

**THE SOCIAL CONTEXT OF BUSINESS AND THE TAX SYSTEM IN NIGERIA:
THE PERSISTENCE OF CORRUPTION**

MICHAEL OGHENEVO OVIE AKPOMIEMIE

A thesis submitted to the Department of Law of the London School of Economics for the degree
of Doctor of Philosophy
London, November 2017

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

Declaration

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work.

The copyright of this thesis rests with the author. Quotation from it is permitted, provided that full acknowledgement is made. This thesis may not be reproduced without my prior written consent.

I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party.

I declare that my thesis consists of **90,500** words.

Abstract

This thesis examines the means by which corruption sustains itself in the relationship between business and the tax system. It is predicated on a desire to understand the possibility of sheltering the relationship from corruption and other similar societal challenges. It relies on the intuition that certain structural elements of this relationship permit the infiltration and sustenance of corruption. With the aid of both qualitative and quantitative data obtained from empirical research in Nigeria, it constructs a model that exposes these structural elements.

This thesis argues that a ‘two-way relationship’ between businesses and the tax system not only exists but is anchored in the interaction between the actors (businesses, tax policy-makers, tax law-makers, tax administrators and tax arbiters) that represent both institutions. It explores four mechanisms (‘access’, ‘awareness’, ‘distortion’ and ‘inaction’) that affect the interaction and consequently the relationship between business and the tax system.

It also addresses the difficulty in defining corruption by adopting a process definition of this phenomenon. In this definition, the tag ‘corruption’ applies where an act or state of affairs and the gain derived therefrom breach the expectations of the legal, economic, political or moral dimension of a given society.

This thesis then argues that corruption sustains itself in the two-way relationship by exploiting a ‘power gap’ between the actual and institutional powers of actors in the said relationship. It defines the ‘institutional power of actors’ as that which accords with the institutional limits of their social setting. An actor’s ‘actual power’, in contrast, refers to that which the actor may exercise in any given circumstance.

This power gap is potentially increased or decreased by the levels of the four mechanisms in the relationship. Therefore, any real effort to tackle corruption in the relationship between businesses and the tax system must seek to address these four mechanisms in a manner that limits the power gap and opportunities for corruption.

The concept of the power gap and its four mechanisms is a novel approach to understanding and tackling corruption. It aspires to support the design of tax systems with the capacity to adequately balance competing interests, especially in countries where corruption is endemic.

Acknowledgements

This thesis would never have seen the light of day without the assistance of family, friends and most importantly my supervisors. I thank my mum who has stood by me all through my education. Without her consistent encouragement, love and dedication, I would be nowhere. Although my Dad did not live long enough to see me complete this process, I am confident that, wherever he is, he is proud that I have come this far. I have countless friends who have contributed in different ways to the completion of this project. I am sure that they are in as much of a celebratory mood as I am.

My supervisors, Ian and Eduardo, have been brilliant all through the process. Unlike me, they never lost faith in my ability to complete this task. Finally, I want to thank the LSE and Chartered Institute of Taxation who provided funding for my project. I pray that they continue to make dreams come true.

Table of Contents

Declaration.....	2
Abstract.....	3
Acknowledgements.....	4
Table of Contents.....	5
THE SOCIAL CONTEXT OF BUSINESS AND THE TAX SYSTEM IN NIGERIA: ‘THE PERSISTENCE OF CORRUPTION’ – INTRODUCTORY CHAPTER.....	9
1.1 Introduction	9
1.2 The Two-Way Relationship	11
1.3 Actor Network Theory as the Theoretical Approach	12
1.4 The Influence of New Institutional Sociology	13
1.5 Why Corruption?.....	14
1.5.1 Nature and Forms of Corruption	16
1.5.2 Impact of Corruption.....	19
1.6 The Formulation of Tax Policies and Enactment of Laws	20
1.7 Administration of Tax Policies and Laws.....	21
1.8 Resolution of Tax Disputes.....	22
1.9 The Interaction between the Terminals	24
1.10 Methodology.....	26
1.11 Nigeria as the Case Study.....	28
1.12 A Synopsis of the Thesis.....	31
1.13 Conclusion.....	34
CHAPTER 2 THE TWO-WAY RELATIONSHIP AND THE FOUR MECHANISMS	35
2.1 Introduction	35
2.2 Understanding the Communication Link	38
2.2.1 The Communication Route	41
2.2.2 Communications as Evidence of Power	45
2.3 Forms of Communication.....	45
2.4 Purpose of Communication	46
2.5 Channels of Communication.....	48
2.6 Actors, Interests and Instruments	49
2.6.1 Businesses	49
2.6.2 Associations and Professionals	52
2.6.3 Tax Policy-Makers	54

