and financial assistance from Western governments, including the USA, UK, and the EU. For instance, between 2006 and 2010, the EU provided $23.5m worth of assistance to the EFCC[842]. Foreign law enforcement agencies, such as the FBI and the London Metropolitan police, have provided aid through key training of EFCC investigators.[843]

The challenges faced by EFCC and ICPC have caused some researchers to refer to Nigeria as a social environment that rewards corruption.[844] For the two Commissions to be effective, there must be an enabling environment to complement it, and the strategies adopted must be by the rule of law and civil society. In *Federal Republic of Nigeria v. Joshua Dariye*[845], J. Dariye, the EFCC prosecuted Dariye, a former state governor, on corruption charges ranging from embezzlement of public funds to criminal breach of trust, yet he won a Senatorial seat in the 2011 elections. Whilst still a serving governor in 2004, Dariye was arrested in the UK for money laundry offences, but he jumped bail in September of the same year and returned to Nigeria.[846] Eight other former governors arraigned on corruption charges by the EFCC won party nominations to contest in the 2011 elections either as a governor or as a senator.[847] In addition, those accused of corruption who are still under probe were honoured by the Nigerian president, Goodluck Jonathan (2010-2015), 'the conferment of national honour that includes several corrupt political elements, fraudsters, and ex-convicts'.[848] One of the most controversial bestowment of national honours is on the late General Sani Abacha, former military president. After the successful forfeiture of

[841] Global Witness 'New leaked emails put Shell at centre of billion dollar bribery scheme involving some of the most powerful officials in Nigeria' (Global Witness, 10 April 2017); UK case: *Energy Ventures Partner Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm).

[842] Human Rights Watch, 'Corruption on Trial? The record of Nigeria's EFCC' (HRW, 25 Jan 2011) <https://www.hrw.org/report/2011/08/25/corruption-trial/record-nigerias-economic-and-financial-crimes-commission> accessed 17 April 2017.

[843] *Ibid.*

[844] PD Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45(2) Journal of African Law 173, 184. See also MAK Oji & VU Oji, *Corruption in Nigeria: the fight and movement to cure the malady* (University Press of America 2010); HRW *ibid.*

[845] *Federal Republic of Nigeria v. Joshua Dariye,* FCT/HC/CR/81/07.

[846] S Murray, 'Profile: Joshua Dariye' *BBC News* (24 July 2007). The article also states that he has been sacked as governor twice and returned to reclaim his position on both occasions, earning him the nickname "the cat with nine lives".

[847] Human Rights Watch (note 842).

[848] JS Ojo, 'Looting the Looters: The Paradox of Anti-Corruption Crusades in Nigeria's Fourth Republic (1999-2014)' (2016) 12(9) Canadian Social Science 1, 10.

General Abacha's assets in the case between *USA v. Mohammed Sani et al.*[849], US Assistant Attorney General Caldwell made the following pejorative statement about Abacha:

> *"Rather than serve his county, General Abacha used his public office in Nigeria to loot millions of dollars, engaging in brazen acts of kleptocracy…With this judgment, we have forfeited $480 million in corruption proceeds that can be used for the benefit of the Nigerian people. Through the Kleptocracy Asset Recovery Initiative, the Department of Justice's Criminal Division denies kleptocrats like Abacha the fruits of their crimes and protects the U.S. financial system from money laundering. In coordination with our partners in Jersey, France and the United Kingdom, we are helping to end this chapter of corruption and flagrant abuse of office."*[850]

Abacha ruled Nigeria for five years after a 1993 military coup, and he is believed to have embezzled $4.3bn while in office, placing him among the ranks of one of Africa's most avaricious kleptocrats.[851] Professor Wole Soyinka condemned the act because 'by honouring Abacha, President Goodluck Jonathan's administration had ridiculed Nigeria in the presence of world leaders by glorifying murderers and thieves'.[852]

Political interference in anti-corruption cases, as well as other ICPC/EFCC activities, is another challenge encountered by the anti-corruption bodies, which is partly why no Chairman of the EFCC is allowed to complete his or her term of office.[853] Other challenges include judicial corruption and inefficiency,[854] inadequate personnel, inadequate funding, poor working conditions and reward system.[855] The rate of poverty in Nigeria is strikingly prevalent that many Nigerians have embraced corruption as an alternative means of survival.[856] A low wage, coupled with high inflationary rates of

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[849] *USA v. Mohammed Sani et al* Case 1:13-cv-01832-JDB Document 1 Filed 11/18/13 (US Department of Justice) <https://www.justice.gov/iso/opa/resources/765201435135920471922.pdf> accessed 24 April 2017.
[850] US Dept of Justice (note 744).
[851] David Smith, 'Switzerland to return Sani Abacha 'loot' money to Nigeria' *The Guardian* (18 March 2015).
[852] *Ibid.*
[853] Oluduro (note 534) 364.
[854] HRW (note 842).
[855] AT Albert *et al.*, 'EFCC and the politics of combating corruption in Nigeria (2003-2012)', (2016) 23(4) Journal of Financial Crime 725.
[856] OO Umoh & AS Ubom, 'Corruption in Nigeria: Perceived Challenges of the Economic and Financial Crimes Commission (EFCC) in the Fourth Republic' (2012) 3(3) International Journal of Advanced Legal Studies and Governance 101, 106.

goods and services, has led to more irreconcilable hardship in spite of the abundance of natural resources, and so many have died due to starvation, diseases and incalculable natural disaster, according to Mamadu.[857]

The ICPC has been condemned for emerging as a weak organisation,[858] while the EFCC is criticised for being indifference to the rule of law and for serving as a tool used by the incumbent government to subdue political opponents.[859] EFCC and ICPC have overlapping functions in the investigation and prosecution of corruption despite having different mandates, leading to suggestions that both bodies should amalgamate as a single entity.[860] Moreso, the EFCC, ICPC, the police force and the Attorney General of the Federation, all have assigned powers to investigate and prosecute corruption cases without a clear scope.[861] Moreover, Albert and Okoli argue that the EFCC is not a capable institution, nor does it serve as a deterrent in combatting corruption,[862]where Oyovbaire[863]and Iyare[864] attributed the ineffectiveness and failures of EFFC to external factors, such as political influence.

5.4.3 The United Nations Convention Against Corruption (UNCAC)

The UNCAC was adopted by the UN General Assembly on 31 October 2003 and came into force on 14 December 2005. It is signed by 140 countries. As part of the effort aimed at eradicating corruption, the Nigerian government ratified the UNCAC on 14 December 2014. The UNCAC is the only legally binding universal anti-corruption instrument.[865] The UNCAC requires countries to criminalise a wide range of acts,

[857] T Mamadu, *Corruption in the Leadership Structure of the Nigerian Polity*, (Jochrisam Publishers 2009) in OO Umoh *ibid* at p106.
[858] VAO Adetula, (note 859) 48.
[859] VAO Adetula (ed), Money and Politics in Nigeria (Petra Digital Press 2008) 50; JS Ojo, 'Looting the Looters: The Paradox of Anti-Corruption Crusades in Nigeria's Fourth Republic (1999-2014)' (2016) 12(9) Canadian Social Science 1-20.
[860] *Ibid.*
[861] AT Albert *et al.*, 'EFCC and the politics of combating corruption in Nigeria (2003-2012)', (2016) 23(4) Journal of Financial Crime 725.
[862] *Ibid*.
[863] S Oyovbaire, 'Introduction', in S Oyovbaire (ed*), Governance and Politics in Nigeria: the IBB and OBJ Years*, (Spectrum Books 2008).
[864] T Iyare, 'Corruption and the crisis of national values'. In S Oyovbaire, *ibid.*
[865] United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, (United Nations: New York, 2004).

including bribery, embezzlement, misappropriation or other diversions of public funds, and various other acts of corruption in the private sector.[866] It is divided into eight chapters, including Preventive measures (Chapter II), Criminalization and law enforcement (Chapter III), International cooperation (Chapter IV), and Asset recovery (Chapter V). This thesis will limit itself to Chapters II and III because the two chapters are directed at corporations.

Preventive measures include anti-corruption policies and practices.[867] For instance, article 5(3) UNCAC requires the State Party to establish and promote effective practices aimed at the prevention of corruption, and periodically evaluate relevant legal instruments and administrative measures to determine their adequacy in preventing and fighting corruption. It is questionable whether the Nigerian state evaluates its legal instruments and administrative measures to determine if they are adequate in the anti-corruption fight. As an example, while section 8 of the CPA Act prescribes seven years imprisonment for any person who corruptly asks for, receives or obtains any property or benefit of any kind, s112 of the Criminal Code Act[868] ascribes three years imprisonment for the same offence. Most often, the latter option is used to decide corruption cases, as evidenced in some corruption judgments.[869] The reason why the latter remains so is that the Nigerian Criminal Code has not been reviewed in accordance to the provision under article 5(3) UNCAC.

Chapter III of the UNCAC criminalises certain offences such as bribery of national public officials, foreign public officials or officials of an international public organisation.[870] State Parties are required to establish liability of legal persons

[866] United Nations Convention Against Corruption (UNCAC), arts 15-25.
[867] See chapter II, article 5 of the UNCAC. Other preventive measures are the use of anti-corruption bodies to prevent corruption (article 6); proper adoption and maintenance of public sector (article 7); code of conducts for public officials (article 8); public procurement and management of public finances (article 9); public reporting (article 10); measures relating to judiciary and prosecution services (article 11); prevention of private sector corruption (article 12); participation of society (article 13); and prevention of money-laundering (article 14).
[868] Criminal Code Act, Chapter 77, Laws of the Federal Republic of Nigeria 1990.
[869] AT Albert *et al.*, 'EFCC and the politics of combating corruption in Nigeria (2003-2012)', (2016) 23(4) Journal of Financial Crime 742.
[870] See chapter III, articles 15 and 16 of the UNCAC. Other offences which States should be criminalized include embezzlement, misappropriation or other diversion of property by a public official (article 17); intentional laundering of proceeds of crime (article 23); intentional obstruction of justice (article 25). Offences which State Parties should consider criminalizing include trading in influence (article 18); abuse of functions by public official (article 19); illicit enrichment (article 20); bribery in the private sector (article 21); and embezzlement of property in the private sector (article 22).

(corporations) for the participation in any offence established within the convention. Such liability may be criminal, civil or administrative. Legal persons held liable are subjected to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.[871] Under the Convention, State parties have territorial and nationality jurisdiction over the offences.[872] The convention includes the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.[873]

The UNCAC has excellent potential to be a useful tool in ensuring corporate responsibility or liability for corrupt corporate practices. Even though Nigeria ratified the UN Convention, it is yet to be domesticated as required by section 12 of the Nigerian Constitution.[874] Oluduro avers that such a step to domesticate the Convention would prove Nigeria's commitment to combating corruption; nonetheless, some sections of the UNCAC have been incorporated into different legislative Acts in Nigeria. An example is provisions under article 14 UNCAC[875], can be found under the provision of the Money Laundering (Prohibition) Act 2011. Again, section 1(b) of Article 14 calls for a dedicated law enforcement agent in combating money laundering, and this was translated into section 6 of the EFCC (Establishment) Act 2004, charging the EFCC with the responsibility of all financial crimes including money laundering. Most sectors under the UNCAC such as, but not limited to, bribery[876], embezzlement[877], illicit enrichment[878], freezing, seizure and confiscation,[879] all have coverage under the EFCC Act or the CPA. However, article 16 - Bribery of foreign public officials and officials of international public organisations – has not yet been postulated in Nigerian legislation, as at the time of writing.

[871] See chapter III, article 26 of the UNCAC.
[872] See chapter III, article 42 of the UNCAC.
[873] See chapter III, art. 42 (6) of the UNCAC.
[874] Oluduro (note 534) 368.
[875] Article 14, sections 1-5, is on measures to prevent money laundering.
[876] Article 15 UNCAC. See Chapter 12 Criminal Code (CC) Act; sections 8-10, 18, 21-22 CPA.
[877] Article 17 UNCAC. See Chapter 12 CC.
[878] Article 20 UNCAC. See Chapter 12 CC; section 19 CPA.
[879] Article 31 UNCAC. Forfeiture See section 20, 21, 23-33 EFCC (Establishment) Act, 2004, and also, sections 20, 37 CPA.

5.4.4 The African Union (AU) Anti-Corruption Convention.

Nigeria is a party to the African Union Convention on Preventing and Combating Corruption (AU Convention).[880]The AU Convention was adopted on 1 July 2003 by the AU Assembly of Heads of State and Government in Maputo, Mozambique.[881] The AU Convention has five objectives as stipulated under article two. The Convention aims to promote and strengthen the development of mechanisms to prevent, detect, punish and eradicate corruption and related offences in the public and private sector in African states.[882] It also aims to facilitate cooperation among the State Parties to ensure the effectiveness of measures and actions to eradicate corruption.[883] It proscribes both public and private sector acts of corruption. In regard to the Private sector, article 11 of the Convention enjoins party states to adopt legislative and other measures to combat corruption and related offences committed by agents of the private sector; establish mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights; and to adopt such other measures as may be necessary to prevent companies from paying bribes to win tenders. Article 1 defines 'private sector' as the sector of a national economy under private ownership in which market forces control the allocation of productive resources rather than public authorities. Private sector entities based on this definition would include partnerships, small and medium-sized enterprises (SMEs), and multi or transnational corporations.[884]

Article 9 of the Convention requires each State Party to adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences. The promulgation of the Freedom of Information Act[885] follows the provisions of article 9. The AU

[880] Nigeria signed and ratified the AU Convention on Preventing and Combating Corruption on the 16/12/2003 and 26/09/2006.
[881] African Union, 'African Union Convention on Preventing and Combating Crime' (AU, 11 July 2003) <https://www.au.int/web/en/treaties/african-union-convention-preventing-and-combating-corruption> accessed 26 April 2017.
[882] Article 2, section 1.
[883] Article 2, section 2.
[884] Olufemi O. Amao, 'The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of MNC', (2008) 12(5) The Int'l Journal of Human Rights 761, 779.
[885] Freedom of Information Act 2011, Laws of the Federation of Nigeria.

Convention recognises the role of civil society and the media in monitoring the principles of the Convention at the domestic level and the need to create an empowering environment that will enable them to hold Governments to the highest level of transparency and accountability in the management of public affairs.[886]

However, the AU Convention is criticised for its excessive use of claw-back clauses as contained in several of its provisions, granting supremacy to domestic laws of state parties. For example, article 7(5) states that any immunity granted to public officials shall not be an obstacle to the investigation of allegations against the prosecution of such officials, subject to the provisions of domestic legislation. All these clawbacks, according to Olaniyan, undermines the objectives of the Convention and emasculates uniformity in its application amongst member State parties.[887] The Convention has also been criticised for lacking provisions on the liability of corporations. Amao, for instance, recognises the Convention's effort to check corruption in the private sector, yet the convention's attention is on State responsibilities without making provisions for the direct liability of multinational corporations.[888] Furthermore, the Convention is silent on the issue of bribery of foreign public officials despite reference to various public and private acts of corruption.[889] Addressing the above challenges, therefore, will help reinforce the Convention's capacity to tackle corruption and, thus, complement the efforts taken at the domestic state level.

5.5 Contribution of the International Community in Combating Corruption in Nigeria

This section examines the efforts of the international community in the global prevention of corruption and its impact on Nigeria, including the use of foreign

[886] Article 12, AU Anti-Corruption Convention.
[887] K Olaniyan, 'The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal' (2004) 4 African Human Rights Law journal 74, 86.
[888] Olufemi O. Amao, 'The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of MNC', (2008) 12(5) The Int'l Journal of Human Rights 761, 781.
[889] NJ Udombana, 'Fighting Corruption Seriously? Africa's Anti-Corruption Convention' (2003) 7 Singapore Journal of Int'l Comparative Law 447, 464-465.

legislative tools such as the United States Foreign Corrupt Practices Act of 1977 and the United Kingdom Bribery Act 2010 in aiding the anti-corruption effort in Nigeria.

The harmonisation of the international community is critical in the global combat against corruption. Home countries holding perpetrators accountable for corrupt practices carried out in host states is a promising development. In the United States, for instance, a corporation and its employees are liable for bribery carried out in a foreign country where the employee must be acting within the scope of his or her duties and for the benefit of the corporation.[890] Generally, a corporation is not liable for exceptional acts that are genuinely outside the employee's assigned duties or contrary to the corporation's interests, such as where the corporation is the victim rather than the beneficiary of the employee's unlawful conduct.[891]

The U.S. Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) successfully prosecuted erring firms under the U.S. Foreign Corrupt Practices Act (FCPA),[892] illustrated in the case of *Universal and Universal Brazil,* where DoJ fined the corporation paid a fine to the U.S. DoJ for the violation of the FCPA.[893] The application of the FCPA in prosecuting corrupt activities carried out in Nigeria is also noteworthy; for instance, the SEC charged Parker Drilling Company, a worldwide drilling services and project management firm, with the violation of the FCPA for authorising bribes to Nigerian officials involved in resolving the company's customs dispute. The company agreed to pay $4m to settle the SEC charges.[894] Again, the Securities and Exchange Commission executed a settled enforcement action against Bristow Group Inc., a New York Stock Exchange-listed helicopter transportation services and an oil and gas operation firm, for the violation of the Foreign Corrupt Practices Act, including the bribery of foreign government officials. Under the Commission's Order, a Nigerian affiliate of Bristow Group made improper payments to Nigerian state government officials in return for the reduction of the affiliate's employment taxes owed to the Nigerian state government. The Order further finds that the same affiliate and another Nigerian affiliate of Bristow Group

[890] Crim No 6516, USDC for the district of Rhode Island 148 F.Supp 365; 1957 U.S Dist. LEXIS 4029.
[891] *Ibid.*
[892] This is a deterrent to companies listed on the US exchanges and registered with the US SEC.
[893] US DoJ (note 710).
[894] O Oluduro (note 1128) 361.

underreported their expatriate payroll expenses in Nigeria.[895] In *SEC v ENI, S.p.A & anor*,[896] the Italian company ENI, S.p.A. and its former Dutch subsidiary Snamprogetti Netherlands B.V. violated the FCPA in a bribery scheme that included deliveries of cash-filled briefcases and vehicles to Nigerian government officials to win construction contracts. According to the SEC's complaint, senior executives authorised the hiring of two agents, a U.K. solicitor, and a Japanese trading company, through which more than $180 million in bribes were routed to Nigerian government officials to obtain several contracts to build liquefied natural gas (LNG) facilities on Bonny Island, Nigeria. Snamprogetti and ENI agreed to jointly pay $125 million to settle the SEC's charges. Snamprogetti was fined an additional $240 million to settle a separate criminal proceeding brought by the U.S. Department of Justice.[897] All these cases were brought under the US FCPA, without which, the perpetrators would not have been brought to justice in Nigeria.

Against this backdrop, the US FCPA is an essential legislative tool in controlling corporate criminal responsibility. It has both anti-bribery and accounting provisions, in accordance with the OECD Convention.[898] The anti-bribery Act prohibits corporate or non-corporate actors,[899] agent of a domestic concern,[900] and any stockholder acting on behalf of a US company from bribing foreign officials to obtain or retain business.[901] An exception under the Act is a payment made to a foreign official, political party or party official, the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party or party official.[902] The

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[895] U.S. Security and Exchange Commission, 'SEC Institutes Settled Enforcement Action Against Bristow Group for Improper Payments to Nigerian Government Officials and Other Violations' (SEC, 26 Sept 2007) <https://www.sec.gov/news/press/2007/2007-201.htm> accessed 2 June 2017.

