Index

Abbreviations used:
NGO non-governmental organisations
OECD Organisation for Economic Co-operation and Development
TNC transnational corporations

Abad v Bayer Corp. (2009)(US) 108
act of state doctrine 114–16
actus reus
for aiding and abetting 103–4, 153
and corporate criminal responsibility 129
Administrative Offences Act (Germany) 128
African Court on Human and Peoples’ Rights 175
Afrimex case (2008)(UK) 50–51
Agreement on Trade-Related Investment Measures (TRIMs)(1995)(WTO) 74
aiding and abetting 101, 103–4
act or omission, and causation 153–4
complicity 152–3
and corporate criminal responsibility 101, 103–5, 129, 153–4
evidence of, and due diligence 105
Aldana v Del Monte Fresh Produce (2005)(US) 102
Alien Tort Claims Act 1789 (US) 95, 99–106
class actions under 101
and comity 117
command responsibility 100–101, 160
and knowledge or intent 104–5
law of nations, violation of 101–2
and liabilities of states and individuals 105–6
and state action, requirement of 103–4
and sovereign immunity 111–12
and US treaties, violation of 102–3

Alston, Philip 38
American Convention on Human Rights 174–5
Anglo-Iranian Oil Company (1951)(ICJ) 194
anti-corruption/ bribery measures 117
in Europe 136–7
extra-territorial legislation on 98–9, 136–8
and International Criminal Court (ICC) 133, 138–9
in US 129–30, 137–8
anti-money laundering measures
in EU 134–5
in Spain 134–6
in US 133–4
apartheid 101–5
Argentina, corporate criminal responsibility 128, 139
ASEAN Intergovernmental Commission on Human Rights (AICHR) 175
Australia
Australian Corporate Responsibility Network 7–8
Australian Minerals Industry Framework for Sustainable Development 23
AWB Ltd, conflicts of interest concerning 48
BHP/ Papua New Guinea case 77–9, 173–4
‘clearly inappropriate forum’ test (forum non conveniens) 110
corporate criminal responsibility 128–9, 139
corporate governance 7–8
corporate social responsibility 7–8
James Hardie Group asbestos case 80–85
OECD National Contact Point, actions by 171, 173
Parliamentary Joint Committee on Corporation and Financial Services (JCCFS) 7–8

Banco Nacional de Cuba v Sabbatino (1964)(US) 114–15
Belgium, corporate criminal responsibility 128, 139
bilateral investment treaties (BITs) 1, 3
and investor protection 75–6
TNC role in, potential benefits of 4, 193–6

Bodner v Banque Paribas (2000)(US) 107
Bowoto v Chevron Texaco (2007)(US)
95, 97–101, 108
bribery see anti-corruption/ bribery
Bribery Act 2010 (UK) 136
Burgess v Al Baraka Inv. and Dev. Corp
(2003)(US) 113
Business and Society Exploring Solutions – A Dispute Resolution Community (BASESwiki) 168–9
Business in the Community (UK) 7–8
Business Leaders Initiative on Human Rights 33

Canada
comity 116–17
corporate criminal responsibility 128, 139
international enterprise liability in 98
causation
and act or omission, in international crime 153–4
and sphere of influence 36–40
in US Alien Tort Claims Act cases 103–5

Chambers, Rachel 35

China
corporate governance 9
corporate social responsibility 11
civil cases against TNCs see also extra-territorial legislation
NGO role in 93–4
agency cases 97–8
success rates of 117
tort and negligence claims 94–7

Civilizing Globalization 2
Civil Law Convention on Corruption
(1999)(Council of Europe) 98–9