2.6.4 Civil/Public Servants.....	54
2.6.5 Ministers/Representatives of Government	55
2.6.6 Tax Law-Makers	57
2.6.7 Tax Administrators/Officials	59
2.6.8 Arbiters.....	61
2.6.9 Other Actors.....	65
2.7 Applying Actor Network Theory	66
2.7.1 Actor Network Theory.....	67
2.7.2 Actor Network Theory and the Communication Link	69
2.8 Issues Affecting the Communication Link.....	71
2.8.1 Distortion of Communications.....	71
2.8.2 Deficiency in Awareness	76
2.8.3 Restriction of Access	79
2.8.4 Inaction	82
2.9 Conclusion.....	83
CHAPTER 3 THE POWER GAP, CORRUPTION AND THE FOUR MECHANISMS	85
3.1 Introduction	85
Figure 1 Communication Link	85
3.2 Institutional Limits to Communicative Actions	86
3.2.1 Origin and Evolution of Rules, Expectations and Dimensions	87
3.2.2 Rules, Actors and Expectations.....	90
3.2.3 Legality of Communicative Actions.....	92
The Petroleum Investment Allowance dispute.....	97
3.3 The Power Dynamics in the Two-Way Relationship	101
3.3.1 Understanding Power	102
Permutations of the exercise of power	109
3.3.2 The Power Gap.....	111
3.4 Understanding Corruption: A Process Definition.....	115
3.4.1 Abuse of Power	118
3.4.2 Corrupt Gain.....	126
3.5 Corruption and the Power Gap.....	129
3.5.1 Corruption and the Expectations of the Dimension	129
3.5.2 Corruption and Social Expectations	130
3.5.3 Corruption and Actions	131

3.6 Conclusion.....	132
CHAPTER 4 THE RELATIONSHIP BETWEEN BUSINESS AND THE TAX SYSTEM: EMPIRICAL RESEARCH FINDINGS (1)	
4.1 Introduction	133
4.2 Maintaining a Good Relationship.....	133
4.3 Small Businesses vs Large/Multinational Businesses	135
4.4 The Tax Law Terminal	141
4.5 The Dispute Resolution Terminal.....	146
4.5.1 Independence and Objectivity of the Tax Appeal Tribunal	147
4.5.2 Tax Expertise of Judges/Commissioners.....	148
4.5.3 Legality of the Tax Appeal Tribunal.....	150
4.6 Undue Delays	152
4.7 Tax Administration and Tax Policy-Making.....	154
4.8 Third Party Organisations	160
4.9 Conclusion.....	162
CHAPTER 5 CORRUPTION AND THE TWO-WAY RELATIONSHIP EMPIRICAL RESEARCH FINDINGS (II) 163	
5.1 Introduction	163
5.2 Revisiting the Meaning of Corruption.....	163
5.2.1 Expectations of the Economic Dimension	164
5.2.2 Expectations of the Legal Dimension.....	165
5.2.3 Expectations of the Moral Dimension	166
5.3 Corruption in the Two-Way Relationship	167
5.4 Corruption in the Tax Administration Terminal.....	171
5.5 Corruption and Protest Mechanisms.....	174
5.6 The Role of Businesses in Tackling Corruption	180
5.7 Conclusion.....	181
CHAPTER 6 THE LAW, CORRUPTION AND THE TWO-WAY RELATIONSHIP	
6.1 Introduction	183
6.2 The Direct Impact of the Law on Corruption	183
6.3 The Indirect Impact of Law on Corruption in the Two-way Relationship.....	189
6.3.1 Awareness.....	189
6.3.2 Access.....	192
6.3.3 Distortion of Communication	195
6.3.4 Inaction	196

6.4 Conclusion.....	197
CHAPTER 7 SHIFTING THE FOCUS TO THE POWER GAP AND ITS MECHANISMS: CONCLUDING CHAPTER	199
7.1 Introduction	199
7.2 Shifting the Focus?.....	199
7.2.1 Monopoly.....	199
7.2.2 Discretion	200
7.2.3 Transparency.....	202
7.2.4 Accountability	203
7.3 Further Research.....	203
7.4 Conclusion.....	206
Appendices.....	208
Table of Cases	230
Table of Legislation and Conventions	232
Bibliography	233
Books, Book Chapters and Reports.....	233
Journal Articles.....	238

THE SOCIAL CONTEXT OF BUSINESS AND THE TAX SYSTEM IN NIGERIA: 'THE PERSISTENCE OF CORRUPTION' – INTRODUCTORY CHAPTER

1.1 Introduction

As the world recovers from the recent economic downturn, and given that revenues from the exploitation of natural resources remain volatile, developed and developing countries are increasingly prioritising the need to encourage, attract and sustain private sector investments. The motivation for this are the benefits that increased or sustained investments may yield. These benefits include a reduction in the level of unemployment; an increase in technology transfer; the improvement of infrastructure; and, in time, an increase in government revenue.

The ability of a polity to encourage, attract and sustain investments largely depends on it possessing the 'right investment climate'.¹ This in turn depends on several factors such as nearness to market, level of infrastructure, availability of qualified pool of labour, access to raw materials and government policy.

One form of government policy which has attracted a considerable amount of interest from academics and policy-makers is taxation. Governments of both developed and developing countries try to use their tax systems to improve their investment climate. This usually involves striking a balance, at least in the short run, between investments and the primary revenue generation role of the tax system. Irrespective of the structure and contents of the tax system, whether the right balance will be struck inevitably depends on the actions or responses of the vehicles behind private sector investments (i.e. businesses).