[896] *SEC v ENI, S.p.A & anor* Civil Action No. 4:10-cv-2414, US District Court, Southern District of Texas, Houston Division.

[897] U.S. Security and Exchange Commission, 'SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials with Carloads of Cash' (SEC, 7 July 2010) <https://www.sec.gov/news/press/2010/2010-119.htm> accessed 2 June 2017.

[898] Likewise, Canada's Corruption of Foreign Officials Act (S.C. 1998, c. 34) accounting provisions under s4.

[899] § 78dd-1 FCPA; an issuer is a corporation that has issued securities registered in the U.S or required to file periodic reports with the SEC.

[900] § 78dd-2 FCPA; a domestic concern is a corporation which has its principal place of business in the U.S, or which is organized under the laws of a state of the United States.

[901] see also United States Department of Justice, 'Foreign Corrupt Practices' (DoJ, 3 Feb 2017) <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> accessed 2 June 2017.

[902] 15 U.S. Code § 78dd–1 (b); similarly, section 4, Canada's Corruption of Foreign Public Officials Act (CFPOA) (S.C. 1998, c. 34), also makes provision for the acceptance of facilitation payments.

jurisdiction of the FCPA for corporate liability is both territorial and extra-territorial in its effect; that is, foreign and national companies which cause—directly or indirectly through agents—an act in furtherance of the corrupt payment to take place within the territory of the US or internationally, are subject to the jurisdiction of the FCPA. There are two liability defences[903]under the FCPA: (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's country; or (2) the payment, gift, offer, or promise of anything of value that was made was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to— (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency.[904] The FCPA also prohibits payments towards obtaining or retaining business.[905]

The UK Government has shown increased propensity in combating money-laundering and bribery offences perpetrated by 'relevant commercial organisation'[906] with an 'associated person' in Nigeria, and globally.[907] This commitment was demonstrated in 2004 with the arrest of a Nigerian serving governor for money laundry, who then jumped bail in September of the same year and returned back to Nigeria.[908] Again, in 2010, former Nigeria state governor, James Ibori (1999-2007), convicted in the UK for fraud and money laundering and other related offences.[909] The Human Rights Watch African Director, Daniel Bekele, noted that Ibori's conviction 'was about

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[903] *Ibid,* (c).

[904] Similarly, see s3 Canada's CFPOA, with similar defences. Conversely, the UK Bribery Act does not have a similar defence mentioned in A & B.

[905] See *United States v. Kay* -- 359 F.3d 738 (5th Cir. 2004). The case gives a detailed analysis of FCPA's legislative history.

[906] Section 7(5), UK Bribery Act 2010: (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

[907] Section 8, *ibid.*

[908] S Murray, 'Profile: Joshua Dariye' (BBC News, 24 July 2007) <http://news.bbc.co.uk/1/hi/6908960.stm> accessed 21 April 2017. The article also states that he has been sacked as governor twice and returned to reclaim his position on both occasions, earning him the nickname "the cat with nine lives".

[909] *R v James Ibori et al.* [2018] EWCA 2291 (Crim); Human Rights Watch, 'Nigeria: UK Conviction a Blow against Corruption' (HRW, 17 Apr 2012) <https://www.hrw.org/news/2012/04/17/nigeria-uk-conviction-blow-against-corruption> accessed 3 June 2017.

acknowledging global responsibility for helping to stop the devastating human cost of corruption in Nigeria'.[910] This determination embarked upon by the UK government will, perhaps, deter corrupt actors contemplating the UK as haven for their proceeds of crime.

At the heart of the UK Anti-Corruption Plan,[911] is the International Corruption Unit (ICU) and the UK Bribery Act 2010 (UKBA), which represents one of the most robust legal regimes against bribery anywhere in the world. Unlike the US Foreign Corrupt Practices Act of 1977 (as amended), the UKBA's requirement applies to both domestic and foreign bribery acts. The UKBA introduces two general offences covering active[912] and passive[913] bribery, and a specific offence relating to the bribery of foreign public officials[914], which applies to individuals and UK-registered companies. It also introduces a specific corporate offence of 'failing to prevent bribery from occurring',[915] designed to make organisations responsible for bribery committed on their behalf. In other words, a corporate body is liable for failing to prevent active bribery on its behalf by employees, agents, or subsidiaries. Therefore, if a UK registered company operating in Nigeria bribes a Nigerian official, and the action of bribery is not exempted under the UKBA, such action of bribery is in contravention of the UKBA. However, by demonstrating 'adequate procedures' were in place to prevent corrupt acts, the organisation could mitigate against a corporate criminal conviction. Cooperating with investigative official(s) or self-reporting by the company could also result in a 'Deferred Prosecution Agreement' (DPA),[916] rather than a criminal

[910] Human Rights Watch, *Ibid.*
[911] HM Government, *UK Anti-corruption plan* (Crown 2014).
[912] Section 1 UK Bribery Act 2010.
[913] Section 2.
[914] Section 6.
[915] Section 7.
[916] For definition of DPA, see *Serious Fraud Office v Standard Bank Plc (Now known as ICBC Standard Bank plc)* (2015) case no: U20150854, especially at [1] – [4]. The concept of DPA was first introduced in the US and, by s45 and Schedule 17 of the Crime and Courts Act 2013, has been adapted and adopted in the UK. It is only applicable to an organisation and not for individuals. In the UK a DPA must be approved by the court, in contrast to US requirement.

conviction.[917] The UK Bribery Act prohibits facilitation payment unlike the US FCPA and Canada's Corruption of Foreign Public Officials Act.[918]

The international corruption unit (ICU) is part of the UK anti-corruption framework, and it is under the purview of the UK National Crime Agency. ICU's main functions include investigating money laundering in the UK resulting from corruption of high-ranking officials overseas; bribery involving UK–based companies or nationals that has an international element; and cross-border bribery where there is a link to the UK; and other functions.[919] The UK government's international anti-corruption plan investigates international corruption from other countries, such as 'bribery by UK companies or individuals in developing countries',[920] including Nigeria.[921]

International cooperation is crucial in curbing global corruption. Moreso, the impact of corruption in developing countries can reverberate around the world. For instance, according to the US Senator Richard Lugar (1977-2013), corruption exacerbates global poverty, terrorism, and instability.[922] In other words, global cooperation could potentially resolve national concerns before they become global challenges. At the heart of international co-operation on bribery, is the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).[923]

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[917] *Serious Fraud Office v Rolls-Royce Plc & Rolls-Royce Energy Systems Inc* (2017) case no: U20170036, where a DPA was approved by the courts; cf. *Serious Fraud Office (SFO): R v Sweett Group plc (unreported),* details available at SFO https://www.sfo.gov.uk/cases/sweett-group/ accessed 6 June 2017. DPA was not offered in this case because of *Sweett's* self-reporting and cooperation shortcomings. Sweett Group PLC was sentenced on 19 February 2016 and ordered to pay £2.25 million. The amount is broken down as £1.4m in fine, £851,152.23 in confiscation. For broader reading see also, S Arrowsmith et al., 'Self-cleaning as a defence to exclusions for misconduct: An emerging concept in EC public procurement law? (2009) 6 Public Procurement Law Review 257-82.

[918] See the Bribery Act Guidance, p18, *ibid.* For more differences between FCPA and the UK Bribery Act 2010, see British Bankers Association, 'Bribery Act 2010: Guidance on Compliance', (BBA, 2011) 13 <https://www.bba.org.uk/policy/financial-crime/anti-bribery-and-corruption/bribery-act-2010-guidance-on-compliance/> accessed 6 June 2017.

[919] J Harvey, 'Tracking the international proceeds of corruption and the challenges of national boundaries and national agencies: the UK example'(2020) 40(5) Public Money and Management 360.

[920] Anti-Corruption Plan (note 911) 39.

[921] See also Anti-corruption Plan, *ibid;* on other UK agencies assisting in combating international corruption such as The Department for International Development (DfID) and the Foreign and Commonwealth Office (FCO); In addition to DfID's extensive anti-corruption efforts, the Foreign and Commonwealth Office (FCO) currently funds around 30 overseas projects that focus on anti-corruption and transparency, at p47-49.

[922] Oxfam Int'l, 'US Congress Passes Law to End Secrecy in Oil, Gas, and Mining Industry' (Oxfam, 15 July 2010) <https://www.oxfamamerica.org/press/congress-passes-law-to-end-secrecy-in-oil-gas-and-mining-industry/> accessed 6 June 2017.

[923] M Pieth *et al., The OECD Convention on Bribery: a commentary* (OUP 2017).

The Convention was adopted in 1997 and came into force on 15 February 1999. It has been adopted by 35 OECD countries and six non-OECD countries: Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa.[924] The Convention obliges member states to domesticate the convention and to prohibit the bribery of foreign officials in international business transactions. Before, many OECD countries allowed bribes to public officials in Africa, as a usual way of doing business.[925] In 1997, when the OECD Convention was signed, nearly half of OECD members allowed bribe to foreign officials as tax deductible expenses.[926] Much encouragement, therefore, has to be done to enable OECD non-members to adopt international anti-corruption standards.[927] To this effect, the OECD Convention provides guidelines against bribery and extortion,[928] and these OECD guidelines are recommended by the International Chamber of Commerce (ICC), who have also issued Rules of Conduct to Combat Extortion and Bribery in International Business Transactions,[929] prohibiting extortion and bribery for any purpose. Since these rules are not binding, corporations may decide not to adopt them.[930]

The World Bank (WB), International Monetary Fund (IMF) and the World Trade Organisation (WTO)[931] are international institutions with an unequivocal wealth of experience and data that can assist Nigeria in tackling corruption. Even though reform programs must be driven from within, the World Bank and IMF[932] are vital allies in the fight against corruption, providing policy advice and developmental finance to state governments. This WB approach in tackling corruption, according to Huther and Shah,

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[924] *Ibid.*

[925] M Milliet-Einbinder, 'Writing off Tax Deductibility' in O Oluduro (note 534) 363: She notes that while Czech Rep classified all bribes as gifts, which were mostly not deductible; bribes were categorised as entertainment expenses in Japan, which by definition made them non-deductible anyway.

[926] RR Demas, 'Moment of Truth: Development in Sub-Sahara Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practise Act and Other Anti-corruption Initiatives' (2011) 26 American University International Law Review 315, 338.

[927] Other non-OECD countries have adopted the UNCAC, for instance, Nigeria.

[928] Section VII.

[929] The ICC Rules of Conduct to Combat Extortion and Bribery, available at <https://iccwbo.org/>.

[930] *Ibid.*

[931] Ala'I, Padideh., 'The WTO and the Anti-Corruption Movement' (2008-2009) 6(1) Loyola University Chicago Int'l Law Review 259-278.

[932] Nigeria is a member of the IMF. The IMF works with its member countries to promote good governance and combat corruption. IMF surveillance involves annual reviews of countries' economic policies, carried out through Article IV consultations. In the process, staff may advise on reforms contributing to good governance and discuss economic consequences arising from poor governance, *inter alia.* IMF provides technical assistance that benefits good governance. In addition, the IMF assists in strengthening countries' capacity to combat corruption by advising on appropriate anti-corruption legal frameworks.

is anchored on three main objectives: preventing fraud and corruption in the programmes and projects it finances; supporting international and regional initiatives to curb corruption; and helping individual countries develop policies and procedures to combat corruption.[933] As a result, the World Bank could support Nigeria's anti-corruption efforts, for instance, by designing and implementing governmental anti-corruption initiatives in areas within its mandate, and in partnering with other international institutions and bilateral aid donors.[934] Through its country-specific advice, the WB could assist Nigeria in the area of economic policy reform and institutional strengthening aimed at improving governance, which then acts as an ancillary benefit in the reduction of corruption.[935]

Non-governmental organisations (NGOs) around the world are also participating with governments at different levels to curb corruption.[936] Among the international NGOs, Transparency International (TI) aims to—curb corruption through international and national coalitions; encourage governments to establish and implement effective laws, policies, and anti-corruption programs; and encourage all parties to international business transactions to operate at the highest levels of integrity, guided by TI's Standards of Conduct.[937] Transparency International has more than seventy national chapters that fight corruption at the national level, and it has contributed significantly to depict corruption as a public issue, cooperating with international organisations in actions against corruption.[938]

5.6 Conclusion

The above evidence demonstrates Nigeria's anti-corruption efforts and how corruption, if not abated, undermines democracy, distort the economy, and restricts

[933] J Huther and A Shah, 'Anti-Corruption Policies and Programs: A Framework for Evaluation', (2000) World Bank Policy Research Working Paper, No. 2501, December.

[934] The World Bank, *Helping Countries Combat Corruption: The Role of the World Bank* (World Bank 1997). The WB, and the Economic Development Institute can support government efforts by facilitating workshops for parliamentarians or journalists on anti-corruption and good governance issues.
[935] *Ibid.*
[936] I Carr & O Outhwaite, 'The role of non-governmental organizations (NGOs) in combating corruption: Theory and practice' (2011) 44(3) Suffolk University Law Review 615.
[937] S Kimeu, 'Corruption as a challenge to global ethics: the role of Transparency International' (2014) 10(2) Journal of Global Ethics 231.
[938] *Ibid.*

tobacco control efforts. It hinders the State and corporations in fulfilling its ‘respect, protect and remedy’ obligations. Corruption endangers individual rights, for it could allow TTCs to become indifferent to the impacts of their activities on the environment and on the health of the population. The effective control of corruption in Nigeria will therefore enable public agencies, institutions, and even the judiciary to hold TTCs accountable for any wrongful activities, advancing the tobacco regulatory framework.

Chapter Six. Tobacco Control, Human Rights and TTCs

6.1 Introduction

This chapter continues with the overall aim of the research—to enhance the tobacco regulatory framework in Nigeria. As a result, the chapter will explore a humans-rights approach, with the objective of exploring solutions to enhance the control of transnational tobacco corporations.

The application of a human rights-based approach to tobacco control has gained prominence and support in both academic research[939] and litigation.[940] The WHO FCTC, which is the world's first international tobacco control treaty, not only recognises human rights as an integral part of tobacco regulation but also projects itself as a human rights treaty. This nexus is evident in the preamble of the WHO FCTC. The preamble cited several human rights treaties as one of the basis to give priority to the right to protect public health, and, as a result, several of the WHO FCTC's decisions and guidelines have advocated for a human rights framework in tackling tobacco prevalence.[941] Consequently, judicial bodies have embraced the WHO FCTC as a human rights treaty. For instance, the constitutional chamber of the Costa Rican supreme court stated that the FCTC is a human rights treaty.[942] In addition, the United Nations associates human rights with tobacco control. After all, under the UN Human Rights Council Resolution 35/23, the United Nations acknowledged the right of physical and mental health in the implementation of the 2030 Agenda for Sustainable

[939] C Dresler and S Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28(3) Human Rights Quarterly 601; HH Koh, 'Global tobacco control as a health and human rights imperative' (2016) 57(2) Harvard International Law Journal 433; MEC Gispen and BCA Toebes, 'The Human Rights of Children in Tobacco Control' (2019) 41(2) Human Rights Quarterly 340.

[940] See, *BAT Uganda Ltd v Attorney General and the Center for Health, Human Rights and Development*, No.46 of 2006, Constitutional Court of Uganda (2019); *British American Tobacco UK Ltd & Ors, R (on the application of) v The Secretary of State for Health* [2016] EWCA Civ 1182; *Vlaamse Liga tegen Kanker (Flemish Anti-Cancer League) et al. v Belgium Council of Ministers*, Arrêt n° 37/2011 du 15 mars 2011, Constitutional Court of Belgium (2011).

[941] See for example Decision FCTC/COP/7/19: Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4 , 11 August 2000; see also the decision of the FCTC/COP/7 (26).

[942] Constitutional Chamber of the Costa Rican Supreme Court. Request on the constitutionality of a proposed piece of legislation. Exp: 12-002657-0007-CO. Res. No 2012-003918, March 2012.; see also Peruvian Constitucional Tribunal, Jaime Barco Rodas contra el Artículo 3o de la ley N. 28705 – Ley general para la prevención y control de los riesgos del consumo de tabaco, unconstitutionality proceeding, July 2011.

Development and urged nations to work towards the full implementation of the WHO FCTC.

TTCs and the tobacco industry in general present a challenge for nations like Nigeria to achieve the UN human rights objectives, since TTCs' activities have the potential to act as a catalyst for the violations of fundamental human rights, violations that are made prominent when transnational corporations invest in countries with weak governance.[943] Under the 'protect, respect and remedy' framework of the UN Guiding Principles on Business and Human Rights, corporations are to respect human rights. This represents the first and unique global standard for preventing and addressing adverse impacts on human rights linked to business activity.

Against this backdrop, the chapter will explore the rights vulnerable to the activities of TTCs and the extent to which the Constitution of Nigeria serves as a viable instrument in protecting such rights. This chapter will examine the adequacy of the international human rights agenda in protecting rights impacted by the activities TTCs.

6.2 Categories of Human Rights Vulnerable to The Activities of TTCs.

> *In reality, these companies sell toxic products that not only kills 7 million people a year but also forces hard-pressed taxpayers to pick up the bill for the illnesses which they cause. It is an industry hooked on profit and devoid of responsibility… There is more, much more, to say about the tobacco industry and its inglorious history. Its suppression of research into the effects of its products, its longstanding involvement in tobacco smuggling, its bribery of government officials and other attempts to distort good decision-making, and its reliance on child labour.* [944]

The following subsections will explore human rights violations associated with the tobacco sector. As highlighted in chapter five, the tobacco industry remains a subject of intense public scrutiny as a result of the improper conduct perpetrated by

[943] UN Environmental Programme (UNEP), *Environmental Assessment of OgoniLand Report* (UNEP 2011); MK Sinha (ed), *Business and Human Rights* (Sage 2013) 2.

[944] Dr Vera da Costa Silva, 'Engagement with Tobacco Industry: Conflicting with UN principles and values' (WHO FCTC, 11 July 2017) <http://www.who.int/fctc/secretariat/head/statements/2017/ungc-integrity-review-tobacco-industry/en/> accessed 14 July 2017.

the industry. Thus, the significance of human rights legislative provisions is to address such improper behaviour.[945]

6.2.1 Right to Life and Health

The fundamental human rights usually embodies the most important universal values of human beings. Generally, the rights are related to the preservation of human life, security of the person, fundamental labour rights, equality, and non-discrimination. Early human rights rhetoric related to health can be found under the Universal Declaration of Human Rights in 1948.[946] Since then, nine core international human rights treaties have been adopted and brought into force. Four of them are relevant to the right to health and well-being: The International Covenant on Civil and Political Rights (ICCPR, 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) and the Convention on the Rights of the Child (CRC, 1989).

Nigeria guarantees the right to life under its international, regional, and national obligations with the UN, the African Union and the 1999 Constitution, respectively. The International Covenant on Civil and Political Rights (ICCPR)[947] was ratified by the Nigerian government, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR).[948] The ICCPR states that 'every human being has the inherent right to life…protected by law'.[949] The 1999 Nigerian Constitution also

[945] Dr Vera Luiza da Costa e Silva, 'Human Rights and Tobacco Control' (Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights Obligations of Transnational Corporations and other business enterprises, Geneva, Palais des Nations, 26 Oct 2016). See also Carolyn Dresler *et al.,* 'Human rights-based approach to tobacco control' (2012) 21(2) Tobacco Control 208-211.