Clark, J.A. 22
Climate and Environmental Justice Tribunal, proposed 196
Clough, Jonathan 83, 137–8
coercion 152–3
comity 116–17
command responsibility 100–101, 160
Companies Act 2006 (UK) 6–7
complementarity principle, of International Criminal Court (ICC) 138–9
complicity, concept of 152–3, 155
Connelly v RTZ (1998)(UK) 95
Convention against Corruption (2003)(UN) 137
Convention against Transnational Organized Crime (CATOC)(2000)(UN) 133
Convention on Civil Liability for Oil Pollution Damage (1969)(IMO) 149
Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID)(1966) 74–5, 188
Corporate Code of Conduct Bill 2000 (Aust) 8
corporate criminal responsibility 3, 4–5
act or omission, and causation 153–4
actus reus and mens rea (action and intent) 128–9, 153
aiding and abetting 101, 103–5, 129, 153–4
basis for international law on 151–2
bribery and corruption 136–8
command responsibility 100–101, 160
complicity 152–3, 155
concept, historical development of 127
and corporate mobility 80–85
and criminal sanctions 155–7
Criminal Law Convention on Corruption (1999) (Council of Europe) (proposed) 137

Declaration Against Corruption and Bribery in International Commercial Transactions (1996)(UN) 136

Denmark, corporate social responsibility 11

dispute resolution, international conventions and agencies for 74–6, 188, 204

*Doe v Unocal* (1997)(US) 95, 99–100, 105

*Dole Food Co. v Patrickson* (2003)(US) 113

Dow Jones Sustainability World Index 55, 149


on complicity 152–3

and criminal sanctions 155–7

and reparation 157–8

Draft Code of Conduct for Transnational Corporations (UN)(1990) 14, 28–9


Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (UN)(2003) 3, 14

background 34

basic provisions 34–5

innovative aspects of 35–6

and non-state parties 35–6

remedies under 157

status of 41

due diligence

as evidence, in aiding and abetting cases 105

and human rights, respect for 3, 46, 48–51, 96–7

and sphere of influence concept 49–51, 96–7

and supply chains 52–3, 96–7
Eastern Carelia, Status of (Advisory Opinion) (1923)(ICJ) 203
employee rights, codes of conduct on 22, 26–7
employee share ownership schemes 9
environmental law
dispute resolution 188–9
ICJ role 195–8
non-state access to 195–8
and international trade, conflicts between 189–93
and jus cogens 187
TNC responsibilities concerning 5, 130–32
Cerrejon coal mine case 173–4
Corrib gas field case 172–3
Union Carbide/ Bhopal case 79–80, 84–5
treaties and agreements concerning 149, 187–8
conflicts between 188–93
increased TNC role in, implications of 191–6
tribunals concerning 188–91
Equator Principles 24–6, 55, 180
ethical behaviour see corporate social responsibility
European Convention on State Immunity (1972)(Council of Europe) 112
European Court of Human Rights 174
European Union, anti-money laundering measures 134–5
Extractive Industries Transparency Initiative (EITI) 24
extra-territorial legislation, use of
Alien Tort Claims Act 1789 (US) 95, 99–106
and comity 117
command responsibility 100–101, 160
and knowledge or intent 104–5
law of nations, violation of 101–2
and liabilities of states and individuals 105–6
and state action, requirement of 103–4
and sovereign immunity 111–12
and US treaties, violation of 102–3
barriers to 91
act of state doctrine 114–16
comity 116–17
forum non conveniens 95, 108–11
political question doctrine 116
sovereign immunity 111–13
on corruption 98–9, 117, 136–8
extra-territoriality matrix 92–3
and jus cogens 4, 150, 157, 175, 187
nationality principle 92
territorial principle 92
Torture Victim Protection Act 1991 (US) 107–8
treaties, applicability to TNCs 178–9, 193–6
universal principle 92