Businesses, for their part, passively and actively play a role in directing the attempts by States to improve their investment climate via their tax systems. Through their interactions with the arms of government, businesses endeavour to steer the tax system in a direction conducive to the achievement of their individual and collective goals. The success of such endeavours depends on how they are perceived and responded to by the tax system.

¹ For a survey of businesses about factors that affect the investment climate of a given state, see Geeta Batra, Daniel Kaufmann and Andrew H Stone, *Investment Climate Around the World: Voices of the Firms from the World Business Environment Survey* (World Bank 2003).

Even without a deliberate attempt by one institution to influence the other, the goals of business and the tax system are such that a state of constant interactions between both institutions in a modern society is the norm. These interactions form the basis of an important relationship between business and the tax system. This relationship is, however, susceptible to the vagaries of the societal factors that pervade polities. One societal factor – corruption – has the potential to alter the dynamics of this relationship owing to its ability to determine the nature, frequency, context, goals and results of the interactions between business and the tax system. Corruption is widely believed to be detrimental to both this relationship and the general fabric of society. Despite wide condemnation across societies, corruption still persists, especially in the relationship between business and the tax system.

This research is therefore born out of a desire to understand the mechanisms through which corruption sustains itself in the relationship between business and the tax system. In arriving at the research question, the relationship between business and the tax system was artificially separated from its harbouring society so as to inquire whether this relationship can be cocooned from the vices in its site of existence.

One may imagine the relationship as a container floating in polluted waters (that is, a corruption-infested society). One may then ask: what structural features of this container may prevent it from being infiltrated by the polluted waters? What aspects of this container make infiltration by the polluted waters possible? In line with this analogy, my research question is: what aspects of the relationship between business and the tax system does corruption exploit in order to sustain itself in the said relationship? What structural features of this relationship may prevent or reduce infiltration by corruption? To answer this question, I conducted an empirical study of the relationship between business and the tax system in Nigeria, where corruption is reputedly rife.

Following this study, my central argument is that corruption remains a part of the relationship between business and the tax system by exploiting a ‘power gap’. This refers to the gap between the institutional and the actual powers of actors in the relationship. This power gap is increased or decreased by the levels of four mechanisms (‘access’, ‘awareness’, ‘distortion’ and ‘inaction’). Therefore, any comprehensive attempt to address corruption in the relationship between business and the tax system must tackle the levels of these four mechanisms so as to reduce the power gap and opportunities for corruption in the said relationship. This argument is supported by a descriptive analysis of data obtained from the empirical research in Nigeria.

1.2 The Two-Way Relationship

In order to construct a firm foundation for answering the research question, this thesis critically examines the relationship between business and the tax system.

The term ‘tax system’ in this research refers to the entire machinery used by government to generate tax revenue. It comprises rules, policies, institutions and persons. Equating the tax system with the tax administration alone would shield this research from the analysis of important interactions that take place during the formulation of tax instruments and the resolution of tax disputes. Focusing only on policies, laws and regulations, and thus leaving out the institutions and processes by which they are formed, also suffers from the same weakness. The term ‘tax system’ is given a broad meaning to enable proper analysis of the core question of this research.

However, defining the tax system as a machinery of government excludes business (and other taxpayers) from its purview. This restriction is apt due to the nature of this research. This is because by separating business from the tax system, it enables the proper analysis of the interactions between both institutions.

In this thesis, I will argue that the relationship between business and the tax system is a product of the interactions that take place in four key ‘terminals of the tax system’. I have named these terminals to signify the fact that the interactions between business and the tax system through which both institutions receive information take place at these locations. These terminals, named according to their output, are the ‘tax policy terminal’, ‘tax law (statute) terminal’, ‘tax administration terminal’ and ‘dispute resolution terminal’. Reference to these terminals rather than to the arms of government (executive, legislature and court/judiciary) is due to two main reasons. Firstly, it enables the research to focus only on the relevant aspects of these arms of government. Secondly, the customary appellations do not adequately describe the various functions performed in the tax system. The courts (judiciary), for example, may not be the only institution charged with the responsibility to resolve disputes. Therefore, using the term court/judiciary in place of the term dispute resolution terminal will be unduly limiting.

I will also contend that business and the tax system partake in a two-way relationship in which each institution has the potential to influence the operations of the other. The tax system, on the one hand, may influence the levels of investments, location of investments, the choice of financing investments, the organisational structure of investments, attitudes to

compliance and other operations of businesses.² Business, on the other hand, may exert political, practical and judicial influence on the tax rates, the tax rules, tax administration and other facets of the tax system.³

1.3 Actor Network Theory as the Theoretical Approach

In order to understand how corruption may sustain itself in the relationship between business and the tax system, it is important to look beyond businesses and the terminals of the tax system and identify other less conspicuous actors that may play a role in this relationship.