[946] Article 25, The United Nations Universal Declaration of Human Rights: 'the right to a standard of living adequate for health and well-being of himself and his family including food, clothing, housing and medical care and necessary social service'.

[947] Adopted 16 Dec 1966 and entered into force on 23 March 1976, G.A Res. 2200 A (XXI).

[948] Adopted 16 Dec 1966 and entered into force 3 Jan 1976, G.A Res. 2200 (XXI). ICCPR and ICESCR were both ratified by Nigeria on 29 July 1993. As at June 2017, Nigeria is yet to sign the first Optional Protocol (1966) to the ICCPR, under which an individual, who asserts that his rights as contained in the ICCPR have been violated and who has exhausted all domestic remedies, can submit written communications to the UN Human Rights Committee.

[949] Article 6(1) of the ICCPR.

stipulates in section 33(1) that 'every person has a right to life'. Similarly, the African Charter on Human and Peoples' Rights (African Charter), which Nigeria ratified[950] and domesticated[951], stipulates that 'human beings are inviolable',[952] and 'shall be entitled to respect of his life and integrity of his person'.[953] The African Commission on Human and Peoples' Rights (African Commission), the quasi-judicial body mandated with the interpretation and enforcement of the African Charter, echoed this position in *Sudan Human Rights Organisation & Another v Sudan,* where the Commission expressly states that the right to life in article 4 of the African Charter 'is the supreme right of the human being…basic to all human rights and without it, all other rights are without meaning'.[954]

In addition to the right to life, international human rights instruments have also adopted the right to health. For instance, the WHO FCTC, 'reaffirms the right of all people to the highest standard of health'.[955] Similarly, article 25(1) of the UN Universal Declaration of Human Rights 1948 provides the right for an adequate standard of the health and well-being, including medical care and the right to security in the event of sickness and disability. Furthermore, the right to health is expressed in both the ICCPR and ICESCR. Article 12 of the ICESCR provides that the right to health includes 'the rights of everyone to the highest attainable standard of physical and mental health,' imploring Convention members to take adequate steps to realise this right. Some of these adequate steps, appearing as guidelines in Paragraph 2 of Article 12, include the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment, and control of epidemic and other diseases; and the creation of conditions that will guarantee medical attention and service in the event of sickness. The UN General Assembly also underscored the relationship between health and the environment: 'all individuals are entitled to live in an environment adequate for their

[950] The African Charter was ratified by Nigeria on 22 June 1983.
[951] The African Charter was domesticated by Nigeria as part of her law through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation 2004 to enable the Charter have effect at the municipal level. The Nigerian Supreme Court in *Abacha v. Fawehinmi* (2000) 6 NWLR (pt.660) 228, held *inter alia* that the Charter has some international flavour, and, in that sense, it cannot be amended, watered down or side-tracked by and Nigerian law.
[952] Article 4, African Charter.
[953] *Ibid.*
[954] *Sudan Human Rights Organisation & Another v Sudan*, Communication No. 279/03, 296/05, 28th ACHPR AAR Annex (Nov 2009-May 2010) [146].
[955] Forward to the WHO FCTC: 'The WHO FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health'.

health and well-being'.[956] Furthermore, the United Nations Sustainable Developmental Goals (SDGs) advocates for the promotion of healthy lives and well-being for all ages.[957] In addition, article 3 of the WHO FCTC urges members, such as Nigeria, to give priority to the 'right to protect public health'[958] from the devastating health consequences of tobacco consumption and exposure to tobacco smoke. The African Charter also reaffirms the right to health. Article 16 states that 'every individual shall have the right to enjoy the best attainable standard of physical and mental health'. Article 16(2) further states that any party to the Charter 'shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'. Article 24 of the African Charter provides for the entitlement of all people to a satisfactory general environment favourable to their development, as pertinent to attaining the right to health.

At the national level, section 17(3)(c) of the 1999 Constitution of the Federal Republic of Nigeria (FRN) (as amended) provides for the state to guarantee the health, safety, and welfare of all persons. This constitutional provision recognises the health rights of Nigerians. However, such rights under s17(3)(c) are classed as 'second generation rights'[959] because they fall under Chapter II[960] of the Constitution, and by virtue of section 6(6)(c) of the same Constitution, such rights are non-justiciable. In other words, the judiciary would not adjudicate on any of the non-justiciable provisions, except where they are incorporated in legislation or executive actions.[961] Nonetheless, Nigerian courts have recourse to international and regional human rights instruments, which Nigeria is already a party to, such as the African Charter. The Nigerian courts can enforce the right to health by reading it into other justiciable rights, such as the right to life.

Although Oduwole and Akintayo argue that the right to health may not have attained the same standard with the right to life[962], this contention, however, is laid to

[956] United Nations General Assembly Resolution 45/94.
[957] Goal 3, SDGs. One of the targets of Goal 3 is to 'strengthen the implementation of the WHO FCTC on tobacco control in all countries'.
[958] Preamble to the WHO FCTC.
[959] O Oluduro (note 534) 240.
[960] Fundamental Objectives and Directive Principles of State Policy under the 1999 Constitution FRN.
[961] See *AG Ondo State v. AG Federation* (2002) 9 Nigerian Weekly Law Report (part 772) 222.
[962] J Oduwole & A Akintayo, 'The rights to life, health and development: The Ebola virus and Nigeria' (2017) 17(1) African Human Rights law Journal 194, 200.

rest by the Committee on Economic, Social and Cultural Rights (ESCR Committee), when it submitted that 'health is a *fundamental human right* indispensable for the exercise of other human rights.[963] The right to health is an essential feature of international, regional, and national instruments. The right to health, therefore, is an essential right without which other rights may be made redundant.[964] As an illustration, a person with ill health and no access to adequate healthcare is unlikely to appreciate, much less exercise, any other rights. This illustration indicates that the right to health consist of two main components: the first relates to the availability of timely and appropriate healthcare; the second relates to the protection of public health through measures such as the provision of potable water and health-related education and information.[965] Note that this section is mainly on the public health dimension of the right to health — that is, the prevention of diseases and safeguarding the health of the population.

However, the use of the term 'right to health' is not without its objection. On the one hand, some have argued that 'the right to healthcare' and 'the right to health protection' are better descriptions of the legal guarantee of the right to health because health itself cannot be guaranteed.[966] On the other, it is argued that the legal guarantee of the right to health goes beyond the mere provision of healthcare and health protection, as illustrated under international, regional and some domestic human rights instruments.[967] However, Ngwena and Cook argue that there is necessarily no real conflict between the different terms, because the ultimate objective is to attain the highest standard of health.[968] As a such, the research will adopt Ngwena and Cook's position on the 'right to health'.

As to the meaning of health, the Preamble to the Constitution of the WHO defined it as the 'state of complete physical, mental and social well-being and not

[963] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4) at para 1. Italics added for emphasis.
[964] See also *Purohit & Another v The Gambia* (2003) African Human Rights Law Report 96.
[965] AR Chapman 'Core obligations related to the right to health and their relevance for South Africa' in D Brand & S Russell (eds), *Exploring the core content of socioeconomic rights: South African and international perspectives* (Protea Boekhuis 2002) 45.
[966] B Toebes 'Towards an improved understanding of the international human right to health' (1999) 21 Human Rights Quarterly 662-663.
[967] *Ibid.*
[968] C Ngwena & R Cook 'Rights concerning health' in D Brand & C Heyns (eds) *Socioeconomic Rights in South Africa* (PULP 2005) 107-108.

merely the absence of disease or infirmity'.[969] According to the Committee on Economic, Social and Cultural Rights (ESCR Committee), the quasi-judicial body responsible for the exposition and enforcement of the ICESCR, the right to health is not a right to be healthy, but a right to embrace a wide range of socio-economic factors that can lead to a healthy life, including the underlying determinants of health, such as food, housing, safe working conditions, and a healthy environment.[970]

Accordingly, how do TTCs violate the right to health, a right so intricately linked to the right to life. They do so when their actions or products endanger individual well-being. It is common knowledge that there is a correlation between tobacco use and the development of health issues,[971] a position that is undisputed by TTCs' representatives.[972] As a result, any unwillingness on the part of the Nigerian government to prevent any corporate human rights infringements constitutes a breach of the constitution, despite TTC contending that tobacco control legislation violates their fundamental rights.[973] In some cases though, it appears whenever TTCs' rights contravene health policies or the right to health, the right to health mostly prevails. For instance, in *Philip Morris et al. v Republic of Uruguay*[974], a bilateral trade (BIT) dispute brought before the International Centre for Settlement of Investment disputes tribunal,[975] the contention was the infringement of the claimant's rights, including proprietary rights, by the respondent. However, the tribunal accepted the findings of one of the Respondent's experts that the government of Uruguay enjoys unquestionable and inalienable rights to protect the health of its citizens, and on this premise, the State has the authority to condition the commercialisation of a product or service, and this will consequently limit or condition the use of the trademark of

[969] Constitution of the World Health Organisation available. In addition, the WHO Constitution was the first international instrument to enshrine the enjoyment of the highest attainable standard of health as a fundamental right of every human being ("the right to health").
[970] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4) at para 4.
[971] See Preamble to the WHO FCTC; See also issues of green tobacco sickness in tobacco farming, JS McBride *et al.*, 'Green Tobacco Sickness', (1998) 7 Tobacco Control 294; MC Kulik *et al.*, 'Tobacco growing and the sustainable development goals, Malawi', (2017) 95 Bulletin of World Health Organisation 362–367.
[972] *British American Tobacco et al. v Secretary of state for Health* [2016] EWHC 1169 (Admin); *Philip Morris Brands SARL et al. v Oriental Republic of Uruguay* (2016) ICSID case no. ARB/10/7 at para 74; see also Case C-547/14 *Philip Morris Brands SARL and Others* (delivered on 23 December 2015).
[973] *Ibid.*
[974] ICSID Case No. ARB/10/7.
[975] An institution devoted to international investment dispute settlement through arbitration, conciliation etc.

TTCs.[976] Similarly, the Advocate General of the Court of Justice of the European Union in *Philip Morris Brands SARL and Others,*[977] rejected the submission presented by the TTCs and underpinned its decision on the importance of public health protection.[978] The Court held that the pursuit of health is a fundamental objective of the European Union (EU), and the health interest and rights are superior to other conflicting rights.[979]

Another example that illustrates the superiority of the right to health against other conflicting rights is *Commission v. Brazil,*[980] a non-tobacco litigation. In this case, the Brazilian government approved a road-building program that resulted in the displacement of the Yanomami Indians from their ancestral land in the Amazon and, as a result, they were exposed to epidemics, including influenza, tuberculosis, and measles. They argued that the government had not taken adequate action in addressing these health issues. The Commission accepted the findings and ruled that the failure of the Brazilian government to address the health issues violates the rights to preserve the health and well-being of the Yanomami Indians, as recognised under Articles VIII and XI of the American Declaration of the Right and Duties of Man. Besides, under international law, the ICESCR obligates all States Parties to recognise the right to the 'enjoyment of the highest attainable standard of physical and mental health'.[981] The General Comment 14 from the ICESCR Treaty Committee states that health is a fundamental human right indispensable for the exercise of other human rights.[982] The term *indispensable* indicates the absolute importance of health even to the point of being necessary for other rights to exist. International judicature have leaned towards this position, as demonstrated in *Brazilian Commission* and *Republic of Uruguay*.

The significance of the right to health and life, especially in the context of tobacco control litigation, appears to outweigh any conflicting rights presented by

[976] *Uruguay* (note 974) *[432].*
[977] C-547/14 (4th May 2016) ("Philip Morris").
[978] *Ibid.* [57].
[979] *Ibid.* see for example paragraphs [61], [144], [156], [170], [176] and [197]. The Court emphasised as considerations warranting the elevation of public health as a guiding principle, the "addictive effects" of tobacco and its impact upon children who, because of addiction, were to be treated as a "particularly vulnerable class of consumers".
[980] *Commission v. Brazil* (1984) Inter-American Commission on Human Rights, Case 7615 (Brazil).
[981] Article 12.
[982] Comm. on Econ., Soc. and Cultural Rights, CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (art. 12), 1, U.N. Doc. EC.12/2000/4 (Aug. 11, 2000) italics by author; see also Amartya Sen, 'Why and How Is Health a Human Right?' (2008) 372 LANCET 2010.

TTCs.[983] However, according to Dresler *et al.,* more attention should be given to the impact of the tobacco epidemic on human rights and to the potential of a human rights perspective to tobacco control as an element of future laws—*norm de lege ferenda.*[984]

6.2.2 Right to A Healthy Environment.

> The tobacco industry uses resources such as wood, water and energy and involves the use of agrochemicals. As in all manufacturing, our processes result in waste materials and our product leaves waste in terms of cigarette butts and packaging. We aspire to maintain our position at the forefront of businesses actively minimising their environmental impacts and expect our Group companies to operate to consistently high standards of environmental performance everywhere — BAT[985]

Nigeria is obliged under Article 18 of the WHO FCTC (Convention) to protect the environment from tobacco smoke[986], cultivation, and manufacturing. The right to a healthy environment is also recognised in Nigeria under the regional instrument of the African Charter on Human and Peoples' Rights: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.[987] Although the African Charter fails to provide the meaning of 'satisfactory environment' in article 24, it is nevertheless the first broadly ratified international human rights instrument explicitly recognising a right to the environment.[988] The reference of 'All peoples'[989] under article 24, suggests the right as being a collective one rather than an individual human right. Therefore, for an individual to have good health, society should have good public health policies. The African Charter was re-enacted as a municipal law by the Nigerian National Assembly, on the 17th of March 1983, under the African Charter

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[983] C Dresler *et al.*, 'The Emerging Human Right to Tobacco Control' (2006) 28(3) Human Rights Quarterly, 599,651.
[984] *Ibid* at p650.
[985] BAT, 'Business Principles and Framework for CSR: the principle of good corporate conduct', (BAT, unknown date) <British American Tobacco p.l.c.'s Framework for Corporate Social Responsibility (bat.com)> accessed 24 July 2017.
[986] WHO FCTC's Guidelines on Protection from Exposure to Tobacco Smoke [4].
[987] Article 24 African Charter – Right to a general satisfactory environment.
[988] OW Pedersen, 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008) 21 Georgetown International Environmental Law Review 73-111.
[989] The African Charter Guidelines [iii].

on Human and Peoples' Rights (Ratification and Enforcement) Act.[990] The domestication of the African Charter resulted from the fact that Nigerian international treaties are not self-executing; they need to be domesticated into local legislation before it can be enforced.

The first international instrument that could arguably be implied to environmental rights is the Charter of the United Nations.[991] The UN Charter was adopted 26 June 1945 and entered into force 24 October 1945. It sets out the purpose of the United Nations, including the protection of human rights, the maintenance of international peace and security, as well as the promotion of economic and social co-operation. Environmental issues are not expressly mentioned in the UN Charter; however, these social and economic provisions lay the foundation to incorporate environmental protection into the human rights agenda.[992] Environmental degradation negatively affects the standard of living, employment, health, and social progress, thus, making environmental protection essential to achieving the Charter's goals. The requirement that States promote and respect these social and economic interests, as well as human rights and fundamental freedoms, provide a basis for imposing positive state obligations to protect the natural environment.[993] Other instruments that include provisions to protect the environment are the International Convention on the Elimination of All Forms of Racial Discrimination[994], Convention on the Elimination of All Forms of Discrimination Against Women,[995] among other international instruments.[996]

The Stockholm Declaration of 1972 expressly recognised the correlation between human rights and the environment.[997] The declaration proclaimed that man's natural and human-made environment 'are essential to his well-being and to the enjoyment of basic human rights – even to the right to life itself'. Although the

[990] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter A9 (Cap 10 LFN) (No.2 of 1983) Laws of the Federation of Nigeria 1990.
[991] Charter of the United Nations, 1 U.N.T.S. XVL (24 October 1945).
[992] United Nations Environment Programme and anor, *UNEP Compendium on Human Rights and the Environment: selected int'l legal materials and cases* (UNEP 2014) <http://www.ciel.org/wp-content/uploads/2015/03/UNEP_Compendium_HRE_Mar2014.pdf> accessed 24 July 2017.
[993] *Ibid.*
[994] 660 U.N.T.S. 195 (21 Dec 1965).
[995] 1249 U.N.T.S. 13 (18 Dec. 1979)
[996] For more of the instruments and further reading see the UNDP Compendium (note *993*).
[997] UN G.A. Resolution 2398 (XXII) 1968.

declaration is non-binding and does not proclaim a fundamental human right to a healthy environment, it recognises that an essential healthy environment is imperative for the enjoyment and exercise of human rights.[998] Furthermore, treaty bodies that oversee the implementation of international human rights conventions produce General Comments connecting environmental issues with the other protected rights. For example, the UN Committee on Economic, Social and Cultural Rights found 'a healthy environment' was part of the right to health, when it interpreted Article 12.2 of the ICESCR.[999] Therefore, what these interpretations reveal is that if the activities and products of TTCs have a negative impact on the environment, TTCs may have interfered with fundamental human rights to such an extent that they violate other rights.[1000]

Subsequently, several non-binding but widely accepted Declarations supporting the individual's right to a clean environment were adopted, such as the 1982 World Charter for Nature.[1001] The Charter does not expressly provide for the individual's right to clean environment, but it was one of the first instruments to recognise rights of nature, distinct from the rights of humans. There is also the 1989 Declaration of The Hague on the Environment that acknowledges the 'right to live in dignity in a viable global environment…'[1002] Furthermore, the UN General Assembly passed a resolution in 1990 to '[r]ecognise that all individuals are entitled to live in an environment adequate for their health and well-being' and that 'member States and Intergovernmental and non-governmental organisation to enhance their efforts towards ensuring a better and healthier environment'.[1003]

Also worthy of consideration is the 1994 Draft Declaration of Principles on Human Rights and Environment appended to the Report of the UN Special Rapporteur on Human Rights and Environment, Fatima Zohra Ksentini.[1004] The Report regarded the 'right to a healthy and flourishing environment' as 'evolving' while also

[998] Dinah Shelton, 'Human Rights, Environmental Rights and the Right to Environment' (1991) 28 Stanford Journal of Int'l Law 1103,112.
[999] ESCR Committee, General Comment No. 14: The Right to the Highest Attainable Standard of Health.
[1000] *Ibid.*
[1001] World Charter for Nature, UN General Assembly Res. No.37/7, adopted on 28 October 1982.
[1002] Declaration of the Hague on the Environment 11 March 1989, 28 I.L.M. (1989), 1308.
[1003] UN, *Need to Ensure a Healthy Environment for the Well-Being of Individuals,* UN G.A.O.R, 45th Session, 68 Ple. Mtg., UN Doc. A/RES. 45/94 (1990).
[1004] The report was presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, at its 46th Session, U.N Doc, E/CN.4/Sub.2/1994/9.

acknowledging ‘a universal acceptance of environmental rights recognised at the national, regional, and international levels’.[1005] The Draft Declaration provides that ‘[a]ll persons have the right to a secure, healthy and ecologically sound environment’ and that this right and other human rights, including civil, cultural, economic political and social rights, are universal, interdependent and indivisible.[1006] However, the report is criticised for being politically motivated and vague.[1007]

The Rio Declaration on Environmental and Development, adopted at the United Nations Conference on Environmental and Development in 1992, endorsed the nexus between humans and the environment. It gives prominence to the integration of the environment and development, allowing for a healthy and productive life in harmony with the environment.[1008] Principle 10 of the Rio Declaration gives significance to environmental activist to act towards the protection of the environment. Recently drafted international human rights instrument do not embody a distinct right to a healthy environment; they do so impliedly, just as some of the declarations above. These include the 1989 Convention on the Rights of a Child (CRC) and the International Labour Organisation (ILO) Convention.[1009] Article 24 of the CRC, for instance, recognises ‘the right of the child to the enjoyment of the highest attainable health standard’ and mandates State parties to consider the ‘dangers and risks of environmental pollution’. Article 29 also includes respect for the environment as one of the goals of educational programmes.