Fafo Institute, survey on applicability of criminal offences to non persons (2006) 127–9, 139
Field, Andrew 159
Filartiga v Peña-Irala (1980)(US) 100–101
financial services sector, voluntary codes of conduct 24–6, 55
Fitzmaurice, Malgosia 202–3, 206–7
Foreign Corrupt Practices Act 1977 (US) 137–8
Foreign Sovereign Immunities Act 1976 (US) 112
forum non conveniens 95, 108–11
Australian ‘clearly inappropriate forum’ test 110
in US courts 110–11
Framework Convention on Tobacco Control (WHO) 57
France
corporate criminal responsibility 128
corporate social responsibility 11
Fraser, Malcolm 73
Frynas, Jedrzej 94
FTSE4Good Index 55, 149

General Agreement on Tariffs and Trade (GATT)(1994)(WTO)
and environmental protection, conflicts between 189–93
most favoured nation rule 189
national treatment rule 189
Germany
- corporate criminal responsibility 128, 139
- corporate governance 9
Global Compact see under United Nations
Global Reporting Initiative 28
Global Solutions Limited (Aust) 42–3
Google 40
Gordon, Richard 210
Guide for Integrating Human Rights into Business Management (BLIHR) 33
Guidelines for Multinational Enterprises (1976)(OECD) 41–3
Gulf Oil Corp. v Gilbert (1947)(US) 111
Hall, John 13–14
Henley, Peter 21
Hilao v Estate of Marcos (1996)(US) 106
Hockman, Stephen 196
Horrigan, Bryan 10
human rights
- 2008 Survey of human rights abuses (OHCHR) 103
- institutions concerning 174–9
- jus cogens, applicability to TNCs 175
OECD Guidelines for Multinational Enterprises on (1976) 54
TNCs responsibility to act within 2, 48–51, 54
and due diligence 3, 46, 48–51, 96–7
enforcement mechanisms 174–9
and supply chains 52–3, 96–7
Human Rights Council (UN) 176–9
India
- corporate criminal responsibility 128
- corporate social responsibility 11–13
- Union Carbide/Bhopal case 79–80, 84–5
Indigenous and Tribal Peoples Convention (1989)(ILO) 78–9
Indonesia
- companies legislation 9
- corporate criminal responsibility 127
for environmental damage 130–32
- corporate social responsibility 85
intent (mens rea)
- and corporate criminal responsibility 128–9, 153
- and US Alien Tort Claims Act 104–5
Inter-American Commission on Human Rights 174–5
Inter-American Court of Human Rights 174–5
International Bar Association, Working Group on OECD Guidelines for Multinational Enterprises 52–4, 171, 174
International Centre for the Settlement of Investment Disputes (ICSID) 74–5, 188, 204
International Chamber of Commerce 195
International Court for the Environmental Coalition (ICE Coalition), proposed 196
International Court of Justice (ICJ)
- Advisory Opinions from, potential role of 202–5
- contentious proceedings in 205–6
- and environmental disputes, role in 195–8
- as global court of appeal, potential benefits of 202, 206–7
- jurisdiction, countries declining 147
International Criminal Court (ICC)
- and anti-money laundering/anti-corruption legislation 133, 138–9
- and claims against individuals 148
- on command responsibility 160
- complementarity principle 138–9
- on joint criminal enterprise 160–61
- and national legislation, on criminal responsibility 127
- as possible forum for TNC cases 4–5, 158–62
- arguments for and against 161–2
- international enterprise liability 98
International Finance Corporation (IFC) 13
Equator Principles 24–6, 55, 180
international financial institutions enforcement role of 179–81
Equator Principles 24–6, 55, 180
International Labour Organization (ILO) Indigenous and Tribal Peoples Convention (1989) 78–9
and remedies against TNCs, role in enforcement 182, 204
on complicity 152–3
and criminal sanctions 155–7
and reparation 157–8
international law, generally absence of, consequences 103–4
and jus cogens 4, 157, 175, 187
sources of 150–51
International Monetary Fund enforcement role of 179–81
Equator Principles 24–6, 55, 180
International Money Laundering Abatement and Financial Anti-Terrorism Act 2001 (Patriot Act) (US) 133–4
International Organization for Standardization (ISO) ISO 26000 Guidance on Social Responsibility (Draft) 43–6
investments bilateral investment treaties (BITs) 1, 3
and investor protection 75–6
TNC role in, potential benefits 4, 193–6
dispute resolution concerning 74–5, 188
ethical/socially responsible value of 21, 54–5
and investor protection 74–6
and local communities, protection of 76–85
ISO 26000 Guidance on Social Responsibility (Draft) 43–6
Iwanowa v Ford Motor Co (1999)(US) 116
Jackson, David 82
James Hardie Group asbestos case 80–85
Japan corporate criminal responsibility 128, 139
corporate governance 10
joint criminal enterprise 160
jurisdiction, of international law over TNCs 4
and Convention on Law of Treaties 150, 157
and environmental law 187
and human rights 175
Kadic v Karadzic (1995)(US) 100
Keitner, Chimène 106
Kimberley Process Certification Scheme 24
Kinley, David 2, 35, 175, 180–81, 354