I apply ‘Actor-Network Theory’ (ANT) in order to achieve this task. With this, I argue that the relationship between the tax system and a business or group of businesses at any given point in time is the product of ‘a network of human and non-human actors’.⁴ This network is ‘transient’ and ‘heterogeneous’ in nature.⁵ This implies that the actors that form the network are varied and constantly changing. The network is also unstable and may collapse with the loss of an important actor.⁶

The durability of the relationship between the tax system and a particular business or group of businesses depends on the nature of the actors that comprise this network or, to put differently, it depends on the materials of this network or relationship.⁷ These actors have their private interests. The existence of these private interests may lead to conflict and consequently the disintegration of the entire network if these interests are not properly managed.⁸

² For a general review of the impact of the tax system on the decisions of businesses, see Michael P Devereux, ‘The Impact of Taxation on the Location of Capital, Firms and Profit: A Survey of Empirical Evidence’ (Oxford University Centre for Business Taxation, Working Paper No 07/02, April 2006) <<http://eureka.sbs.ox.ac.uk/3395/1/WP0702.pdf>> accessed 5 July 2015; See also James Hines, ‘Tax Policy and the Activities of Multinational Corporations’ (NBER Working Paper No 5589, 1996) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4609> accessed 5 July 2015, in which the author analysed existing (US-related) research which suggests that taxation influences FDI, corporate borrowing, transfer pricing, dividend and royalty payments, research and development activity, exports, bribe payments and location decisions.

³ On the power of businesses to influence government on matters pertaining to taxation, see Dennis P Quinn and Robert Y Shapiro, ‘Business Political Power: The Case of Taxation’ (1991) 85(3) *American Political Science Review* 851.

⁴ See Bruno Latour, *Science in Action: How to Follow Scientists and Engineers Through Society* (Oxford University Press 1987); John Law, ‘Notes on the Theory of the Actor-Network: Ordering and Strategy and Heterogeneity’ (1992) 5 *Systems Practice* 379.

⁵ Law (n 4).

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

Therefore, the classification of the relationship between the tax system and a business as one of compliance,⁹ for example, can only be temporary. Understanding the state (the durability) of this network will require identifying and examining the actors that constitute it, their private interests and the process by which they were co-opted or enrolled into the said network. It is also important to understand how the potentially conflicting interests of the different actors are controlled so as to prevent the breakdown of the entire network.¹⁰

In sum, ANT uncovers certain less conspicuous actors in the two-way relationship. It also provides a framework through which these actors (in particular, corruption) may be examined so as to understand their individual and collective impact on the relationship between business and the tax system. ANT also encourages the conducting of an empirical study¹¹ of these actors using a qualitative methodology¹² which is in keeping with this research.

1.4 The Influence of New Institutional Sociology

Although ANT is the main theoretical approach adopted in this thesis, it is pertinent to acknowledge the influence of ‘New Institutional Sociology’ (NIS) as well. NIS influenced the analysis of the behavioural dynamics behind the responses of the terminals of the tax system and business to the interactions that take place via the communication link.

The use of NIS is not without the challenges associated with a theory that has been subject to different interpretations within and across academic fields. The elusiveness of its core concept of ‘institution’ or ‘institutional environment’ from comprehensive definition threatens to deprive the entire theory of validity. On the meaning of institution, for example, Williamson remarked in 2000 that ‘we are still very ignorant about institutions’.¹³

Nevertheless, NIS’ recognition of the imperfections of the decision frame of actors, the contextual nature of their interests, the duality of their relationship with their institutional environment, and diverse instruments of influence¹⁴ make it a suitable tool for elucidating the

⁹ See Karen Boll, ‘Taxing Assemblages: Laborious and Meticulous Achievements of Tax Compliance’ (PhD Thesis, IT University of Copenhagen 2011).

¹⁰ Law (n 4).

¹¹ See Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press 2005).

¹² See John Roberts, ‘Poststructuralism against Poststructuralism: Actor-Network Theory, Organisations and Economic Markets’ (2012) 15 *European Journal of Social Theory* 35, 41.

¹³ Oliver Williamson, ‘The New Institutional Economics: Taking Stock, Looking Ahead’ (2000) 38 *Journal of Economic Literature* 595; See also Douglas North, ‘Institutions’ (1991) 5 *Journal of Economic Perspectives* 97, 111; Douglas North, ‘Institutions and Credible Commitment’ (1993) 149 *Journal of Institutional and Theoretical Economics* 11.

¹⁴ Paul J DiMaggio and Walter W Powell, ‘The Iron Cage Revisited: Institutional Isomorphism And Collective Rationality In Organizational Fields’ (1983) 48 *American Sociological Review* 147.

rationality of the operations of the actors in the two-way relationship. NIS postulates that the interactions between actors and their institutional environment give rise to certain social expectations which influence the structure, decision frame and actions of these actors as well as shape the existing institutional environment.¹⁵ It suggests a two-way relationship of influence between an actor and its institutional environment, which aligns with the understanding of the relationship between business and the tax system in this thesis.