Healthy environment, as a right, is not enshrined in the 1999 Constitution, FRN. Section 20 of the Constitution states that ‘the State shall protect and improve the environment…’ The section, however, implies that the Government of Nigeria must take into consideration environmental impact in its decision-making policy. Section 20 is under Chapter II and, as established earlier, they are non-justiciable. They are not enforceable against the State by virtue of section 6(6)(c) of the Constitution FRN.[1010]

[1005] *Ibid.*

[1006] *Ibid.* principle 2.

[1007] OW Pedersen (note 988) at p78.

[1008] See Principle 1 of the Rio Declaration.

[1009] The 1989 ILO Convention No. 169.

[1010] The section states: ‘The judicial powers vested in accordance with the foregoing provisions of this section - shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this constitution’.

They would have been justiciable if they had been under Chapter IV of the Constitution, in accordance with the 'good' practices list on environmental rights published by The UN Special Rapporteur on human rights and the environment.[1011]

The Nigerian government should endeavour to make environmental rights justiciable under the Constitution. Research suggests that environmental rights provisions in the constitution, such as in Brazil and Argentina, have somewhat improved environmental and human rights outcomes.[1012] In Brazil, the 1988 Constitution contains substantive and procedural environmental rights directing the public prosecutor (Ministerio Publico) to conduct investigations and file civil suits to protect the environment. Not only has the public prosecutor been particularly active on the environmental front, but it has also exerted the threat of prosecution to negotiate settlement agreements with alleged polluters.[1013] In Argentina, section 41 of the constitution protects the right to a healthy and balanced environment fit for human development. This constitutional provision was invoked in the Argentinian Supreme Court case between *Mendoza Beatriz Silva and the National Government of Argentina et al.*[1014] In the case, a group of concerned residents of the Matanza-Riachuelo River basin filed a complaint against the government and private companies, based in part, on the constitutional right to a healthy environment. They sought remedy for the environmental damage caused. The Court ordered the government and the other defendants to undertake a wide range of remedial actions without delay. The two examples—Brazil and Argentina—appears to demonstrate that domestic legal institutions can protect human rights and the environment when charged with a clear mandate and support.

[1011] John Knox, with the assistance of the UN Environment Programme and the Office of the High Commissioner for Human Rights, compiled a list of 'good' practices in environmental rights available at the Environmental Rights Database <http://environmentalrightsdatabase.org/> accessed 24 July 2017. The website features over 100 good practices from more than 50 countries that involve the work of a range of actors, including academic institutions, civil society organisations, indigenous communities, and individuals.

[1012] C Jeffords, 'Constitutionalizing Environmental Rights: A Practical Guide' (2017) 9(1) Journal of Human Rights practice 136-145.

[1013] *Ibid.* See also Chris Jeffords, 'Constitutionalizing Environmental Rights: A Practical Guide', (2017) 9(1) Journal of Human Rights Practice 136.

[1014] Mendoza Beatriz Silva *et al*. v State of Argentina *et al*. on damages (damages resulting from environmental pollution of Matanza/Riachuelo river). File M. 1569. XL, Date of the Ruling: 8 July 2008.

Nigeria has a dualist approach[1015] concerning its relationship with international law. What this means in practice is that international law must be incorporated into domestic legislation to have the force of law, otherwise they serve only as persuasive argument.[1016] As aforementioned, the non-justifiability of Chapter II provisions, by virtue of section 6(6)(c) of the Nigerian Constitution, has led to the refusal of the Nigerian courts to adjudicate directly on any of its provisions, save where they are incorporated in legislative or executive orders.[1017] The African Charter, domesticated into the national legislation, goes beyond both civil and political rights to include social-economic, cultural and solidarity rights. While it can be argued that the African Charter generally supplements the Constitution, there are certain rights under the African Charter that are identified by the constitution as unenforceable.[1018]

The status of the African Charter was considered in the *Abacha v Fawehinmi.*[1019] The Nigerian Supreme Court held that the Charter is part of the Nigerian legislation by virtue of domestication; however, the Charter was held not to be superior to the Constitution because its international flavour does not prevent the National Assembly or the Federal Military (as in this instance) from repealing it. A way round this lack of enforcement is to underpin the unenforceable rights with the enforceable ones, such as with the right to life under section 33 of the constitution. Consequently, when TTCs violate environmental rights that are nonjusticiable, the environmental rights has to be embedded with the justiciable rights before it could be enforced. This should not be the case, considering that Nigeria is a party to the WHO FCTC, a Convention that urges members to protect the environment from the activities of TTCs.[1020] Environmental rights, as well as health rights, should be justiciable to enhance accountability. After arguing that environmental rights should be justiciable,

[1015] International law needs to be domesticated by virtue of section 12 of the Constitution FRN. Contrary to a monist approach where international laws are automatically adopted.
[1016] *AG Ondo State v AG Federation* (2002) FWLR 1972.
[1017] *Ibid.*
[1018] E Egede, 'Bringing Human Rights Home: An examination of the domestication of Human rights treaties in Nigeria' (2007) 51(2) Journal of African Law 249 at 255.
[1019] *Abacha v Fawehinmi* (2000) S.C. 45/1997; FWLR (pt. 4) 533.
[1020] Article 18 of the WHO FCTC: 'In carrying out their obligations under this Convention, the Parties agree to have due regard to the protection of the environment and the health of persons in relation to the environment in respect of tobacco cultivation and manufacture within their respective territories. Article 17 addresses the need for alternative livelihoods for tobacco growers.

the next paragraph will then demonstrate how activities and products of TTCs violate environmental rights.

The environmental lifecycle of tobacco can be roughly divided into four stages: tobacco growing and curing; product manufacturing and distribution; product consumption; and post-consumption waste. Each stage poses environmental and health concerns.

Tobacco growing and curing. Vast acres of land have been dedicated to cultivating tobacco, notably in low- and middle-income countries (LMICs).[1021] These acres of land are as a result of deforestation, which has many environmental consequences—including loss of biodiversity, soil erosion and degradation, water pollution and increases in atmospheric carbon dioxide.[1022] Findings suggest that between 2 – 4% of deforestation globally is as a result of tobacco cultivation, even though it accounts for less than 1% of the world's agricultural land use.[1023] This process has an impact on forest reserves in LMICs that in Malawi, the government declared tobacco as a significant driver of deforestation.[1024] In Tanzania, Sauer and Abdallah found that tobacco production 'is still dominated by small-scale subsistence farmers' without scientific agricultural practices. As such, the production expansion is only possible through the clearing of additional forest land.[1025] According to the study, tobacco farmers in the study area deforest new woodlands every season for plantation. They also use wood for flue-curing, which is burning wood on kilns at high temperature for Virginia tobacco production, resulting in deforestation and soil degradation.[1026]

[1021] Natacha Lecours *et al*, 'Environmental health impacts of tobacco farming: a review of literature' (2012) 21(2) Tobacco Control 191.
[1022] *Ibid.*
[1023] Conference of Parties to the WHO FCTC, 'Study group on economically available alternatives to tobacco growing (in relation to Articles 17 and 18 of the Convention 2008)', FCTC/COP/3/11, 4 Sept 2008.
[1024] John Vidal, 'Malawi's forests going up in smoke as tobacco industry takes heavy toll' (the guadian.com 31 July 2015).
[1025] J Sauer & JM Abdallah, 'Forest diversity, tobacco production and resource management in Tanzania' (2007) 9 Forest Policy Econ 421-439.
[1026] *Ibid.*

Tobacco growing usually involves substantial use of chemicals, including pesticides, fertilisers and growth regulators,[1027] and when discharged into the environment, this chemicals may contaminate sources of drinking water. In the Nueva Segovia Department of Nicaragua, where most tobacco farms are close to essential rivers, researchers found pesticides have contaminated both the superficial aquifer and the deep groundwater.[1028] Studies in Brazil have also found excessive agrochemical residues in waterways near tobacco farming communities.[1029] This practice has continued unabated because of intensive lobbying and investments by TTCs in LMICs,[1030] as well as many of these countries have limited legislative and economic capacities to resist the influence and investments of TTCs, leading to short-term economic benefits for some farmers and long-term social, economic, health and environmental detriments for others.[1031]

Manufacturing and Production. It is estimated that global tobacco manufacturing produced over 2 million tonnes of solid waste; 300,000 tonnes of non-recyclable nicotine-containing waste; and 200,000 tonnes of chemical waste.[1032] For the annual cigarette production to remain constant for the last 20 years (output increased from 5 to 6.3 trillion cigarettes annually), tobacco factories would have deposited a total of 45,000,000 tonnes of solid wastes, 6,000,000 tonnes of nicotine waste and almost 4,000,000 tonnes of chemical wastes during this time.[1033] Other toxic by-products of tobacco manufacturing or chemicals used in manufacturing include ammonia, hydrochloric acid, toluene, and methyl ethyl ketone.[1034]

Post Consumption. The exposure of environmental tobacco smoke (ETS), colloquially referred to as secondhand smoke, can lead to various respiratory health

[1027] N Lecours *et al.*, 'Environmental health impacts of tobacco farming: a review of the literature' (2012) 21(2) Tobacco Control 191–6.
[1028] DL Riquinho & EA Hennington, 'Health, environment and working conditions in tobacco cultivation: a review of the literature' (2012) 17(6) Cien Saude Colet 1587 in WHO FCTC & UNDP, 'The Who Framework Convention on Tobacco Control: An Accelerator for Sustainable Development' (UNDP, Discussion Paper, May 2017).
[1029] *ibid.*
[1030] Thomas E Novotny *et al.*,' The environmental and health impacts of tobacco agriculture, cigarette manufacture and consumption' (2015) 93(12) Bulletin of the World Health Organisation 877.
[1031] *Ibid.*
[1032] TE Novotny & F Zhao, 'Consumption and production waste: another externality of tobacco use' (1999) 8(1) Tobacco Control 75–80.
[1033] *Ibid.*
[1034] TE Novotny *et al.*, 'The environmental and health impacts of tobacco agriculture, cigarette manufacture and consumption' (2015) 93(12) Bulletin of the World Health Org 877, 878.

issues, especially among children.[1035] Exposure to residual chemicals in smoking environments may also have human health impacts. Residual tobacco stays on surfaces, including the smoker's, and can even remain on dust. Unlike ETS, which has inhalation as a single pathway for exposure, residual tobacco can be inhaled, ingested, or absorbed dermally.[1036] Some other post-consumption issues include the non-extinguished cigarette light, which remains a significant cause of accidental fire.[1037]

Post-consumption waste. The environmental impact of disposing cigarettes, plastic, metal, and butane used in making cigarette lighters are also a key concern.[1038] The discarded cigarette releases hazardous substances, such as arsenic, lead, nicotine and ethyl phenol into the aquatic environment and soil.[1039] In 2014, for instance, over two million discarded cigarette butts were picked up from beaches and water edges across 91 countries.[1040] Lastly, tobacco emission from smoking directly generates 2.6 million tonnes of carbon dioxide and about 5.2 million tonnes of methane.[1041]

6.2.3 Rights of the Child

This section will focus primarily on child labour in tobacco farming.[1042] The tobacco sector is not unique in its use of child labour. The distinction is the damage caused by the tobacco crop to the health and physical development of a child-worker on a tobacco plantation.

The first international legally binding text recognising all the fundamental rights and interests of a child was when the International Convention on the Rights of the

[1035] J Pugmire *et al.*, 'Environmental tobacco smoke exposure among infants, children and young people: now is no time to relax' (2017) 102 Archives of Disease in Childhood 117-118.
[1036] *Ibid.*
[1037] Novotny (note 1034).
[1038] *Ibid.*
[1039] *Ibid.*
[1040] Ocean Conservancy, *International Coastal Clean-up Report*, (Ocean Conservancy, 2015); JM Rath *et al.* 'Cigarette litter: smokers' attitudes and behaviours' (2012) 9(6) Int'l Journal of Environmental Research and Public Health 2189.
[1041] Action on Smoking and Health (ASH), 'Tobacco and the environment' (ASH, 22 Sept 2015) <http://www.ash.org.uk/files/documents/ASH_127.pdf> accessed 25 July 2017.
[1042] Other areas a child may be exposed to the hazards of tobacco include ETS and the increasing appeal of smoking, such as through advertisement.

Child (CRC) was adopted on 20 November 1989.[1043] Aside from being the most ratified instrument of international law, the CRC wields significant influence, shaping the law and policy of a child's status.[1044] Nigeria became a signatory on 26 January 1990 and ratified the CRC on 19 April 1991. Under the CRC, a child means every human being below the age of eighteen years.[1045]According to Archard, it is now standard to categorise the rights of a child in the context of the CRC: provision, protection, and participation.[1046] While article 24(1) makes provision for States to 'recognize the right of the child to the enjoyment of the highest attainable standard of health and to provide facilities for the treatment of illness and rehabilitation of health', Article 19 (1) CRC urge States to protect the child from all forms of physical or mental abuse, including sexual abuse. In addition, Article 32 CRC, urge States Parties to protect the child from violations ranging from exploitation to interference with the child's education. Therefore, exploiting and withdrawing a child from school to work on a tobacco farm, where they can get exposed to green tobacco sickness and pesticides, is a breach of the CRC.

On the regional level, Nigeria signed and ratified the African Charter on the Rights and Welfare of the Child (African Charter).[1047] Even though the African Charter corresponds with the CRC, the African Charter has a distinctive African piquancy reflected in its preamble, which states 'that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation, and hunger…'. Viljoen is of the view that the adoption of child rights instrument in the regional context is setting a higher standard for the child in numerous respects, which also incorporates some uniquely 'African' aspects; therefore, the African Children's Charter envelopes an African perspective, and sets a higher level of protection for

[1043] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49. Although Children's rights were recognised after the 1st World war, The League of Nations adopted the Declaration of the Rights of the Child on 16 September 1924, which is the first international treaty concerning children's rights. In five chapters, it gives specific rights to the children and responsibilities to the adults. The process of recognition of children's rights continued under the UN, with the adoption of the Declaration of children's rights in 1959.
[1044] David Archard, *Children: rights and childhood,* (3rd ed., Routledge, 2015) 107.
[1045] Article 1 CRC. See also article 2 African Charter on the rights and welfare of the child: a child means every human being below the age of 18 years.
[1046] David Archard, (note 1044) 110.
[1047] The African Charter entered into force on 29 Nov 1999. Nigeria signed, ratified and deposited the charter on 13 July 1999, 23 July 2001 and 2 May 2003 respectively.

children than its UN equivalent.[1048] Article 14 of the African Charter states that 'every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health'. On child labour and hazardous work, Article 15 states that 'every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental…social development'.

On the national front, the Nigerian Child Rights Act (CRA) 2003 was promulgated as a result of the domestication of the international and the regional instruments of the rights of a child. The CRA represents a significant move for the protection of a child, as it transposed and consolidated all laws relating to children, including the CRC. The rights and responsibilities of children, as well as the duties and obligations of government, parents and other authorities, organisations, and bodies, are stipulated in the CRC. It provides for the establishment of the Child Rights Implementation Committees at the National, State and Local Government levels. The Committees are to ensure that there is a political commitment at all levels to fulfilling the implementation of the provisions of the CRA 2003, through research, investigation, and jurisprudence.[1049] Concerning the health of a child, section 13 of the CRA states that 'every child is entitled to enjoy the best attainable state of physical, mental and spiritual health', and every Government, parent, guardian, institution, among others, should aim to achieve this objective.

The violation of child's rights, including child labour, have been associated with the tobacco process. Fadare, for instance, avers that children in Nigeria are withdrawn from school to work on tobacco plantation, sometimes due to poverty,[1050] in violation of not only section 15 of the CRA but also section 2 of the Compulsory, Free Universal Basic Education Act 2004, which accords the child the right to free compulsory universal primary education.[1051] Babalola also observed children—eight years old and above—working on a tobacco plantation, carrying out functions such as transplanting and watering tobacco seedlings in the nurseries, applying fertilizer on tobacco plants,

[1048] Frans Viljoen, 'Africa's contribution to the development of International Human Rights and Humanitarian Law' (2001) 1(1) African Human Rights Law Journal 18-39.
[1049] Part XX111 CRA 2003.
[1050] S Fadare, 'On the trail of Oke-Ogun kid tobacco farmers' *The Nation* (12 March 2014) <http://thenationonlineng.net/on-the-trail-of-oke-ogun-kid-tobacco-farmers/> accessed 5 August 2017.
[1051] See also Article 13, ICESCR: Right of everyone to education.

topping and suckering, harvesting and sorting tobacco leaves, and stringing and grading the cured tobacco leaves.[1052] These children are being exposed to pesticide and acute nicotine poisoning, a condition also known as Green Tobacco Sickness (GTS).[1053] GTS damages the health of workers who cultivate and harvest tobacco. It occurs when workers absorb nicotine through the skin as they encounter matured tobacco leaves. Symptoms of GTS include nausea, vomiting, headache, muscle weakness, and dizziness.[1054] Exploitative child labour is prohibited under section 28 of the CRC, while the Nigerian Labour Act[1055] prohibits all young persons from any employment injurious to health. The United Nations Children's Fund (UNICEF) estimates about 15 million children under the age of 14 are involved in child labour across Nigeria.[1056] The US Department of Labour in its 2010 report states that Nigeria is witnessing the worst form of child labour particularly in agriculture, including tobacco farming.[1057] Underaged children working on tobacco farms, encountering hazardous conditions with little or no remuneration corresponds with the International Labour Organisation's (ILO) terminology of child labour: 'child labour is work that harms children's well-being and hinders their education, development and future livelihoods'.[1058] And the worst form of child labour, according to Article 3 of ILO Convention No. 182(d), is 'work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of a child'.