knowledge requirement under international criminal law 154
and US Alien Tort Claims Act 104–5
law of nations, and US Alien Tort Claims Act 101–2
Law on Economic Crimes (1955)(Indonesia) 131
Law on Environmental Protection and Management 2009 (Indonesia) 132
Law on the Environmental 1997 (Indonesia) 131–2
Leary, Virginia 182
legal personality, of corporations 1–2, 80–84
and limited liability 83–4, 94
status in international law 147–50
and status of individuals 147–8
Lubbe v Cape plc (2004) (UK) 95
McBeth, Adam 149, 177, 181
McCorquodale, Robert 47, 148–9
MacDonald, Donald 56
Malaysia, corporate social responsibility 11
Mendes, E.P. 22
mens rea (intent)
and corporate criminal responsibility 128–9, 153
and US Alien Tort Claims Act 104–5
Metalclad Corp. v United Mexican States (2004)(ICSID) 75–6
mining sector, voluntary codes of conduct 23–4
money laundering see anti-money laundering
Multilateral Investment Guarantee Agency (MIGA) 74
multilateral investment treaties (MITs) 75–6 see also bilateral investment treaties (BITs)
multinational enterprise liability 98
National Contact Points, under OECD Guidelines for Multinational Enterprises 41–3, 50–51, 168 cooperation between, importance of 172–4
and remedies for wrongful acts of TNCs, role in obtaining 170–74
nationality principle, of extra-territorial jurisdiction 92
nations, law of, and US Alien Tort Claims Act 101–2
negligence claims, against TNCs 94–7 agency cases 97–8
Ness, Richard 131–2
Netherlands
corporate criminal responsibility 128, 139
corporate social responsibility 11, 57
OECD National Contact Point, actions by 171–2
New Zealand, corporate criminal responsibility 139
Nolan, Justine 26
non-government organisations (NGOs), role in civil cases against TNCs 93–4
North American Free Trade Agreement (NAFTA) 75–6
Norway
corporate criminal responsibility 128, 139
corporate social responsibility 56–7
OECD National Contact Point, actions by 172–3
Norwegian Government Pension Fund Global 56–7
nuclear weapons cases (1996)(ICJ) 197–8, 205
Nuremberg Tribunal, on liability of states and individuals 106, 159–60
OECD
Guidelines for Multinational Enterprises (1976) 41–3 amendments 51–4
on human rights 54
International Bar Association Working Group on 51–4, 171, 174
National Contact Points, role of 41–3, 50–51, 168, 170–74
on supply chains 52–3
Multilateral Agreement on Investment (MAI) 74
Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones 50, 85
Office of the High Commissioner for Human Rights, 2008 Survey 103
Ok Tedi Mine case (Papua New Guinea) 77–9, 193
Papua New Guinea, BHP/ Ok Tedi Mine case 77–9, 193
Patel, Raj 27
Office of the High Commissioner for Human Rights, 2008 Survey 103
Ok Tedi Mine case (Papua New Guinea) 77–9, 193
Papua New Guinea, BHP/ Ok Tedi Mine case 77–9, 193
Patel, Raj 27
Patriot Act 2001 (US) 133–4
Permanent Court of International Justice 127
Pinochet, Augusto 134–5
political question doctrine 116
Posner, Michael 26
Presbyterian Church of Sudan v Talisman Energy (2009)(US) 105, 115–17
Principles for Responsible Investment (RPI)(UN)(2006) 56
Protect, Respect and Remedy Framework for business and human rights (UN) 3–5, 210
on corporate due diligence 48–51, 96–7
PT Newmont Mining (Indonesia) 131–2
Regie Nationale de Usines Renault SA v Zhang (2002)(Aust) 111
remedies, for TNCs wrongful acts barriers to 167–9, 209
human rights enforcement mechanisms 174–9
need for 146–7, 157–8, 167–70
OECD National Contact Points, enforcement role 41–3, 50–51, 168, 170–74
reparation 157–8
trade sanctions, dangers of 181–2
Riggs Bank cases (2004)(Spain) 134–5
Rodolfo Flores v Southern Peru Copper Corp. (2003)(US) 101–2
Rodriguez v Drummond Coal (2007)(US) 99
Ruggie, John 38–41
BASESwiki, establishment of 168–9
extra-territoriality matrix 92–3
on need for judicial mechanisms, against TNCs for wrongful acts 167–70
necessary principles for 169–70 and role of OECD National Contact Points 170–74
Saleh v Titan Corp. (2005)(US) 102
Salomon v Salomon & Co Ltd (1897) (UK) 21
Sarei v Rio Tinto (2002)(US) 114–16
Sen, Amartya 210
Simons, P. 47
Social Accountability International (SAI), accreditation standards 41, 54–5
Social Investment Forum (SIF) 13
South Africa corporate criminal responsibility 128, 139
corporate social responsibility 11–12
South African Truth and Reconciliation Commission 154
In re South African Apartheid Litigation (2009)(US) 97, 104–5
South West Africa Proceedings (1970)(ICJ) 205
sovereign immunity, and extra-territorial jurisdiction 111–13
multilateral treaties concerning 112–13
restrictive approach to 112
Spain anti-money laundering legislation 134–6
corporate criminal responsibility 128, 139
Special Representative of the Secretary-General on Business and Human Rights (UN) see Ruggie, John
sphere of influence, concept of 3, 36–40 and due diligence 49–51, 96–7
and supply chains 52–3
Index