1.5 Why Corruption?

There is hardly another phenomenon that remains as highly relevant to modern societies as corruption does. Its existence can be traced as far back as Babylon¹⁶ in the 22nd century BC, Egypt¹⁷ and India¹⁸ in the 14th century BC, and the biblical stories of Luke.¹⁹

In the contemporary world, while corruption is usually discussed as a problem of developing countries, it remains a problem in their developed counterparts.²⁰ This is because the development or modernisation of a country does not eradicate corruption; corruption merely adapts to the changed circumstances.²¹ Corruption exists in all forms of government, albeit at different levels of pervasiveness.²² Amongst states with similar socio-economic structures, the levels of corruption may also differ.²³ However, statistics show that poorer countries or areas are likely to be more corrupt. Lipset, for example, argues that the levels of corruption are higher in areas with low levels of education and income.²⁴ This may not be unconnected with the fact that corruption allegedly thrives on financial, social and mental poverty, and opportunity. However, other researchers point out the lack of clarity over whether corruption increases poverty or poverty increases corruption due to the inability of poor countries to fight corruption. For instance, Gupta and others argue that corruption increases

¹⁵ *ibid.*

¹⁶ Law Code of Hammurabi, King of Babylon.

¹⁷ Great Edict of Horemheb, King of Egypt.

¹⁸ Kautilya's Arthashastra.

¹⁹ Such as the stories of Zacchaeus the tax collector (Luke 19:8) and the parable of the unjust steward (Luke 16:3-8).

²⁰ Carl J Friedrich, *Man and his Government* (New York 1963) 167.

²¹ See John Girling, *Corruption, Capitalism and Democracy* (Routledge 1997).

²² See Carl J Friedrich, *The Pathology of Politics: Violence, Betrayal Corruption, Secrecy and Propaganda* (Harper & Row 1972) 128.

²³ See Jens Chr. Andvig and Karl Ove Moene, 'How Corruption May Corrupt' (1990) 13 *Journal of Economic Behavior & Organization* 63; Francis T Lui, 'A Dynamic Model of Corruption Deterrence' (1986) 31 *Journal of Public Economics* 1.

²⁴ See Seymour Lipset, *Political Man: The Social Bases of Politics* (John Hopkins University Press 1981); Edward L Glaeser and Raven E Saks, 'Corruption in America' (2006) 90 *Journal of Public Economics* 1053.

poverty.²⁵ For his part, Husted points out that some countries may simply lack the resources to tackle corruption adequately.²⁶ Some have described the relationship between corruption and poverty as a two-way relationship.²⁷ Research has shown a negative correlation between corruption and economic development.²⁸ Research also shows that corruption and human development influence each other.²⁹ In general, some causes of corruption are weak institutions that allow for wide discretionary powers, poor internal control and detection mechanisms, poor wages and working conditions of staff, and political interference in bureaucracy and culture.³⁰

From an extensive list of societal factors, corruption was picked for consideration in this thesis for two main reasons. The first and well recognised reason is the importance of corruption and its impact on the ability of modern states to achieve their goals. The second reason is the seeming affinity between corruption and tax compliance. Both refer to the extent to which an act accords with certain expectations in society, albeit that the source and value of expectations regarding corruption are more likely to be contested. To the extent that both corruption and non-compliance are punishable legal, moral or economic wrongs, their likely occurrence, from an economic perspective, can be surmised as dependent on a comparison of their uncertain costs and benefits. The costs include the severity of the penalties for both acts as multiplied by the probability that these penalties will be administered. The benefits include the tax burden avoided or corrupt gain secured.

In order to give weight to the above reasons, the following subsections discuss the form, nature and impact of corruption. This discussion assumes a prior understanding of the meaning of corruption. However, a detailed consideration of the controversy over the definition of corruption is carried out in Chapter 3. It is sufficient to state at this point that a process definition of corruption is adopted in this thesis. By this definition, an act will be corrupt where

²⁵ Sanjeev Gupta, Hamid Davoodi and Rosa Alonso-Terme, 'Does Corruption Affect Income Inequality and Poverty?' (International Monetary Fund, IMF WP98/76, May 1998).

²⁶ Bryan W Husted, 'Wealth, Culture and Corruption' (1999) 30 *Journal of International Business Studies* 339, 341-2.

²⁷ Robert E Hall and Charles I Jones, 'Why Do Some Countries Produce So Much More Output Per Worker Than Others?' (1999) 114 *The Quarterly Journal of Economics* 83; Jakob Svensson, 'Eight Questions About Corruption' (2005) 19 *Journal of Economic Perspectives* 19.

²⁸ Alfredo Del Monte and Erasmo Papagni, 'The Determinants of Corruption in Italy: Regional Panel Data Analysis' (2007) 23 *European Journal of Political Economy* 379; Ghulam Shabbir and Mumtaz Anwar, 'Determinants of Corruption in Developing Countries' (2007) 46(4) *The Pakistan Development Review* 751.

²⁹ Eleanor RE O'Higgins, 'Corruption, Underdevelopment, and Extractive Resource Industries: Addressing the Vicious Cycle' (2006) 16(2) *Business Ethics Quarterly* 235.