Child labour and nicotine poisoning are also challenges faced in the developed world.[1059] In the US, children aged over 12 years are permitted to work for unlimited hours on tobacco farms with parental permission and outside school hours.[1060] However, a study carried out by Human Rights Watch in 2013 found that three quarters of the children interviewed—aged between 7 and 17—reported symptoms consistent

[1052] Ademola Babalola, 'Capitalist Development in Agriculture: The Case of Commercial Tobacco Farming in the Oyo-North Division, Oyo State, Nigeria' (1993) 21 African Economic History 37-49 at p44.
[1053] RH McKnight & HA Spiller, 'Green Tobacco Sickness in Children and Adolescence' (2005) 120(6) Public Health Report 602-5.
[1054] *Ibid.*
[1055] Section 59(6) Labour Act, Chapter 198, Laws of the federation of Nigeria 1990.
[1056] L Ama, 'Child Labour: An Approach to Corporate best practise' (The Guardian Nigeria, 27 Jun 2017).
[1057] Cited in L Ama, *Ibid.*
[1058] ILO, *Tackling hazardous child labour in agriculture: guidance on policy and practise* (ILO office 2006).
[1059] M Wurth and J Buchanan, *Tobacco's hidden children: Hazardous child labour in United States tobacco farming* (Human Rights Watch, 13 May 2014).
[1060] *Ibid.*

with acute nicotine poisoning and pesticide exposure.[1061] According to public health experts and research, long-term and chronic health effects of pesticide exposure include respiratory problems, cancer, neurologic deficits, and reproductive health problems.[1062]

Malawi, the world's largest producer of burley leaf tobacco[1063] and one of the least developed countries in the world, [1064] is severely affected by the many negative consequences of tobacco consumption and production due to having few tobacco control policies.[1065] Although Malawi's Employment Act of 2000 prohibits children younger than 14 years from working, it is not enforced.[1066] It is estimated that 80,000 children work on tobacco farms in Malawi,[1067] with child labour saving the tobacco industry an estimated $10.7million annually due to non-remunerative child labour from 2000-2010.[1068] Likewise, Otanez *et al*. estimate that the tobacco companies benefit from $1.2 billion in unpaid child labour costs in the top 12 tobacco growing developing countries.[1069] The tobacco industry in Malawi is dominated by two global leaf-buying companies: Alliance One International and Universal Corporation—represented nationally as Alliance One Malawi and Limbe Leaf, respectively.[1070] These two companies sell tobacco leaf to British American Tobacco, Imperial Tobacco, Japan Tobacco, and Philip Morris International.[1071] The issue of child labour in supply chains extends to most TTCs. Research conducted by MSCI listed 62 companies and their supply chains involved in the allegation of child labour and three TTCs were accused of the most severe allegations: Japan Tobacco, Imperial Tobacco, and BAT.[1072] BAT

[1061] *Ibid.*
[1062] *Ibid.*
[1063] C Bickers, *Is the leaf pendulum swinging away from undersupply?* (Tobacco International, New York: Lockwood Publications 2008) cited in MC Kulic *et al.*, 'Tobacco growing and the sustainable development goals, Malawi' (2017) 95 Bulletin of World Health Organisation 362–367.
[1064] United Nations Committee for Development Policy, *List of Least Developed Countries (as of June 2017).*
[1065] World Health Organization, *Report on the global tobacco epidemic: country profile Malawi* (WHO, 2019).
[1066] MG Otañez *et al.,* 'Eliminating child labour in Malawi: a British American Tobacco corporate responsibility project to sidestep tobacco labour exploitation' (2006) 15(3) Tobacco Control 224.
[1067] MC Kulic *et al.*, 'Tobacco growing and the sustainable development goals, Malawi' (2017) 95 Bulletin of World Health Organisation 362–367.
[1068] M Otañez *et al., '*Social responsibility in tobacco production? Tobacco companies' use of green supply chains to obscure the real costs of tobacco farming' (2011) 20(6) Tobacco Control 403. For more on child labour see, A Cigno and FC Rosati, *The Economics of Child Labour,* (Oxford University Press, 2005).
[1069] *Ibid.*
[1070] MC Kulic *et al.* (note 1067).
[1071] *Ibid.*
[1072] Chris Flood, 'Child Labour fuel fears of reputational risk' *Financial Times* (27 Nov 2017).

stated it was aware that around 130,000 school-age children were living on farms that supplied BAT, but it was also working to ensure an effective and consistent child labour policy across all its supply chain.[1073]

Against this backdrop, the International Labour Organisation (ILO) urged the tobacco industry to address important decent work deficits, such as poor working conditions at the workplace, exposure to hazardous and dangerous work, long hours and low pay, as well as child labour.[1074] In addition, companies worldwide are under pressure to act following a G20 summit in Hamburg, Germany, where world leaders committed to take 'immediate and effective measures to eliminate child labour by 2025'.[1075]

6.2.4 Economic and Social Rights

Economic and Social rights in Nigeria are traceable to a few international instruments that Nigeria is a party to, particularly the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1076] As part of its treaty obligations, Nigeria is required to take steps towards the progressive realisation of economic and social rights.[1077]

The significant harms of tobacco use in developing countries are usually understood primarily as a health issue, so it overlooks the significant impact of tobacco on social, economic, and environmental rights. These rights may be expressed differently from country to country or from one instrument to another. The basic list, according to the United Nations High Commissioner for Human Rights, includes workers' rights, right to social security and social protection, protection of and

[1073] *Ibid.*
[1074] ILO 'Food, Drink and Tobacco Sector' available at http://www.ilo.org/global/industries-and-sectors/food-drink-tobacco/lang--en/index.htm accessed 19 September 2017.
[1075] Leaders of the G20, *G20 Leaders' Declaration: Shaping an Interconnected World* (G20 Germany, Hamburg, 7-8 July 2017) 5.
[1076] Adopted 16 Dec 1966 and entered into force 3 Jan 1976, G.A Res. 2200 (XXI). Ratified by Nigeria on 29 July 1993.
[1077] See Articles 1 and 2 of the ICESCR.

assistance to the family, right to an adequate standard of living, right to health, education and cultural rights.[1078]

The Constitution of the FRN 1999 provides for social and economic rights, albeit in the form of the 'Fundamental Objectives and Directive Principles of State Policy' (Directive Principles). These rights are under a separate chapter in the 1999 Constitution, different and distinct from the chapter on Fundamental Human Rights. These Directive Principles include the social and economic objectives of the state: the right to adequate means of livelihood, the right to health, the right to education, the rights of children, the right to protect the young person and the aged, and the right to the Environment, among other rights. It is pertinent to note at this point that the activities of TTCs have infringed upon some of these rights, as revealed in previous sections of this research.[1079]

Tobacco control is a developmental issue, and its success relies on the work of other sectors such as commerce, trade, finance, justice, and education. For this reason, the international community agreed to include the WHO FCTC in the UN's Sustainable Development Goals (SDGs).[1080] According to the WHO FCTC, the inequitable burden of tobacco, both within and between countries, is particularly troubling, as tobacco is a barrier to the UN sustainable development goals.[1081] Poor and marginalised countries are more likely to consume tobacco, with younger ages at risk of exposure to second-hand smoke.[1082]

Each year tobacco costs the global economy nearly 2% of its gross domestic product (GDP) due to medical expenses and lost productive capacities from premature death and disease, which greatly impacts household level.[1083] Tobacco-related medical expenditures, often out-of-pocket, can drive vulnerable households into poverty or force individuals to forgo life-saving care altogether. The misuse of limited family income fosters poverty and lowers worker's productivity, as well as raising the

[1078] UN High Commissioner for HRs, 'frequently asked questions on economic, social and cultural rights', fact sheet no.33.
[1079] For more analysis on Social and Economic Rights and enforcement under the Nigerian constitution, see section 6.3 below.
[1080] See Target 3.A of the UN SDG on 'health and well-being'.
[1081] WHO, *Tobacco and its environmental impact: an overview* (WHO 2017).
[1082] FCTC & UNDP (note 1028).
[1083] *Ibid.* at p7.

burden on new healthcare systems, which often struggle to cope with communicable diseases, let alone non-communicable diseases (NCDs). More than 80% of premature deaths from NCDs occur in low- and middle-income countries.[1084] Tobacco farmers in Nigeria also encounter a cycle of poverty and economic hardship.[1085] Some of the farmers are unable to clear their unsustainable loans or debts with the tobacco companies—the farmers receive loans from the tobacco companies. After deducting payment to the tobacco corporation for fertilisers, pesticides, tractors fees, et cetera, the remaining debt is carried forward to the next planting season, therefore, creating a cycle of poverty.[1086] Tobacco farming—itself health-harming—often relies on unlawful or exploitative labour, including child labour, and contributes to environmental degradation.[1087]

6.3 Nigeria's Human Rights Responsibilities under the Nigerian Constitution.

This section will examine Nigeria's responsibility under its constitution and then Nigeria's responsibility under international law.

Since achieving independence, Nigeria's constitution has incorporated fundamental rights provisions. The first set of fundamental rights was introduced into the Nigerian constitution on the advice of the Willink Commission, which was set up by the British colonial administration to consider the position of minority groups with majority groups after independence.[1088] The Nigerian Independence Constitution of 1960 incorporated human rights provisions, laying the foundation for subsequent Constitutions, such as the 1979 and the current 1999 constitution. Conversely, the

[1084] *Ibid.*

[1085] Marty Otanez, 'Social disruption caused by tobacco growing' (study conducted for the Second meeting study group on economically sustainable alternatives to tobacco growing – WHO FCTC, Mexico City, Mexico, 17-19 June 2008); E Cadmus *et al.*, 'The reality of tobacco farmers exploitation in a region in Nigeria' (2018) 16(1) Tobacco Induced Diseases 394; WHO, 'Tobacco and poverty: a vicious circle' (WHO Regional Office for the Eastern Mediterranean 2004).

[1086] E Cadmus *etal*., 'The reality of tobacco farmers exploitation in a region in Nigeria' (2018) 16(1) Tobacco Induced Diseases in J Elliott *etal.*(eds), *Tobacco Induce: Diseases Abstract Book: 17th World Conference on Tobacco or Health* (EU European Publishing 2018) 150.

[1087] T Hu and AH Lee, 'Tobacco control and tobacco farming in African countries' (2015) 36(1) Journal of Public Health Policy 41-51.

[1088] B Manby, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York Human Rights Watch 1999) 4.

fundamental human rights section of the constitution was suspended under past Nigerian military administration. From Nigerian independence in 1960 to 1999, six successful military coups occurred and lasted for a cumulative period of 30 years.

The pre-1979 Constitution concentrated on natural rights[1089] and less attention on civil and political rights while economic, political, and social rights were not included.[1090] The 1979 and 1999 Constitution widened the scope of rights. The broader scope of rights ranges from the right to life and dignity of the human person, to the freedom from discrimination and the right to ownership.[1091] The 1999 Constitution, under chapter II, recognised political, social, educational, and economic rights. However, section 41 of the 1999 Constitution allows the government to derogate from social and economic rights provided it is in the interest of defence, public safety, public health, and other interests cited under the s41. Moreover, the SEC rights are nonjusticiable, even though some sections are couched in the mandatory language of 'shall'.[1092] The courts have held this nonjusticiable position for over three decades.[1093] Despite this position, the Nigerian Supreme Court (SC) held that the rights contained in Chapter II of the Constitution may be enforced under certain circumstances.[1094] The SC further held that the provisions of Chapter II are unenforceable, but the constitution empowers the National Assembly to legislate on the provisions of Chapter II and enforce those rights against government bodies, private persons and organisations. Therefore, any step taken by the National Assembly in the furtherance of such a goal is valid and enforceable in the Nigerian courts.[1095]

[1089] Natural rights, that is, inalienable rights including rights to life and pursuit of happiness, freedom of speech, association and equality before the law.

[1090] M Akpan, 'The 1979 Nigerian Constitution and human rights' (1980) 2 Universal Human Rights 23 in O Amao, 'CSR, Human Rights and the Law', (note 124) p133.

[1091] Chapter IV of the Nigerian constitution, 1999. Note the similarities between the 1979 and 1999 constitution.

[1092] See Justice Modibo Ocran, *The Rule of Law and Delivering Justice in Africa*, (Keynote Address at the Loyola University Chicago International Law Review Symposium, 15 February 2007).

[1093] See for example *Okojie v. AG Lagos State* (1981) 2 NCLR 337.

[1094] *AG Ondo State v. AG of the Federation and 35 others* (2002) 6 SC (part 1) 1.

[1095] In *Government of South Africa et al. v. Grootboom et al.; Grootboom v. Osstenberg Municipality et al.* CCT38/00 (2000), a similar approach was taken by the South African court in respect of section 7 (2) of the Constitution of South Africa which requires the state to respect, protect and fulfil the rights in the Bill of Rights. The court held that even though the section also applied to provisions that are considered non-justiciable, but "given that socio-economic rights are expressly included in the Bill, the question is not whether they are justiciable, but how to enforce them in a given case.

The human rights provisions in the Nigerian constitution is crucial in the tobacco regulatory framework. The human rights approach enables the court to grant injunctions to protect rights considered fundamental under tort law. For instance, in *Gbemre v. Shell and others*[1096], the plaintiff argued that the provisions of the Associated Gas Re-injection Act (Continued Flaring of Gas Regulations) 1984 and the Associated Gas Re-injection (Amendment) Decree no. 7 of 1985, which allowed for the continuation of gas flaring, were inconsistent with the right to life and the right to a healthy environment guaranteed under the constitution. The court agreed with this argument and held that statutes permitting the flaring of gas in Nigeria, with or without permission, are inconsistent with the Nigerian constitution and, therefore, unconstitutional. As a result, the court directed the Attorney General of the federation and the Minister of Justice to take steps to amend the statutes governing gas flaring to bring it in line with the fundamental rights provisions of the constitution. The case reflects the progressive ambition of the court regarding non-justiciable human rights. Since most human rights, to a considerable extent, are interwoven, the court can link the justiciable rights together with the non-justiciable one to make such claims admissible and enforceable.

In *Gbemre*, gas flaring may initially constitute an environmental objective of the State to improve the environment under section 20 of the Nigerian constitution; however, this section falls under the non-justiciable provision of the constitution, which should not have been heard in the Nigerian courts, but once the environmental objective is underpinned with a justiciable right, the case takes a whole new meaning. This creative approach has been used by the Indian Supreme Court to resolve the dilemma of non-justiciable rights. Similar to the Nigerian Constitution, the Indian Constitution[1097] has two distinct rights: the justiciable and the non-justiciable human rights.[1098] The provisions of the non-justiciable rights in the Indian Constitution provide that they 'shall not be enforced by any court'.[1099] There is a clear and direct prohibition ousting the authority of the courts to address such rights. An alleged breach of the principles did not offer any grounds for redress in the Indian courts.[1100] From 1977, the

[1096] *Gbemre v. Shell and others* Suit No. FHC/B/CS/53/05, FHC, Benin Judicial Division, 14/11/05.
[1097] Indian Constitution 1950.
[1098] *Ibid.* Part III and Part IV.
[1099] *Ibid.* Article 37.
[1100] Sandra Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems, in Asbjorn Eide et al. (eds), *Economic, Social and Cultural Rights* (2nd ed, Martinus Nijhoff 2012).

Indian Supreme Court took a novel approach to resolve the dilemma of nonjusticiable rights,[1101] whereby judges became outspoken supporters of the social and economic rights (SERs) and the oppressed through the instruments of social action litigation or public interest litigation.[1102] Through this mechanism, the Indian court used the interpretation of the right to life and security of persons to usher in a regime of SERs protection. For instance, in *Unni Krishnan v. State of Andhra Pradesh & ors,*[1103] the Supreme Court of India asserted the right to education for children even though that right is non-justiciable.[1104] The Court construed that the right to education underpins the right to life because of its inherent fundamental importance. This approach adopted by the Indian Supreme Court to enhance and enforce SERs has, however, not been without criticism. The Supreme Court has been accused, *inter alia,* of judicial activism and politicising constitutional adjudication.[1105] Notwithstanding the criticisms, the citizens of India appear to have found in their courts the opportunity to get their government to act on matters that appears to be elusive. This approach can limit the activities of TTCs in the context of tobacco regulatory.

6.4 Nigeria's Human Rights Responsibilities under International law.

Under the classic doctrine of international law, States are responsible for upholding human rights.[1106] United Nations treaties firmly establish that states are the primary duty bearers for the protection of human rights,[1107] with some of the treaties' provisions obligating states to regulate businesses in a way that ensures human rights are not violated.[1108] International treaties, including the ICCPR, ICESCR, and ICERD, impose general obligations on states to ensure the enjoyment of rights and the

[1101] See PN Bhagwati, 'Judicial Activism and Public Interest Litigation' (1984-5) 23 Columbia Journal of Transnational Law 561.
[1102] *Ibid.*
[1103] *Unni Krishnan v. State of Andhra Pradesh & ors*. (1993) 4 Law Reports on Crime 234 (India).
[1104] India Constitution, Article 45 provides that the state shall endeavour to provide within a period of ten years from the commencement of the Constitution, free and compulsory education for all children until they complete the age of fourteen years.
[1105] Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 American Journal of Comparative Law 496.
[1106] N Jagers, *Corporate Human Rights Obligations: in search of accountability* (Intersentia 2002) 137; O De Schutter (ed), *Transnational Corporations and Human Rights* (Hart 2006) part 1.
[1107] JG Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 American Journal of Int'l Law 819.
[1108] O Amao, *CSR, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge 2011)

restriction of human rights violation by non-state actors.[1109] Later treaties in time began to address business in a more direct and detailed manner,[1110] such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[1111] Convention on the Rights of a Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).[1112]

Nigeria has a duty to protect human rights under the principle of territoriality.[1113] This principle obliges the state to exercise due diligence to prevent and respond to violations of human rights within its territorial boundaries. This state responsibility is an old principle of international law. According to Chirwa, the principle emanates from the doctrines of state sovereignty and equality of states.[1114] Similarly, Weiler avers that under conventional international human rights law, states are obliged to ensure that each of their citizens enjoy basic rights and freedoms and to safeguard those rights against the conduct of non-state actors.[1115] Although states are not liable for the violation of non-state actors, they are, however, liable for failing to prevent the human rights infringements committed by state and non-state actors. For a state to be held liable for the actions of TTCs, the conduct has to breach positive international law in a manner that is attributable to the state, or a state must violate one of its obligations with regards to the regulation or supervision of TTCs,[1116] or where a state fails to take appropriate steps to prevent, investigate, punish, and redress human rights violations of non-state actors.[1117]

[1109] For example, see article 2 of the ICCPR and article 2(1)(d) of ICERD.
[1110] For instance, article 2(e) of CEDAW imposes obligations on states to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.
[1111] CEDAW, GA res. 34/180, 34 UN GAOR Supp. (no.46) at 193, UN Doc. A/34/46, entered into force 3 September 1981.
[1112] The CRPD and its optional protocol was adopted by the UN General Assembly on 13 December 2006 and opened for signature on 30 March 2007.
[1113] Mark Gibney *et al.*, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harvard Human Rights Journal 267, 267.
[1114] DM Chirwa, 'The Doctrine of state Responsibility as a Potential means of Holding Private Actors Accountable for Human Rights, (2004) 5 Melbourne Journal of International Law 1, 4.
[1115] Todd Weiler, 'Balancing human rights and investor protection: a new approach for a different legal order' (2003) 1(2) Oil, Gas and Energy Law Intelligence in O Oluduro (note 534) 266.
[1116] J Brunnee, 'International Legal Accountability Through the Lens of the Law of State Responsibility' (2005) 36 Netherlands Yearbook of International Law 21, 42.
[1117] United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: implementing the UN 'protect, respect and remedy' framework* (UN 2011) 3.

Nigeria has a binding obligation to respect the fundamental rights recognised under the ICCPR without distinction of race, sex, language, or religion.[1118] Article 2(3)(a) and (b) of ICCPR includes the obligation to ensure that any person whose rights or freedom included in the ICCPR is infringed upon shall have this right determined by a competent judicial, administrative, or legislative authority or by any competent authority provided for by the legal system of the State.