Spiliada Maritime Corp. v Cansulex Ltd (1986)(UK) 108–10
State Immunity Act 1978 (UK) 112
state responsibility
act of state doctrine 114–16
home state, definition 14
host state, definition 14
and TNCs, relationship between 73–4
Australian BHP/ Papua New Guinea case 77–9
ILC Draft Articles on (2001) 4–5, 47–8, 151–8
and protection of local communities 76–85
Union Carbide/ Bhopal case 79–80, 84–5
Stephens, Tim 188–90
supply chains
complicity 152–3
and due diligence 52–3, 96–7
Sweden, corporate social responsibility 11–12, 57
Tadaki, Junko 175, 180–81
territorial principle, of extra-territorial jurisdiction 92
TNCs, generally see also corporate
criminal responsibility; corporate social responsibility;
environmental law; human rights
accountability vacuum 5, 146–7
civil cases against
agency cases 97–8
NGO role in 93–4
tort and negligence claims 94–7
definition, of corporation 1–2, 14
and global economy, role/ place in 1–2, 73, 146–7
goals of, conflicts over 2–3, 6–10
and international treaties
applicability to 178–9
increased role in, potential benefits of 191–6
and investor protection 74–6
jus cogens, applicability of 4, 150, 154, 157
legal personality of 1–2
corporate mobility 80–85
and individuals, status of 147–8
and limited liability 83–4, 94
status, under international law 147–50
models for
in civil law 8–10
in common law 6–8
self regulation and voluntary codes 3, 11–14, 23–7, 55, 180
and state responsibility, relationship between 4–5, 47–8, 73–4,
77–85, 151–8
tort claims, against TNCs 94–7
and agency cases 97–8
Torture Victim Protection Act 1991 (US) 107–8
treaties
and TNCs
applicability to 178–9
increased role in, potential benefits of 191–6
and US treaties violations, and Alien Tort Claims Act 102–3
Vienna Convention on the Law of
150, 157, 194
Tuna, United States Restrictions on Imports of (1994)(GATT Decision) 190–91
Ukraine, corporate criminal responsibility 128, 139
Union Carbide/ Bhopal case 79–80, 84–5
United Kingdom
and act of state doctrine 115
Bribery Act 2010 136
corporate criminal responsibility 128, 139
corporate governance 6–7
corporate social responsibility 6–7
negligence cases, against TNCs 95
OECD National Contact Point, actions by 171–2
State Immunity Act 1978 112
United Nations
Convention against Corruption (2003) 137