³⁰ For these and other causes of corruption, see Daniel Treisman, 'The Cause of Corruption: A Cross-National Study' (2000) 76 *Journal of Public Economics* 399; Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge University Press 1999).

both the act and the gain derived therefrom breach the ideal expectations of the legal, moral, economic or other relevant dimension of society.

1.5.1 Nature and Forms of Corruption

This thesis focuses on corruption that may exist in the two-way relationship between business and the tax system. It recognises that a considerable amount of corruption may exist solely within the tax system or solely within business. These may have an indirect effect on the relationship between business and the tax system but are not central to this thesis. Three forms of actions are identifiable as constituting corruption in the two-way relationship. These actions are:

- 1) the demand for, offer of or receipt of social or economic gain for the performance of public services that should be provided ordinarily;
- 2) the demand for, offer of or receipt of social or economic gain for the performance of a service that should not be provided; and
- 3) the extortion of social or economic gain from or by businesses.

Some have divided these forms of corruption into two main categories. Langseth and others, for example, state that corruption can be categorised as either according-to-rule or against-the-rule. The first and second category involve situations where the service provided by the official is in accordance with or against the law respectively.³¹

In this thesis, however, emphasis is placed, not on these aforementioned forms but on the expectations of actors in the two-way relationship as the barometer for what constitutes corruption. These expectations are sourced from different ‘dimensions’ (such as economic, moral or legal dimensions) in society which possess institutional mechanisms through which they secure compliance with their dictates. Consequently, there can be no fixed and exhaustive list of forms of corruption. The content of any such list is likely to change as the expectations of the different dimensions in society change.

Two models have been developed by academics to aid the analysis of corruption. They are: the principal-agent-client model³² and the collective action model.³³ Under the principal-agent-client model, a principal seeking to maintain a relationship with a client but constrained

³¹ See Petter Langseth, Rick Stapenhurst and Jeremy Pope, ‘The Role of a National Integrity System in Fighting Corruption’ (1997) 23 *Commonwealth Law Bulletin* 3.

³² See Rose-Ackerman (n 30); Robert Klitgaard, *Controlling Corruption* (University of California Press 1988).

³³ See, for example, Heather Marquette, Vinod Pavarala and Kanchan K Malik, ‘Religion and Attitudes Towards Corruption in India: A Collective Action Problem?’ (2014) 24 *Development in Practice* 854.

by time or expertise may co-opt an agent to interact with the client on his behalf. This constitutes a restatement of the principal-agent problem. The tax system, for instance, has been described as a hierarchy of contracts between the principal, the agent and a supervisor. Under this model, the principal is often the elected representative of the people, the agent is the taxpayer and the supervisor is the tax official who ensures that the taxpayer complies with his civic duty.³⁴ The principal sets the agenda for this relationship, which the agent should comply with when dealing with the client. The principal may directly monitor the relationship between the agent and the client or may do so indirectly with the aid of other agents. The principal may similarly appoint other agents to provide parallel services to the client in line with his set agenda.

The first step in applying this model to the relationship between business and the tax system involves the identification of the principal, agent and the client. This task involves hidden complexities which may be easily neglected. These complexities lie in the power play, contributed to by the surrounding economic and political circumstances, which determines the identity of the actor that sets, enforces and monitors the agenda in a given case.

Though with differing levels of probability, any actor in the two-way relationship may hold the position of principal in accordance with whose interests and under whose direction the agenda is set for the tax system as a whole. However, researchers commonly award this role to either the people³⁵ (as will be the case in a representative democracy) or to the political actors (tax policy-/law-makers) who stipulate the laws and policies by which the tax system is administered and adjudged.³⁶

Under this principal-agent-client model, corruption is usually perceived as a function of the ability of the principal to monitor the actions of the agents and demand accountability, which is affected by the extent of the agent's discretionary powers. In line with this, Klitgaard³⁷ argued that within the principal-agent-client model, corruption equals monopoly power plus discretionary power minus accountability. However, despite access to an adequate mechanism for monitoring and demanding accountability, passive or active collusion between the principal

³⁴ See Jean Tirole, 'Hierarchies and Bureaucracies: On the Role of Collusion in Organisations' (1986) 2(2) *Journal of Law, Economics and Organisation* 181; R Antle, 'An Agency Model of Auditing' (1982) 20 *Journal of Accounting Research* 503.

³⁵ Nico Groenendijk, 'A Principal-Agent Model of Corruption' (1997) 27 *Crime, Law & Social Change* 207.

³⁶ Tim Besley, *Principled Agents? The Political Economy of Good Government* (Oxford University Press 2006); Susan Rose-Ackerman (n 30).

³⁷ Klitgaard (n 32).

and the agent in flouting the agenda may be sufficient to sustain corruption. It is this foundation that forms the basis for introducing the theory of collective action to the concept of corruption.