Nigeria is also obliged under the ICESCR to respect, promote and fulfil economic, social and cultural rights.[1119] The obligation to 'respect' requires that States refrain from interfering directly or indirectly with the enjoyment of a human right. The obligation to 'protect' requires States to prevent third parties, including individuals, groups, corporations or other entities, from interfering with the enjoyment of a human right, and this also includes an obligation for the State to ensure that all other bodies subject to its control (such as transnational corporations based in that State) respect the enjoyment of rights in other countries.[1120] To 'fulfil' contains the obligation to facilitate the full actualisation of the right in question, and where a right has been violated, the State has to redress it and provide an adequate remedy, which may include compensation.[1121]

Furthermore, the Committee on Economic, Social and Cultural rights requires States to protect against the infringement of human rights arising out of the activities of non-state actors in relation to the enjoyment of economic, social, and cultural rights. For instance, there is an underlining responsibility for States to 'take appropriate steps to ensure that activities of the private business sector and civil society conform with the right to food'.[1122] Another international instrument that recognised State's duty to protect is the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which was adopted in 1997. It states that the obligation to 'protect' includes the

[1118] See article 2(1) of ICCPR.
[1119] See Amnesty International Report, *Nigeria: Are Human Rights in the Pipeline?* (Amnesty International Index: AFR 44/020/2004, Amnesty International 9 November 2004) 19.
[1120] F Coomans, 'Some remarks on the extraterritorial application of the international covenant on economic, social and cultural rights' in F Coomans & MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 192.
[1121] Amnesty International (note 1119).
[1122] General Comment No. 12 para. 27.

State's responsibility to ensure that private entities or individuals within its jurisdiction do not deprive others of their economic and social rights.[1123]

Nigeria ratified core of the international treaties in force,[1124] but the impact, according to Amao, is less than one would expect because 'Nigeria has failed to ratify necessary instruments that will enhance their application'.[1125] For example, Nigeria has not acceded to the first optional protocol to the ICCPR (1976); therefore, Nigeria does not recognise the ICCPR Human Rights Committee to consider individual complaints regarding the violation of the covenant. Another example is the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2014), which Nigeria has neither signed nor ratified. The CRC's communication procedure allows children from ratified States to bring complaints about violations of their rights directly to the UN Committee on the Rights of the Child, provided there is no solution or redress, among other admissibility criteria.[1126] Nonetheless, Nigeria established the National Human Rights Commission under the National Human Rights Acts 1995 to fulfil the resolution of the UN General Assembly that enjoins all member States to establish human rights institutions for the promotion and protection of fundamental rights.[1127] However, the Commission lacks independence, constitutional backing, and resources, to mention but a few failures, leading to the inadequacy of the Commission to achieve its objectives.[1128]

Again, Nigeria ratified the African Charter on Human and Peoples' Rights and domesticated it under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Decree;[1129] thus, the African Charter is part of Nigeria's domestic

[1123] See para.18. A similar Declaration was also submitted by the African Commission in the SERAC *et al.* v Nigeria, Communication 155/96.
[1124] Instruments and date of ratification: ICCPR, 1993; ICESCR, 1993; International Convention on the Elimination of Racial Discrimination (ICERD), 1993; Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), 1985; Convention Against Torture etc. (CAT), 2001; CRC, 1991; Convention on the Rights of Persons with Disabilities (CRPD), 2010; Int'l Convention on the Protection of the Rights of All Forms of Migrant Workers and Members of Their Families, 2009.
[1125] O Amao (note 124) 136.
[1126] See article 7 for the criteria, Optional Protocol to the Convention on the Rights of the Child on a communications procedure 2014.
[1127] Now National Human Rights Commission Act, Cap N. 46, Laws of the Federal Republic of Nigeria, 2004.
[1128] See O Oluduro, *Oil Exploitation and Human Rights Violations In Nigeria's Oil Producing Communities* (Intersentia 2014) 424-435.
[1129] Cap 10 Vol 1 LFN 1990.

law[1130] and enforceable under the Nigerian constitution.[1131] In *Gbemre v. Shell and others[1132],* for instance, the court held that Shell's flare gas activities in the course of oil exploration and production in the applicant's community violated their constitutionally protected human rights (the protected rights include the rights to clean, poison-free, pollution-free environment) under the Nigerian Constitution and the African Charter. Even though there is no apparent justiciable right to 'clean poison-free, pollution-free and healthy environment' under the Nigerian Constitution, the court relied on the cumulative use of constitutional provisions and on the provision of article 24 of the African Charter to recognise and apply a fundamental right to a 'clean poison-free, pollution-free and healthy environment'. The impact of this decision is that it is possible to have recourse to the African Charter for rights that are not available under national law. After considering Nigeria's obligation under international treaties, the research will now turn to the consider international regional judicial decisions.

Drawing guidance from the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights (African Commission), the research will be informed by their decisions to hold States accountable for the failure to prevent human rights violation under the principle of State responsibility. The ECtHR's approach on the relevance the state's responsibility to control private parties and corporations are notable in the case laws. For instance, in *Lopez Ostra v. Spain,[1133]* a limited company, SACURSA, had a waste treatment plant in the town of Lorca, Spain. The plant was built with state subsidy on municipal land about 12 meters away from the applicant's home. The plant commenced operation in July 1988 without a license from the municipal authorities contrary to the Spanish regulation. The complainant alleged that the plant emitted fumes, repetitive noise, and repulsive smell, therefore affecting the living conditions and health of her family. Although the Spanish authorities were not responsible for the acts in question, the court found that since the municipal authority permitted its land to be used, as well as the subsidy offered, the State was responsible for failing to

[1130] *Garba v. Lagos State AG* Suit ID/599M/91 and *Agbakoba v. Director State Security Services* (1994) 6 Nigerian Weekly Law Report 475.
[1131] *Nemi v The State* (1996) 6(452) Nigeria Weekly Law Report 42.
[1132] Suit No. FHC/B/CS/53/05, Federal High Court, Benin Judicial Division, 14/11/05.
[1133] *Lopez Ostra v Spain* (1994) 20 European Human Rights Report 277.

secure the right to private and family life, a right that is guaranteed under article 8 of the European Convention on Human Rights (ECHR).

Another important ECtHR case is *Guerra and others v. Italy*[1134]. The applicants lived in a town about one kilometre from a company's chemical plant. During its production process, the company released a large amount of inflammable gas and other toxic substances. An explosion in the factory released tonnes of dangerous toxic substances and led to 150 people hospitalised. The applicants alleged that the Italian authorities failed to inform the public of the risks posed by the factory's operations and on what was to be done in the event of an accident. The ECtHR held that the Italian authorities were in breach of article 8 of the ECHR (the right to private and family life) for failing to protect the people from the emissions and explosions. Both *Guerra* and *Ostra* cases indicate that a State could be held liable for the violations of human rights infringements by a third party within the State's territory.

Under the Inter-American Court in *Velasquez Rodriguez v. Honduras*,[1135] the court held that a third-party human rights violation can also lead to the international responsibility of the State, not because of the act itself, 'but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention'.[1136] In the said case, Rodriguez, a student, was alleged to have been detained without warrant, tortured by the police, and consequently disappeared without a trace. The Honduran government contended that the allegations against the police were false and that there was no credible evidence to prove otherwise. It was held that even though the attackers were private actors, the State was liable because of 'the failure of the State apparatus to act'[1137], including the failure to provide any remedy to the victim's family and failure to find the victim or perpetrators.

In the same vein, the African Commission in *SERAC & et al. v. Nigeria*[1138] held that African governments have a duty to monitor and control activities of multinational corporations. The Commission further held that African states should also ensure

[1134] *Guerra and others v. Italy* [1998] ECHR 7, (1988) 26 EHRR 357.
[1135] *Velasquez Rodriguez v. Honduras* Judgement of 29 July 1988, Inter-American Court on Human Rights Series C. No. 4 (1988); (1989) 28 ILM 294, para 172.
[1136] *Ibid,* [172]. Emphasis added.
[1137] *Ibid,* [176].
[1138] SERAC & CESR v. Nigeria (2001), Communication No. 155/96 (African Commission on Human and Peoples' Rights); (2001) African Human Rights Law Report 60.

respect for economic and social rights.[1139] The African Commission, relying on its earlier decisions in *Union des Jeunes Avocats/Chad*[1140] and the decision of the Inter-American Court of Human Rights in *Velásquez Rodriguez,*[1141] as well as the ECtHR in *X and Y v. the Netherlands*[1142]*,* held that governments have to protect their citizens, through appropriate legislation and effective enforcement, from damaging acts perpetrated by private parties.[1143] The Commission criticised the Nigerian government for failing to exercise the necessary degree of care by allowing private actors to carry out the infringement.[1144]

Having explored the constitution, international treaty obligations, and regional judicial decisions, the research has not only demonstrated that Nigeria has a responsibility to safeguard human rights, but it also shows that Nigeria has restricted its scope of accountability, such as categorising SERs as nonjusticiable under the Constitution; hence, what does it mean in relation to regulating the negative human rights impact of transnational tobacco corporations in Nigeria? The final part of section 6.4 will explore the implications.

Safeguarding the population from the impact of TTCs in Nigeria is challenging, partly due to the abundant resources of TTCs, the resources that could sometimes be used to interfere and weaken tobacco control, especially in low-income and middle-income countries.[1145] One of the ways Nigeria could enhance its human rights obligation is to change the nonjusticiable rights to justiciable ones. This could be achieved through legislation. The reason for the reform is because most of the human rights vulnerable to the activities of the transnational tobacco corporations, such as health, environment, and socio-economic rights, are classified as unenforceable rights under the Nigerian constitution. This position remains the same even if Nigeria adopts an international instrument. The effect of this position is that if Nigerian government lacks the political will to hold TTCs accountable, then the government cannot be held liable for most of the human rights impact of TTCs, therefore, weakening the overall

[1139] *Ibid.* [44].
[1140] *Union des Jeunes Avocats/Chad* Communication 74/92, Ninth Annual Report of The African Commission on Human and Peoples' Rights – 1995/96 AHG/207 (XXXII).
[1141] *Velásquez* (note 1135*).*
[1142] *X and Y v. the Netherlands* 91 ECHR (1985) (ser. A) 32.
[1143] *SERAC* (note 1138) [57].
[1144] *SERAC* (note 1138) [58].
[1145] WHO FCTC*, History of the WHO FCTC* (WHO 2009) 1.

tobacco regulatory framework. A weak regulatory framework has the tendency to increase tobacco prevalence,[1146] but as the regional judicial judgements demonstrates, the constitutional backing of all rights can force the State to act, either voluntarily or through judicial pronouncements. The result, therefore, could reinforce the tobacco regulatory framework.

However, Nigeria cannot regulate the transnational tobacco corporations in isolation, particularly with the regulatory gaps identified in the research. As TTCs are influential transnational companies, international legal solution is necessary.[1147] According to the former WHO Director-General, Dr Brundtland, tobacco control is a global problem that requires an international response for any chance of success.[1148] For this and other reasons, Nigeria participated in the WHO FCTC, which serves as a coordinated global response to the tobacco crisis, yet international collaboration appears to be inadequate. For instance, the WHO FCTC lacks the authority to enforce compliance; it relies on the government to implement the Convention through domestic law and policy.[1149]

Despite the adoption of the tobacco Convention, the Nigerian government cannot be held accountable for lacking the political will to hold TTCs liable for health, environmental and socio-economic rights violations. The reason is that such rights and objectives are deemed unenforceable under the Nigerian constitution.[1150] This cycle, however, can be severed only by the deliberate action at the national level rather than by international treaties and conventions. On the one hand, international convention such as the one furthered by the WHO FCTC have shown meaningful results in achieving tobacco control,[1151] but on the other hand, they are sometimes considered weak. Using the WHO FCTC as an example, Gostin *et al.* aver that the treaty has significant weaknesses: first, it contains ambiguous language, affording countries a broad discretion in implementation; second, it does not provide enough financial

[1146] E Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: recent changes and recurring challenges' (2008) 6(2) Northwestern Journal of Human Rights 222, 249.
[1147] IG Cohen, *The globalization of health care: legal and ethical issues*, (Oxford University Press 2013).
[1148] *Ibid, p6*.
[1149] LO Gostin *et al*., 'Global Health and the Law' (2014) 370 New England Journal of Medicine 1732.
[1150] See Chapter II of the 1999 Constitution FRN; *AG Ondo State v. AG of the Federation and 35 others* (2002) 6 SC (part 1) 1.
[1151] J Chung-Hall *et al*., 'Impact of the WHO FCTC over the first decade: a global evidence reviews prepared for the Impact Assessment Expert Group' (2019) 28(2) Tobacco Control 119.

resources to low-income and middle-income countries lacking sufficient capacity to implement and enforce policies outlined in the convention.[1152] These weaknesses prove there is no single approach in regulating transnational tobacco corporations. At best, a multifaceted approach can build on each other—an approach that should include the cooperation of home States of transnational corporations. When home States are involved, the scope of involvement should be unambiguously defined, otherwise home States risk encroaching on the internal affairs of sovereign nations, resulting to what Fowlers claims to be a new form of 'cultural imperialism' in developing countries.[1153]

Against this backdrop, Nigeria's capacity to regulate human rights impact is somewhat weakened by the fact that the Nigerian government cannot be held accountable for lacking the will to hold TTCs liable for health, environmental and socio-economic rights, since these rights are classified as unenforceable rights. TTCs, therefore, have a role to play in filling this regulatory gap and, most importantly, preventing human rights abuses within their sphere of influence. The next section below will focus on the responsibilities of TTCs in preventing human rights abuses.

6.5 Human Rights Responsibilities of Transnational Tobacco Corporations.

Transnational Tobacco Corporations exert immense power and resources, leading to challenges for states like Nigeria to adequately regulate the industry. In 2008 the revenues of the five leading TTCs exceeded $300 billion.[1154] In 2014, Philip Morris International's net revenue was slightly over $80 billion[1155] while Zimbabwe's GDP was $19.4 billion.[1156] With such immense revenue and international presence, it

[1152] *Ibid.*

[1153] RJ Fowler, 'International Environmental Standards for Transnational Corporations' (1995) 25 Environmental Law 27. Further reading on cultural imperialism see, A Sreberny-Mohammadi, 'The Many Cultural Faces of Imperialism' in P Golding & Phil Harris (eds.) *Beyond Cultural Imperialism: Globalization, Communication and the New International Order* (Sage 1999) 49.

[1154] C Callard, 'Follow the money: How the billions of dollars that flow from smokers in poor nations to companies in rich nations greatly exceed funding for global tobacco control and what might be done about it' (2010) 19(4) Tobacco Control 285.

[1155] PMI, *Philip Morris International Investor fact sheet*: *full year 2014* (PMI, 2014).

[1156] World Bank Group, World Bank national accounts data *available at* <*https://data.worldbank.org/country/zimbabwe*> *accessed 11 Sept 2017.* The figure is GDP (current US $).

would be demanding for developing countries to adequately regulate the activities of transnational tobacco companies—PMI[1157] and BAT[1158] operate in over one hundred countries. For example, in enforcing a judgement debt, TTCs could be insulated from liability by moving assets and operations to other countries,[1159] a move that could potentially frustrate enforcement of the judgment debt against the organisation.[1160] Furthermore, regulation is also compounded by some governments who rely on the taxes generated from TTCs, creating a lack of willingness to regulate the industry.[1161] One-third of Malawi's economy GDP, for instance, is predominantly from agriculture, therefore, the performance of the tobacco sector is key to Malawi's short-term growth.[1162] This narrative correlates with the remarks of Nigerian President, Olusegun Obasanjo,[1163] when he admitted that the country cannot sacrifice the huge benefits BAT contributes to the economy,[1164] which demonstrates a willingness to relax regulatory policies in favour of economic gains. However, the challenges could be tapered if only TTCs could religiously channel their resources and influence to promote human rights within the company and within their sphere of influence, such as their supply chain. This obligation to uphold human rights standards should not be viewed as a choice, but as a direct obligation under international law.

The Universal Declaration of Human Rights explicitly imposes direct human rights obligations on private actors. According to the Preamble, 'every individual and every organ of society … shall … promote respect for these rights and freedom'. The phrase 'every individual and organ of society' should therefore include TTCs. As emphasised by Henkin, the phrase captures all individuals and corporations, including

[1157] PMI, 'Communication on Progress: United Nations Global Compact' (PMI, 2016) available at <unglobalcompact.org> accessed 22 September 2017.
[1158] BAT, 'Global Directory' (BAT, date unknown) <http://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO9FEJAW> accessed 12 Sept 2017.
[1159] B Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley Journal of Int'l law 45, 83.
[1160] O Oluduro, (note 1128) 276.
[1161] B Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley Journal of Int'l law 45, 46.
[1162] J Smith and J Fang, 'If you kill tobacco, you kill Malawi': structural barriers to tobacco diversification for sustainable development' (2020) 28(6) Sustainable Development 1575.
[1163] President Olusegun Obansanjo (1999-2007).
[1164] A Akinremi, 'Obasanjo, BAT and Blood Money', *The Cable* (19 Feb 2016). see also J Glenza, 'Tobacco companies tighten hold on Washington under Trump' (theguardian.com, 13 July 2017) <https://www.theguardian.com/world/2017/jul/13/tobacco-industry-trump-administration-ties> accessed 18 Sept 2017: The article indicate how TTCs are influential in the USA through making donations to politicians and political parties, among others.

market and cyberspace.[1165] This all-embracing position has been reiterated by the UN Commission on Human Rights.[1166] In addition, the general comments of the Committee on Economic, Social and Cultural Rights (CESCR) explicitly obliged non-State actors to realise the economic, social and cultural rights entrenched in the ICESCR.[1167] This position resonates with several other international Declarations that imposed both positive and negative duties on private actors concerning socio-economic rights.[1168] Under the UN Guiding Principles on Business and Human Rights, business enterprises should espouse the fundamental rights, and they should address any adverse human rights impacts within their sphere of influence,[1169] regardless of their size, sector, operational context, ownership, and structure.[1170]

Moreover, when States, business organisations, and people adhere to their human rights obligations, it becomes a cooperation that benefits society. This view was enunciated by the UN Human Rights Commissioner, Mary Robinson, when she declared that business needs human rights and human rights need business.[1171] The real progress in human rights, according to Robinson, will require innovative beneficial partnerships at all levels from governments to corporations, and to the broader civil society.[1172] Likewise, Pogge believes the focus on human rights should be a collaborative one,[1173] with the responsibility on government, organisations, and individuals to ensure all members of society have secure access to the objective of human rights.[1174] Therefore, for organisations to realise their human rights obligations,

[1165] Louis Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' (1999) 25 Brooklyn Journal of International law 17, 25.
[1166] UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 2nd Session, 1 August 2000, E/CN.4/Sub.2/2000/Rev.1, at p17.
[1167] See General Comment No. 12, The Right to adequate food (Article 11) 12 May 1999 at [20].
[1168] For instance, para 12(e) of the Copenhagen Declaration on Social Development and Programme of Action, adopted by the World Summit for Social Development in Copenhagen on 12 March 1995, UN Doc. A/ CONF. 166/9 (1995), states that 'national and transnational corporations to operate in a framework of respect for the environment … with proper consideration for the social and cultural impact of their activities'. Similarly, see also, Article 2 of The UN Declaration on the Elimination of All Forms of Racial Discrimination, adopted on 20 Nov 1963, by the UN General Assembly Resolution 1904 (XVIII). See also the UN Global compact which calls on all transnational corporations to observe the fundamental rights of workers, human rights and the environmental standards.
[1169] Principle 11, UN Guiding Principles on Business and Human Rights. See also Principles 12-24.
[1170] Principle 14, *ibid.*
[1171] Mary Robinson, *Building Relationship That Make a Difference'* in Denise Wallace, *Human Rights and Business: A Policy-Oriented Perspective* (Brill Nijhoff 2015) 147.
[1172] *Ibid.*
[1173] Thomas Pogge, *World Poverty and Human Rights* (Polity Press and Blankwells 2002) 47.
[1174] *Ibid* at p65.

there should be a complete shift from profit maximisation to an ardent commitment to the human rights agenda.