Declaration Against Corruption and Bribery in International Commercial Transactions (1996) 136


background 34
basic principles 34–5
innovative aspects of 35–6
and non-state parties 35–6
remedies under 157
status of 41

Global Compact 3–4, 28
incorporation, views on 8
Integrity Measures 32–3
role of 32–3
signatories to 33
sphere of influence concept 3, 36–40
ten principles of 31

Human Rights Council 176–9

Principles for Responsible Investment (PRI)(2006) 56

Special Representative of the Secretary-General on Business and Human Rights (see Ruggie, John)

United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2009 1

United States and act of state doctrine 114–15
Alien Tort Claims Act 1789 95, 99–106, 111–12
and comity 117
command responsibility 100–101, 160
and knowledge or intent 104–5
and law of nations, violation of 101–2
and liabilities of states and individuals 105–6
and state action, requirement of 103–4
and sovereign immunity 111–12
and US treaties, violation of 102–3
anti-corruption measures 137–8
anti-money laundering measures 133–4
corporate criminal responsibility 128, 139
corporate social responsibility 8
Federal jurisdiction, overlap with international law 107–8
Foreign Corrupt Practices Act 1977 137–8
Foreign Sovereign Immunities Act 1976 (US) 112
and forum non conveniens 110–11
negligence cases, against TNCs 95
OECD National Contact Point, actions by 172–3
Patriot Act 2001 133–4
Racketeer Influenced and Corrupt Organizations Act 1970 (RICO) 129–30
Torture Victim Protection Act 1991 107–8

United States v Philip Morris (2009)(US) 130
universal principle, of extra-territorial jurisdiction 92

Voluntary Principles on Security and Human Rights (VPs) 23–4

Voth v Manildra Flour Mills Pty Ltd (1990) (Aust) 110

Wal-Mart 57
Works Constitution Act 1972 (Germany) 9

World Bank 180
<table>
<thead>
<tr>
<th>Index</th>
<th>245</th>
</tr>
</thead>
<tbody>
<tr>
<td>World Investment Report 2009 (UNCTAD)</td>
<td>1</td>
</tr>
<tr>
<td>World Trade Organization (WTO) Agreement on Trade-Related Investment Measures (TRIMs)</td>
<td>74</td>
</tr>
<tr>
<td>enforcement role, against TNCs</td>
<td>181–2</td>
</tr>
<tr>
<td>General Agreement on Tariffs and Trade (1994)(GATT) and environmental protection, conflicts between</td>
<td>189–93</td>
</tr>
<tr>
<td>Xuncax v Gramajo (1995)(US)</td>
<td>100</td>
</tr>
</tbody>
</table>