Collective action theorists acknowledge the potential unwillingness or incapacity of the principal to defend the agenda or its inherent interests. They propose a study into the causes of this unwillingness or incapacity. These causes may include the usurpation of the mantle of the majority by minority interests due to the superior organisational prowess of the latter.³⁸ It may also include the loss of faith in the essence of the agenda or the often misguided hope for present or future profit from its violation on the part of the principal.³⁹ This is captured by Besley's call for 'principled principals'.⁴⁰

Arguably, there is no substantive difference between an approach based on the principal-agent-client model and that based on collective action. The formal difference between both approaches resides in the identification of the principal whose interests the set agenda seeks to protect. Where a contextual attempt to identify the true principal is conducted, rather than adopting a pre-defined view of this actor, principal-agent-client and collective action approaches become, by and large, similar.

For the purpose of this thesis, corruption will be addressed as a potential actor in the network that constitutes the relationship between business and the tax system. It may serve as an actor (or intermediary) through which other actors are enrolled or co-opted into the network that forms the two-way relationship. For instance, compliance (or non-compliance) may be the result of the presence or absence of corruption in the network. Compliance (or non-compliance) may also be an actor in the network that produces corruption. Likewise, businesses may only be able to reach out to the various terminals of the tax system and attain influence at a distance where corruption is present (or absent) in the network.

Corruption is, in essence, a transient network composed of a potentially diverse collection of human and non-human actors. Its strength and durability in any system depends on the variety of actors that make up its network. A strong culture ingrained in the psyche of persons in the tax system, for example, may be an actor in the network that produces corruption. This, together with other actors, may account for the strength and durability of corruption within that system.

³⁸ For example, by applying Olson's logic of collective action. Mancur Olson, *The Logic of Collective Action* (Harvard University Press 1965).

³⁹ See, for instance, Monika Bauhr and Marcia Grimes, 'Indignation or Resignation: The Implications of Transparency for Societal Accountability' (2013) 27 *Governance* 291.

⁴⁰ Besley (n 36).

1.5.2 Impact of Corruption

A considerable amount of research has been carried out on corruption, especially as it relates to tax administration.⁴¹ It has been held to have a negative correlation with economic growth,⁴² as well as an adverse effect on tax effort,⁴³ tax morale,⁴⁴ rule of law,⁴⁵ human capital,⁴⁶ domestic firm growth,⁴⁷ firm value⁴⁸ and foreign direct investments (FDIs)⁴⁹. Egger and others distinguish between ‘grabbing hand’ and ‘helping hand’ corruption and state that the former (which suggests a negative correlation with FDI) outweighs the latter (which suggests a positive correlation).⁵⁰ They also found that corruption is an important determinant of FDI in developing countries but not in developed countries.⁵¹ Uhlenbruck and others argue that multinational companies are more likely to enter into a jurisdiction where corruption is highly pervasive via a wholly owned subsidiary rather than through a local partner.⁵² Hope and others

⁴¹ Odd-Helge Fjeldstad, ‘Corruption in Tax Administration: Lessons from Institutional Reforms in Uganda’ (Chr Michelsen Institute Working Paper No 10, 2005); Odd-Helge Fjeldstad and Bertil Tungodden, ‘Fiscal Corruption: A Vice or a Virtue?’ (2003) 31 *World Development* 1459; Odd-Helge Fjeldstad, ‘Fighting Fiscal Corruption: Lessons from the Tanzania Revenue Authority’ (2003) 23(2) *Public Admin Dev* 165; Sheetal K Chand and Karl O Moene, ‘Controlling Fiscal Corruption’ (1999) 27(7) *World Development* 1129.

⁴² Andrei Shleifer and Robert Vishny, ‘Corruption’ (1993) 108 *Quarterly Journal of Economics* 591 (cf Nathaniel Leff, ‘Economic Development through Bureaucratic Corruption’ (1964) 82(2) *American Behavioural Scientists* 337; Francis Lui, ‘An Equilibrium Queuing Model of Bribery’ (1985) 93 *Journal of Political Economy* 760. See Pranab Bardhan, ‘Corruption and Development: A Review of the Issues’ (1997) 35 *Journal of Economic Literature* 1320 for a review of literature on corruption and development.

⁴³ Tax effort is usually measured by the ratio of tax revenue generated from the Gross Domestic Product of a country. See, Richard Bird, Jorge Martinez-Vazquez and Benino Torgler, ‘Tax Effort in Developing Countries and High Income Countries: The Impact of Corruption, Voice and Accountability’ (2008) 38(1) *Economic Analysis and Policy* 55; Dhaneshwar Ghura, ‘Tax Revenue in Sub Saharan Africa: Effects of Economic Policies and Corruption’ in George T Abed and Sanjeev Gupta (eds), *Governance, Corruption and Economic Performance* (International Monetary Fund 2002).

⁴⁴ Tax morale refers to the attitude of taxpayers to compliance. Fjeldstad and Tungodden (n 41).

⁴⁵ Vito Tanzi, ‘Corruption around the World: Causes, Consequences, Scope and Cures’ (International Monetary Fund, IMF WP98/63, May 1998).

⁴⁶ Pak Hung Mo, ‘Corruption and Economic Growth’ (2001) 29 *Journal of Comparative Economics* 66.

⁴⁷ Raymond Fisman and Jakob Svensson, ‘Are Corruption and Taxation Really Harmful to Growth? Firm Level Evidence’ (World Bank Policy Research Working Paper No 2485, 2000).