Under their corporate governance framework, TTCs claim to recognise human rights as part of their business policy. In recognition to respect human rights, BAT affirmed commitment to the Universal Declaration of Human Rights.[1175] Philip Morris International (PMI) also gave similar recognition to respect human rights.[1176] Both firms' expression to respect human rights demonstrates the influence or impact of international law and voluntary codes on TTCs' human rights agenda. Following on from these expressions, TTCs should, truly, commit to addressing and promoting any human rights matter within its sphere of influence. The next section would now examine the influence international voluntary codes have on TTCs.

6.6 Voluntary Codes of Conduct and TTCs.

TTCs, including PMI and BAT, have recognised international voluntary codes of conduct that expressly commits to respecting human rights.[1177] Both corporations have included international voluntary instruments as part of their corporate code of conduct,[1178] as well as defined ethical standards in their policy statements. Philip Morris International, for instance, is committed to business practices in line with the United Nations Guiding Principles on Business and Human Rights.[1179]These international codes of conduct are voluntary behavioural principles, standards or guidelines.[1180] The diverse codes available to TTCs include international public codes of conduct, private company codes of conduct, industry association codes of conduct, and nongovernmental (NGO) codes of conduct. Private company codes, such as BAT's Standard of Business Conduct (SoBC), appear to be the most common

[1175] BAT, *Journey: human rights report 2020* (BAT 2020).
[1176] PMI, 'Our Commitment to Human Rights' (PMI, date unknown) <pmi-human-rights-commitmenta280c4bd6c7468f696e2ff0400458fff.pdf> accessed 16 Sept 2017. The UN Global Compact is a principle-based framework for businesses, stating 10 principles in the areas of human rights, labour, the environment and anti-bribery. More on the Guiding Principles and Global Compact will be dealt with below.
[1177] *Ibid.*
[1178] *Ibid.*
[1179] *Ibid.*
[1180] SD Murphy, 'Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 Columbia Journal of Transnational Law 389, 392-3.

because TTCs conceived the codes themselves. Industry association codes are like private codes except they belong to an entire industry or group of companies within the same industry.[1181] The NGO codes are created by organisations with interests in labour, environment, human rights, among other interests. Usually NGOs' codes are in response to a significant incident of multinational corporation conduct; for instance, the 1977 Global Sullivan Principles was for multinational corporations to dissociate from the principle of segregation in South African, as a way of protesting against apartheid.[1182] The principles were later relaunched in 1999 as a more general code, known as the Global Sullivan Principles of Social Responsibility.[1183] The Global Sullivan Principles advocates the support for human rights, including equal opportunities and freedom of association.

The following part below examines the international voluntary codes that have somewhat influenced human rights policy of TTCs.

ILO Tripartite Declaration of Principles—the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)[1184] is the only tripartite U.N. agency that brings together representatives from governments, employers, and workers in 187 member States to set labour standards, develop policies and devise programmes promoting decent work for all.[1185] It provides in paragraph 8 that '[a]ll the parties concerned by this Declaration…should respect the Universal Declaration of Human Rights (1948) and the corresponding International Covenants (1966) adopted by the General assembly of the United Nations, as well as the Constitution of the International Labour Organisation'.

The MNE Declaration calls upon transnational corporations to take decisive measures in creating employment opportunities, ensuring security of employment, promoting equality, providing favourable work conditions and health and safety. The

[1181] For instance, the Zimbabwean 'Tobacco Industry Code of Conduct' under the Collective Bargaining Agreement: Tobacco Industry, Statutory Instrument 70, 2017 [CAP.28:01]. The 'code' is, a set of agreed principles and acts, designed to regulate and promote good behaviour at workplace, see section 6.
[1182] SP Sethi and OF Williams, 'Global Code of Conduct: an assessment of the Sullivan Principles…Lessons Learned and Unlearned' (2000) 105(2) Business and Society Review 169-200.
[1183] JB Stewart, 'Amandla! The Sullivan Principles and the battle to end apartheid in South Africa, 1975-1987' (2011) 96(1) Journal of African American History 62.
[1184] Adopted by the Governing Body of the International labour Office at its 204th session (Geneva, November 1977) and amended at its 279th (Nov 2000), 295th (March 2006) and 329th (March 2017) sessions.
[1185] International Labour Organization, 'About the ILO' (ILO, 2017) <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> accessed 20 September 2017.

ILO Declaration on Fundamental Principles and Rights at Work[1186], for instance, commits members to respect and promote principles and rights in four categories: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

Unlike the MNE Declaration that is non-binding and unenforceable, the ILO Declaration and Fundamental Principles and Rights at Work has a follow-up procedure that provides three ways to help countries, employers and workers achieve the full realisation of the Declaration's objectives through annual review, global reports, and technical cooperation projects.[1187]

Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (Guidelines)—The OECD is an institution of 35 countries from developed and emerging countries. It adopted a declaration on international investment and multinational enterprises, which are recommendations by governments to multinational enterprises operating in, or from, adhering countries. The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards, serving as a link between Member State and transnational organisations.[1188] It calls on corporations to respect the internationally recognised human rights of those affected by their activities,[1189] as expressed in the International Bill of Human Rights,[1190] and urges multinational corporations to carry out human rights due diligence as appropriate to their size, nature, and context of operations, as well as to protect public health and safety, among other recommendations.[1191] Although they are not legally binding, corporations are charged to respect the Guidelines wherever they operate. Therefore, to ensure a measure of enforceability, each adhering OECD

[1186] Adopted by the International labour Conference at its 86th Session, Geneva, 18 June 1998 (annex revised 15 June 2010).
[1187]For an expansive explanation see, 'ILO Declaration on Fundamental Principles and Rights at work' (note 1185).
[1188] OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) 17, [1].
[1189] *Ibid* p19, para 2.
[1190] *Ibid.* The Int'l Bill of Human Rights, which consists of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.
[1191] *Ibid.*

member is required to establish a 'national contact point' (NCP), whose leading role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling inquiries, and contributing to the resolution of issues arising from the alleged non-observance of the guidelines.[1192] However, NCPs have been criticised for lacking the resource to investigate complaints and to provide an effective mediation service.[1193] According to critics, the NCPs reject far too many complaints and, of those accepted, the vast majority do not result in outcomes that end corporate misconduct, provide victims with remedies for harms incurred, or bring about changes to corporate behaviour.[1194] The guidelines may represent no more than a corporate marketing opportunity rather than an authentic opportunity to moderate corporate behaviour.[1195]

UN Global Compact. In 1999, the then UN Secretary-General, Kofi Annan, launched the UN Global Compact (GC), a voluntary initiative designed to encourage corporations to commit to ten principles based on four themes: human rights,[1196] labour, environment, and anti-corruption.[1197] These themes or principles are derived from international instruments: the Universal Declaration of Human Rights, the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.[1198] The initiative aims for businesses to adopt these principles in their practice,[1199] serving as a key entry point for engaging business and improving the United Nations ability to work with the private sector.[1200]

To participate in the GC, the company's chief executive officer is expected to write to the UN Secretary-General expressing support for the initiative, and then

[1192] OECD, 'About the NCP' (OECD, 2017) <https://mneguidelines.oecd.org/ncps/> accessed 22 Sept 2017.
[1193] John Ruggie, *Protect, Respect and Remedy: a framework for Business and Human Rights,* Report of the UN Special Representative on human rights and transnational corporations and other business enterprises (7 April 2008) UN Doc A/HRC/8/5, at para 98.
[1194] S Khoury and D Whyte, 'Sidelining corporate human rights violations: the failure of the OECD's regulatory consensus' (2019) 18(4) Journal of Human Rights 363.
[1195] O Amao, *CSR, Human Rights and the Law* (Routledge 2011) 36.
[1196] Principle 1&2 are on human rights. Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; Principle 2: and, make sure that they are not complicit in human rights abuses.
[1197] SP Sethi and DH Schepers, 'United Nations Global Compact: the promise performance gap' (2014) 122(2) Journal of Business Ethics 193.
[1198] *Ibid.*
[1199] George Kell, '12 years later: Reflections on the growth of the UN Global Compact' (2012) 52(1) Business and Society 31, 32.
[1200] S Williams, 'The Global Compact: special report on corporate social responsibility' (Feb 2007) African Business 40.

publicly advocate it.[1201] As a condition for participation, companies are required to submit annual report on compliance, although they may be selective as to what they include in the report. Failure to comply may lead to delisting and labelling the company as 'non-communicating'.[1202] PMI declared commitment to the Global Compact in 2015 to improve reputation and influence UN agencies;[1203] however, following a board meeting in 2017, the UN Global Compact officially announced their decision to exclude tobacco companies from participating in the initiative.[1204]

United Nations Guiding Principles on Business and Human Rights (Guiding Principles).

In 2005, the UN appointed Professor John Ruggie a Special Representative on human rights and business to 'identify and clarify' existing standards and practices of corporate responsibility and accountability. His first report in 2008 to the UN Human Rights Council disclosed underlining challenges:

> *The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.*[1205]

According to Ruggie, companies claim they respect human rights but only a few have systems in place to demonstrate the claim with any degree of confidence.[1206] As part of his recommendation, he proposed a tripartite international framework on human rights corporate accountability which he referred to as 'protect, respect and remedy',

[1201] Y Eijk *et al.*, 'United Nations Global Compact: an 'inroad' into the UN and reputation boost for the tobacco industry' (2008) 17(e1) Tobacco Control e66.
[1202] *Ibid.*
[1203] *Ibid.*
[1204] UN Global Compact (UNGC), *UN Compact integrity policy update* (UNGC, 13 Oct 2017).
[1205] John Ruggie Report, A/HRC/8/5, 7 April 2008.
[1206] John Ruggie, *Business and Human Rights: Towards operationalizing the 'protect, respect and remedy' framework,* report of the Special Representative of the Secretary-General, UN Human Rights Council, A/HRC/11/13, April 2009, paras 49,59.

and these guiding principles were endorsed by the UN Human Rights Council.[1207] The three core guiding principles could be understood as a coherent whole and should be read in terms of their objective to enhance business and human rights standards and practices.[1208] The Guiding Principles apply to all States and all business enterprises, both transnational and others, regardless of size, sector, location, ownership, and structure.[1209]

The first principle—to protect—addressed the settled position in international law that states have the primary duty to protect against human rights violations. States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime.[1210] The duty of states in this regard is unequivocal. States would be perceived as violating their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.[1211] It strongly advocates home States to set out the expectation that businesses respect human rights abroad, especially where the State is involved in, or supports, those businesses.[1212] It also gives practical examples of how the state can influence human rights compliance in business organisations. One example is where a State conducts commercial transaction with business enterprises, therefore, providing the State with a unique opportunity to promote awareness and respect for human rights, such as through the terms of contract.[1213]

The second core principle is on corporations to respect human rights. This means that corporations should avoid infringing on the human rights of others, and they should address adverse human rights impacts within their space of involvement wherever they operate.[1214] On this core principle, Ruggie focuses on the role of corporations. He disagrees with the discourse limiting the set of responsibilities to hold

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[1207] The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31), which also includes an introduction to the Guiding Principles and an overview of the process that led to their development. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

[1208] OHCHR, *Guiding Principles on Business and Human Rights: implementing the United Nations "protect, respect and remedy" framework* (United Nations 2011) 1.

[1209] *Ibid.*

[1210] *Ibid.* commentary on Principle 4 at p7.

[1211] *Ibid.* p3.

[1212] *Ibid.* p4.

[1213] *Ibid.* commentary on Principle 6 at p8.

[1214] *Ibid.* p13.

corporations accountable. He believes that since corporations can affect all recognisable rights, corporations should, therefore, consider every rights. He further argues that the duty to respect is defined by social expectations.[1215] However, social expectation, according to Amao, is not sufficient to guide corporate actions and, for that reason, there should be 'more clarity as to what is owed, which the law may be best placed to provide'.[1216]

The third core part of the framework is access to remedy. The Guiding Principles recommends that home states should strengthen judicial and non-judicial capacity that is accessible and equitable to address complaints and enforcement against organisation within their authority. Under the commentary of the Guiding principles, the remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), injunctions or guarantees of non-repetition.[1217] The Guiding Principles recommend business organisations to establish or participate in operational-level grievance mechanisms accessible directly to individuals and communities who may be adversely impacted by a business enterprise.[1218] This company-led, non-judicial, and non-state remedy is typically administered by enterprises alone or in collaboration with other relevant stakeholders, or may be provided through a mutually acceptable external expert or body.[1219] Non-judicial grievance mechanisms, either state or non-state, should meet specific criteria under the Guiding Principles, including legitimacy, accessibility, and transparency.[1220] However, the major challenge with this sort of non-judicial grievance mechanism is enforceability, without which the non-judicial process would likely be nugatory.

Having discussed the core aspects of the guiding principles, the next paragraph will focus on how TTCs should address their adverse human rights impact.

According to the Guiding Principles, TTCs should carry out human rights *due diligence* to identify, prevent and mitigate human rights impacts as an ongoing

[1215] Ruggie Report (note 1205). *See also Guiding Principles (note 1208)*.
[1216] O Amao, *Corporate social responsibility, Human rights and the Law (*Routledge 2011) 46. See also Guiding Principles*, ibid.*
[1217] OHCHR (note 1208) 27.
[1218] Principle 29 at p31.
[1219] *Ibid.*
[1220] *Ibid.* at p33.

concern.[1221] This procedure should comply with national laws and circumvent the risks of human rights infringement,[1222] including assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking and communicating the responses.[1223] The context in which a company operates—its activities and the relationships associated with those activities—determines the scope of human rights-related due diligence.[1224] Therefore, the scope of due diligence in the tobacco industry should be wider than an industry producing less harmful product or service. In line with the Guiding Principles, due diligence involves an inductive and fact-based process guided by three set of factors: (a) due diligence includes adverse human rights impact business enterprise may cause through its own activities or through its operations, products or services by its business relationships (b) due diligence varies in complexity according to the risk and size of the corporation, and the nature and context of its operations (c) due diligence is an on-going process, recognising that the human rights risks may change over time as business operations and operating-context evolve.[1225]

However, Brown argues that the due diligence referenced in international instruments are inadequate to change corporate behaviour, considering that they are not legally binding on transnational corporation and therefore unenforceable.[1226] Brown further argues that states governments should legislatively mandate due diligence with enforceable remedies, and, also, the definition of due diligence be expanded to enhance the obligations of multinational companies to provide human rights protection.[1227] Besides, without fines and criminal sanctions, the burden of enforcement under tort law falls on the victim who are least equipped to meet it, and the formidable legal defence of transnational corporations could serve as an obstacle to enforce compliance.[1228]

[1221] *Ibid.*

[1222] John Ruggie, *Protect, Respect and Remedy: a framework for Business and Human Rights,* Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises (7 April 2008) UN Doc A/HRC/8/5, at para 98.

[1223] Principle 17, Guiding Principles, *ibid.*

[1224] *Ibid.,* para 25.

[1225] *Ibid.*

[1226] RC Brown, 'Due diligence 'hard law' remedies for MNCs labor chain workers' (2018) 22(2) UCLA Journal of Int'l Law and Foreign Affairs 119, 128.

[1227] *Ibid.*

[1228] *Ibid.* at p151.

With the Guiding Principles and other international codes on businesses and human rights, the question now is, what impact do they have on TTCs? The paragraph below will give an account of the impact of international initiatives on TTCs, *vis-à-vis* the UN Guiding Principles (GPs).

International human rights initiatives, such as the GPs, have had an impact over TTCs, at least by raising public awareness. TTCs have also embedded the GPs in their governance framework partly due to the voluntary and non-legally binding nature of the GPs, which are responsibilities rather than duty. As an example, the Human Rights Policy of Japan Tobacco International (JTI), which also applies to suppliers and other business partners working on behalf of the company, recognised the GPs.[1229] Equally, PMI[1230] and BAT[1231] have both adopted the GPs. The potential benefit could be the implementation of human rights due diligence as an integrated part of TTCs' operations and supply chain.[1232] As an example, PMI have recognised the harmful effect of their products and the impact it has on human rights, subsequently leading to the development of less harmful tobacco products.[1233] The use of less harmful alternatives, as research suggest, can reduce exposure to toxic chemicals that can lead to cancer in cigarette smokers.[1234] However, applying the UN Guiding Principles, the Danish Institute of Human Rights[1235] concludes that tobacco production, marketing, and consumption are irreconcilable with the right to health.[1236] To reconcile the differences, therefore, there should be a seismic shift from TTCs' recognition of human rights to the full realisation of human rights, which entails an overhaul of their operations, including their tobacco products.

[1229] Japan Tobacco International, *JT Group Human Rights Policy* (JTI, 1 Sept 2016).
[1230] See PMI human rights policy (note 1157).
[1231] BAT, 'Human Rights and Modern Slavery' (note 1175).
[1232] Principle 13 page 14, Guiding Principles (note 1208).
[1233] PMI, 'Assessing risks reduction' (PMI, 31 July 2019) <https://www.pmi.com/science-and-innovation/assessing-risk-reduction>; PMI, 'Creating Less Harmful Alternatives to Smoking' (PMI, 31 July 2019) <https://www.pmi.com/science-and-innovation/creating-less-harmful-alternatives-to-smoking-cigarettes> both articles accessed 9 October 2017.
[1234] L Shahab, *et al*. 'Nicotine, Carcinogen, and Toxin Exposure in Long-Term E-Cigarette and Nicotine Replacement Therapy Users: A Cross-sectional Study' (2017) 166(6) Annals of Internal Medicine 390-400.
[1235] The Danish Institute for Human Rights (DIHR) is an independent human rights institution mandated to promote human rights through advice to public actors. The DIHR collaborated with Philip Morris International Inc. (PMI) to develop a human rights implementation plan across PMI's value chain, including risk assessment, gap analysis and action plan. The collaboration was from September 2016 to August 2017.
[1236] Danish Institute for Human Rights, 'Human Rights in Philip Morris International' (DIHR, 4 May 2017) <https://www.humanrights.dk/news/human-rights-assessment-philip-morris-international> accessed 11 October 2017.

However, sole reliance on the international voluntary codes to initiate a comprehensive change in the industry is rather inadequate, given the voluntary nature and the insufficient enforcement of the codes at the international level.[1237] Currently, national legal framework acts as an enforcement mechanism, as illustrated under the WHO FCTC. However, enforcement in Nigeria is weak.[1238] Moreover, government in developing countries disregard human rights abuses by multinational corporations, following economic losses.[1239] As a result, enforcement within an international context or framework should be enabled.[1240] This international enforcement process, perhaps led by the United Nations, should be empowered to hold multinational corporations accountable for human rights abuses, which would lead to the global harmonisation of rules and a consistency in the application of such rules.[1241]

6.7 Conclusion

Despite the growing importance of addressing human rights issues with international human rights initiatives, responsibility in this area is voluntary.[1242] For corporate businesses, the international human rights responsibilities are rarely framed in mandatory language.[1243] As a result, international human rights laws neither binds nor provides any real mechanism to hold TTCs accountable. Therefore, to advance the benefits of these international initiatives in Nigeria, domestication and a robust enforcement framework is crucial to enhance tobacco control. However, awareness of these human rights initiatives holds a commanding significance, exemplified by TTCs recognising international human rights initiatives, including the UN Guiding Principles on Business and Human Rights, under their governance framework. The advantage

[1237] E Giuliani and C Macchi, 'Multinational corporations' economic and human rights impacts on developing countries: a review and research agenda' (2014) 38 Cambridge Journal of Economics 479, 486.
[1238] OB Igbayiloye *et al.,* 'Legal response to human rights challenges of MNCs in Nigeria' (2015) 6 Nnamdi Azikiwe Uni. Journal of Int'l Law and Jurisprudence 106, 114.
[1239] Giuliani (note 1237) 480.
[1240] *Ibid* at p485.
[1241] RC Brown, 'Due diligence "hard law" remedies for MNC labor chain workers' (2018) 22(2) UCLA Journal of Int'l Law and Foreign Affairs 119, 126-7.
[1242] B Choudhury, 'Balancing soft and hard law for business and human rights' (2018) 67(4) International and Comparative Law Quarterly 962.
[1243] *Ibid.*

of which only goes to show that international law and initiatives can influence corporate policy. However, the crux of the matter is the transition from recognition to implementation of the objectives of these human rights instruments and initiatives.

Furthermore, human-rights based approach serves as a useful tobacco control tool in Nigeria, especially when non-justiciable rights are associated with justiciable ones.[1244] Once the connection is established—because people's inalienable right build on each other—[1245]restitution can be pursued in court, as illustrated in the chapter. In addition, as the Nigeria company law recognises corporate entities as natural persons,[1246] corporations should therefore be placed on the same pedestal as humans.

Finally, this thesis recommends the establishment of a well-resourced independent Human Rights Reporter or Commissioner with the mandate to investigate, sanction and remedy any human rights abuses within the tobacco industry.

[1244] Non enforceable by the courts.
[1245] Michelle Bachelet, *Opening Statement by UN High Commissioner for Human Rights*, 39th session of the Human Rights Council, 10 Sept 2018.
[1246] Section 38(1) CAMA at (note 203).

Chapter Seven. General Conclusion and Recommendations

The research evaluates the adequacy of Nigeria's legal framework at regulating the activities of the tobacco industry, and what role, if any, CSR has in the regulatory framework. To this end, it analysed the laws, international instruments and institutional structure governing the tobacco industry, as well as TTCs' corporate social responsibility statements and actions. Consequently, the research found a considerable amount of improvement in the current tobacco control framework compared to the one it replaces. However, the research identified substantial inadequacies. Issues ranging from unlawful interference by TTCs to weak enforcement have rendered tobacco control somewhat inadequate. Most importantly, the regulatory framework in part fails to actualise the objective of the WHO Framework Convention on Tobacco Control, which it purports to domesticate. Adequate representation of the Convention is fundamental to tobacco control in Nigeria. Given that international law has inherent limitations in holding TTCs accountable,[1247] the national legal framework therefore serves as an enforcement mechanism for such laws. Moreover, before a ratified treaty is enforceable in Nigeria, it must be enacted as a domestic legislation.[1248]

The second part of the research question explored what role CSR could have in the regulatory framework. This is because Ruggie argues that a regulatory alliance between government and business could enrich the regulatory framework.[1249] While legal pronouncements are government's contribution to the regulatory alliance, business contribution to the alliance could be—among others—corporate social responsibility, a deliberate business culture that is hinged on internal control and accountability. In answering this part of the research question, the thesis first gave scope to a fluid concept, identifying common themes and debates intended to establish a general understanding of CSR. Second, it captured the symbiotic relationship between law and CSR, especially how they both converge and advance

[1247] M Ssenyonjo and MA Baderin (eds), *International Human Rights Law: six decades after the UDHR and Beyond* (Taylor and Francis 2010) 263, 578.
[1248] E Egede, 'Bringing Human Rights Home: an examination of the domestication of human rights treaties in Nigeria' (2007) 51(2) Journal of African Law 249, 283.
[1249] John G Ruggie, 'Multinational as global institution: power, authority and relative autonomy' (2018) 12(3) Regulation and Governance 317.

each other. It argues that the law should engage with CSR, especially considering the notoriety of the industry. The law should therefore mandate a sub-set of CSR to make it meaningful, creating a quasi -mandatory and -voluntary approach to CSR. It then draws attention to CSR statements of TTCs and depicts how the National Tobacco Control Act of 2015 severely constrains CSR practices. The Act prohibits any form of public promotion, sponsorship, and advertisement of CSR in the tobacco industry, leading to an unusual industry-specific CSR performance. The discovery of the restriction steered the answer to the research question in a different direction from what was initially intended. Despite the restrictions, the research findings suggest that CSR could drive internal processes and ethical values. To present it another way, when legislative control over TTCs is ineffective, and perhaps even counterproductive, the responsibility that is needed is for corporations to fill the gap, which is already driven by their claims to advance CSR objectives. The result of which could therefore benefit the broader tobacco control framework.

In accomplishing the research objectives, chapter four explored other laws that could supplement tobacco control regulations, thereby enhancing the general regulatory framework. In other words, chapter four identified a network of laws, regulations and agencies that could function collectively to ensure the regulation of TTCs. In line with this objective is article 19(1) of the WHO FCTC, which asserts all Parties to consider ‘promoting their existing laws … to deal with criminal and civil liability’ for the purpose of tobacco control. The laws presented in chapter four fulfil this purpose. They could augment the primary tobacco legislation—that is the NTCA 2015—in areas such as environmental protection. Article 18 of the WHO FCTC requests parties signing up to the treaty to protect the environment from ‘tobacco control and manufacture’. However, the NTCA is weak on this objective. There is no comprehensive reference to environmental issues on tobacco manufacture, as suggested under the WHO FCTC. The research demonstrated, in chapter four, that other laws could be ‘promoted’, as suggested under article 19(1) WHO FCTC, to serve as an intricate part of the tobacco regulatory framework. One such law that could be enhanced to protect the environment against the impact of the tobacco industry is the National Environmental Standards and Regulatory Enforcement Agency Act (NESREA). However, the findings suggest that there are deficiencies in the laws cited in chapter four, too. NESREA, for instance, addresses some environmental issues

concerning the Tobacco industry, but it is perceived has having a limited effect. Challenges of budgetary constraint, inadequate human and institutional capacity, lack of public awareness and education, weak enforcement and communication with relevant stakeholders are concerns that need attention. The research also identified similar deficiencies affecting other tobacco control regulatory bodies and regulations. Addressing all these deficiencies would strengthen the tobacco regulatory framework.

Furthermore, the research findings suggest an urgent need for tougher anti-corruption measures. Unconscionable social and corporate practises will only weaken the regulatory framework, including the implementation and enforcement of tobacco regulations. The research suggests that, without strong anti-corruption measures, it would be a challenge for the Nigerian government to meet its responsibilities under national and international law because corrupt acts manifest itself in extra-legal and criminal practices. After all, smuggling,[1250] fostered by weak anti-corruption measures, has made Nigeria one of the main transit and transit-destination countries for illicit tobacco products,[1251] creating a challenge to eliminate illicit trade in tobacco products under its protocol obligation with the WHO FCTC.[1252]

In Chapter 6, the research argues that a human rights-based approach can be achieved in the context of controlling the tobacco industry in Nigeria. It illustrates the nexus between human rights and tobacco regulation. The study discussed how the activities of TTCs affect certain categories of human rights. It then explored the responsibilities of the Nigerian government to protect against negative corporate impact and the responsibilities of TTCs to society. The research findings suggest human rights provisions in the constitution could compel TTCs to act responsibly, provided the non-justiciable rights, such as the right to a healthy environment and the right to health, are elevated to justifiable rights either through legislative changes or judicial precedents.

[1250] P Jha & FJ Chaloupka (eds) *Tobacco Control in Developing Countries* (OUP 2000).
[1251] See WHO FCTC (note 730).
[1252] OO Ewetan and E Urhie, 'Insecurity and Social Economic Development in Nigeria' (2014) 5(1) Journal of Sustainable Development Studies 40.

The Nigerian judiciary could also draw guidance from landmark foreign judicial decisions,[1253] where non-justiciable rights are reinforced with justiciable rights.[1254] This novel approach underscores the indivisibility and interdependence of human rights and, indeed, the judiciary is crucial in this regard.

Recommendations

The research draws attention to some of the inadequacies of the National Tobacco Control Act 2015 (NTCA). By addressing the gaps, policymakers and legislators could fully align the NTCA with the aims and objectives of the WHO FCTC in which it intends to represent. The research recommends the following to enable the legislation:

1) The federal legislative body should be responsive in approving regulatory directives initiated by the Minister of Health. According to section 39 of the NTCA 2015, the two Houses of the National Assembly must approve all tobacco control regulations issued by the Minister of Health. However, the approval has been a protracted process. This presents ongoing challenges for the Ministry, and it delays implementing the directives of the WHO FCTC.
2) The legislative body should consider amending section 12 of the NTCA because the section, as it stands, creates an avenue to circumvent tobacco control policies.
3) The NTCA 2015 would benefit from a procedural guidance that promotes clarity. The Bribery Act Guidance issued by the UK Justice Ministry serves as an example.
4) Educating the public and promoting public awareness of tobacco control laws, policies and institutions should be considered. This would increase the prevalence of the NTCA and other tobacco control regulations and policies.
5) The findings suggest that the tobacco regulatory institutions lack the necessary resources to function adequately, as identified by the Ministry of Health in the Report filed with the WHO FCTC. To meet this challenge, the research

[1253] *Unni Krishnan v. State of Andhra Pradesh & ors*. (1993) 4 Law Reports on Crime 234 (India).
[1254] India Constitution, Article 45 provides that the state shall endeavour to provide within a period of ten years from the commencement of the Constitution, free and compulsory education for all children until they complete the age of fourteen years.

recommends an increase in taxation on tobacco products. The tax income should be directed towards enhancing tobacco control institutions, including the Tobacco Control Committee and the Tobacco Control Fund. Research suggests that increasing tax on tobacco products could result in declining demand:[1255] tobacco consumption is reduced by about 8% in low- and middle-income countries for every 10% increase in the retail price.[1256]

6) The National Tobacco Control Committee should establish guidelines on how it would evaluate projects to be funded. It should also provide details of the approved projects, the organisations behind them, the level of funding and the publication of annual reports of the Tobacco Control Fund's, thus, providing access to the public on all necessary framework documents, information, and tools.
7) The research findings suggest government agencies are still interacting with the TTCs, which is contrary to s27 and s28 of the NTCA and article 5.3 of the WHO FCTC. The government should therefore cease to have any interaction with the industry. This would prevent TTCs from interfering in tobacco control policies.
8) The WHO FCTC have informed parties to adopt measures beyond those required by the Convention. It follows on that the adoption of the requirements proposed by the Convention could be regarded as the first step before attaining the 'beyond' status. However, the identification of these inadequacies suggest that Nigeria has not yet attained the first level, and, consequently, still a long way from attaining the 'beyond' status.
9) The NTCA and the general tobacco regulatory framework should be consistent with the objectives of the WHO FCTC, which it purports to represent**.** Smoking occurs in public places contrary to the 100% smoke-free environmental policy promoted by the WHO FCTC. In addition, managers of smoke-free buildings could be exempted from the indoor smoking ban, again, contrary to the WHO FCTC guidelines.

[1255] Article 6 WHO FCTC; DD Blake and Vera da Costa e Silva (eds), *Tobacco Control Legislation: An Introductory Guide* (2nd edn, WHO, 2004) 100; SD Golden & ors, 'Comparing projected impacts of cigarette floor price and excise tax policies on socioeconomic disparities in smoking' (2016) 25(1) Tobacco Control i60-i66. See also World Health Organization, *Mpower: A Policy Package to Reverse the Tobacco Epidemic* (WHO 2008) 26-9.
[1256] WHO *ibid.* at p27.

10) Regarding the environment, the NTCA should conform with the objectives of Article 18 of the WHO FCTC. The NTCA has limited environmental policies that protects the environment from the activities of the tobacco industry. It is recommended that environmental provisions could be added to the NTCA, or the NTCA could refer to other environmental laws and regulations, like those highlighted in chapter four.
11) The manager of smoke-free premises should have their 'enforcement' role clarified. For this reason, the NTCA would benefit from a supplementary guidance note.
12) Monitoring and data collection should be undertaken to measure the success of the NTCA and tobacco control efforts. There is a need to improve the data and research gap on tobacco control regulation in Nigeria. At present, non-state actors, such as non-governmental organisations and donors, have played the leading role in this area. However, government stands to benefit from the availability of quality data and evidence-based policy design. It is key for government to allocate human and financial resources to this end.
13) The NTCA is silent on electronic nicotine delivery systems (ENDS) and electronic non-nicotine delivery systems (ENNDS), such as e-cigarettes, contrary to the decision adopted under the WHO FCTC. It is recommended that there should be a consistent approach with the decision of the WHO FCTC. This could be achieved by (a) amending the NTCA to address ENDS and ENNDS products; (b) establishing a specific new law or legal instrument to regulate ENDS and ENNDS products; (c) or by a combination of (a) and (b).

CORRUPTION

1) A reduction in corrupt practises would enhance the regulatory framework. For this reason, this study recommends consistent anti-corruption measures and public awareness; a well-informed citizen plays an active role in accountability and the elimination of corruption. Regular training of public officials on the impact of corruption on tobacco regulation is also beneficial.
2) Economic improvement could also reduce corrupt practices.
3) The government should not intervene in anti-corruption investigations and ICPC/EFCC activities, a challenge encountered by the anti-corruption bodies.

There should be an unbiased recommitment of political will in the anti-corruption effort. In safeguarding the regulatory framework, Government should also address other challenges faced by the anti-corruption bodies such as judicial corruption and inefficiency, inadequate personnel, inadequate funding, poor working conditions, and reward system.

4) EFCC and ICPC have overlapping functions in the investigation and prosecution of corrupt persons despite having different mandates. This has led to suggestions that both bodies should amalgamate as a single entity. In addition, there is the issue of conflict amongst different governmental bodies due to an overlap of duties. The EFCC, ICPC, the police force and the Attorney General of the Federation all have assigned powers to investigate and prosecute corruption cases without a clear scope. A clear scope between these investigative bodies is recommended to eliminate conflict and jurisdictional overlap.
5) Laws and processes should be evaluated consistently in accordance with article 5(3) of the United Nations Convention Against Corruption (UNCAC), which requires states to periodically evaluate relevant legal instruments and administrative measures to determine their adequacy at preventing and fighting corruption. The research findings suggest certain legal instruments have not been evaluated. Section 8 of the Criminal Procedure Act, for instance, prescribes 7 years imprisonment for any person who corruptly obtains any property or benefit of any kind, while section 112 of the Criminal Code Act prescribes 3 years imprisonment for the same offence. Most often, the latter option is used to decide corruption cases, as evidenced in some corruption judgments. This demonstrates the duplicity of the two legal instruments which could have been avoided if article 5(3) of the UNCAC were implemented.
6) The African Union Anti-Corruption Convention lacks provisions on the liability of corporations. It recognises the need to curb corruption in the private sector without making provisions for the direct liability of multinational corporations. The Convention is also silent on the issue of bribery of foreign public officials despite its reference to various public and private acts of corruption. Addressing these challenges will help reinforce the Convention's capacity to tackle corruption in Africa, complementing the efforts taken at the domestic state level.

7) It is recommended that government agencies collaborate with non-governmental organisations (NGOs), media and international communities on anti-corruption matters. Anti-tobacco NGOs should be enabled to monitor and hold TTCs and regulatory bodies accountable.

GOVERNMENT

To achieve an enhanced regulatory framework, the research recommends all arms of government to act in one accord, guided by the recommendations and principles of the WHO FCTC.

1) Executive: government should address weak enforcement of tobacco regulations, with the aim of improving institutional structures and administrative competence. It is also recommended that a tobacco control commissioner be established to investigate any infringements arising out of the activities of the tobacco industry.
2) Judiciary: to advance tobacco regulation, the research recommends the judiciary to lend itself to a degree of judicial flexibility and innovation, since there is a dearth of case laws involving TTCs in Nigeria.[1257] The thesis took insights from litigations initiated by TTCs in other jurisdictions, where the judiciary have demonstrated judicial flexibility and, perhaps, judicial activism in support of tobacco control legislation and policy.[1258] One of the contributions of this research is the supply of successful counterclaims from foreign jurisdictions that would aid the judiciary and tobacco control advocates in litigation against TTCs.[1259]
3) Legislature: The legislature and other government agencies should prevent the tobacco industry from interfering in tobacco control laws and policies. The legislature should expeditiously ratify regulations emanating from the Ministry of Health.

[1257] Maria Cahill and Sean O Conaill, 'Judicial Restraint Can Also Undermine Constitutional Principles: An Irish Caution' (2017) 36(2) University of Queensland Law Journal 259; PN Bhagwati, 'The role of the judiciary in a democratic process: balancing activism and judicial restraint' (1992) 18(4) Commonwealth Law Bulletin 1262; See also p92-3 of this thesis.
[1258] *British American Tobacco Australasia Ltd (BAT) & ors v Commonwealth of Australia*, [2012] HCA 43; 250 CLR 1; 86 ALJR 1297; 291 ALR 669. *[217] - [234].*
[1259] *Ibid.*

CSR

An analysis of the domestic forum, Nigeria, reveals gaps in the tobacco control legislation and other relevant domestic laws. Weak enforcement of the laws and issues of corruption have all amplified the importance of CSR. The absence of an enforceable international framework for controlling TTCs, considering that the enforcement of the foremost international tobacco control treaty—WHO FCTC—has been entrusted to individual member states, has only tend to justify the significance of CSR. Therefore, having claimed to adhere to CSR principles, TTCs should use their influence to drive positive changes over the environment, their supply chain, and other areas of influence.

Another recommended area where CSR can play an active role is around international law. On matters such as the environment and human rights, international law does not have any real mechanisms to hold TTCs accountable. For this crucial reason, the WHO FCTC had to be domesticated by party members. An indication that protecting human rights against the activities of TTCs are best protected within the confines of a national normative framework,[1260] a framework (in a corporate context) that is usually driven by corporate law, and, to some degree, appears to be incomplete. Having adopted international human rights initiatives under their CSR policy framework,[1261] TTCs have an opportunity to fill the gap by promoting environmental and human rights standards, especially in host countries with weak human rights enforcement.

Furthermore, this research argues that CSR have driven innovative changes in TTCs, such as the production of alternative tobacco products that are less harmful compared to traditional cigarettes.[1262] However, for a complete form of CSR practice in the tobacco industry, the study suggests CSR should go beyond innovative changes to products; it should be expanded to also drive ethical changes.

[1260] See also JL Cernic 'Corporate Responsibility for Fundamental Human Rights' (Doctoral Thesis, University of Aberdeen, 2008).
[1261] BAT (note 1175).
[1262] See PMI, *Sustainable Report* (PMI, 2018).

It is vital to reiterate that this study does not advocate self-regulation as a sole form of tobacco control, considering that it is ineffective.[1263] Instead, it centres on the context-specific form of CSR in driving internal ethical values, and this in turn lends itself to the broader regulatory framework. Furthermore, based on certain questionable corporate conduct revealed in the study, TTCs should consider a forthright commitment[1264] to the 'social contract' of corporate social responsibility.

Finally, the findings and the recommendations have important implications for the broader domain of tobacco regulation. They are insightful to inform practice, improve policy and decision-making, which could ultimately save lives, considering the morbidity risks and other risks associated with the industry. This thesis also contributes to the knowledge and academic discourse of CSR in a legal perspective.

[1263] RW Pollay, 'Promises, promises: self-regulation of US cigarette broadcast advertising in the 1960s' (1994) 3(2) Tobacco Control 134.
[1264] Recommitment was deliberately used to indicate the venal actions by TTCs revealed in the research.

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