⁴⁸ Michael Long and Rao Spuma, ‘The Wealth Effect of Unethical Business Behaviour’ (1995) 19 *Journal of Economics and Finance* 65.

⁴⁹ Shang-Jin Wei, ‘Why is Corruption So Much More Taxing than Tax? Arbitrariness Kills’ (NBER Working Papers No 6255, 1997). Corruption may also affect the choice of entry modes, Peter Rodriguez, Klaus Uhlenbruck and Lorraine Eden, ‘Government Corruption and the Entry Strategies of Multinationals’ (2005) 30(2) *Academy of Management Review* 383.

⁵⁰ Peter Egger and Hannes Winner, ‘How Corruption Influences Foreign Direct Investment: A Panel Data Study’ (2006) 54(2) *Economic Development and Cultural Change* 459; cf Peter Egger and Hannes Winner, ‘Evidence on Corruption as an Incentive for Foreign Direct Investment’ (2005) 21 *European Journal of Political Economy* 932.

⁵¹ *ibid.*

⁵² Rodriguez, Uhlenbruck and Eden (n 49).

argue that corruption increases business costs and deters investments as a result.⁵³ Furthermore, corruption has been held to lead to inefficient governments, faltering economic competitiveness,⁵⁴ distrust amongst citizens⁵⁵ and general lowering of social capital.⁵⁶ It has been argued that corruption also leads to the inefficient diversion of talent⁵⁷ and government expenditure.⁵⁸ Participating in corruption may be seen as an option for businesses that wish to operate in the formal economy while avoiding an associated regulatory burden.⁵⁹ It may also enable firms to continue operating in the shadow economy without detection from the authorities.⁶⁰

Though not central to this thesis, it is worthwhile to briefly discuss the nature and possible impact of corruption on the formulation of tax policies and enactment of laws, the administration of tax laws and policies and the resolution of tax disputes. This provides added justification for a study into the persistence of corruption in the two-way relationship between business and the tax system.

1.6 The Formulation of Tax Policies and Enactment of Laws

Although the actors operating at the tax policy and law terminals may be different – hence the separation of the terminals – the issues arising from both terminals are broadly similar. This is why they are discussed under the same heading in this section.

Corruption at these terminals may involve the grant of favourable tax policies and laws (such as exemptions and tax holidays) in return for some form of social or economic consideration from businesses. It may also involve the outright demand for such considerations in order to avoid unfavourable tax policies or laws. Corruption may construct formal or substantive barriers that restrict certain businesses from interacting with the tax system at the

⁵³ Kempe Ronald Hope and Bornwell C Chikulo, *Corruption and Development in Africa* (Macmillan 1999).

⁵⁴ Alberto Ades and Rafael Di Tella, 'Rents, Competition and Corruption' (1999) 89(4) *The American Economic Review* 982.

⁵⁵ Manuel Villoria, Gregg G Van Ryzin and Cecilia F Lavena, 'Social and Political Consequences of Administrative Corruption: A Study of Public Perceptions in Spain' (2012) 73 *Public Administration Review* 85.

⁵⁶ Stephen Knack and Philip Keefer, 'Does Social Capital Have an Economic Payoff? A Cross-Country Investigation' (1997) 112(4) *The Quarterly Journal of Economics* 1251.

⁵⁷ Kevin Murphy, Andrei Shleifer and Robert W Vishny, 'Why is Rent-Seeking So Costly to Growth?' (1993) 83 *The American Economic Review* 409; William J Baumol, 'Entrepreneurship: Productive, Unproductive and Destructive' (1990) 98 *Journal of Political Economy* 893; Tanzi (n 45).

⁵⁸ Vito Tanzi and Hamid Davoodi, 'Corruption, Public Investment and Growth' (International Monetary Fund, IMF WP97/139, October 1997).

⁵⁹ Jay Pil Choi and Marcel Thum, 'Corruption and the Shadow Economy' (2005) 46 *International Economic Review* 817.

⁶⁰ Stravox Katsios, 'The Shadow Economy and Corruption in Greece' (2006) 1 *South-Eastern European Journal of Economics* 61.

tax policy and tax law terminals. It may also trigger voluntary withdrawal by businesses from interaction with the tax system at these terminals. These consequences may deprive the terminals concerned of information about the plight of these businesses, thus reducing the level of responsiveness between the tax system and the disaffected businesses.

Conversely, corruption may increase the level of interaction between these terminals and businesses that benefit from the state of affairs. It may also lead to an increase in interaction between the disaffected businesses and other terminals of the tax system. For instance, the promulgation of 'corrupt laws' may lead to increased recourse by businesses to the dispute resolution terminal to challenge these laws.

The grant of tax exemptions, holidays and other policies or laws which result in the narrowing of the tax base as a result of corruption may lead to the increase (concentration) of the tax burden on a limited number of businesses. This grant of specific exemptions may also increase the complexity of the tax system, which may in turn increase uncertainty, discretionary powers of officials and the compliance costs of businesses. Corruption may also lead to a high perception of unfairness and inequality by businesses in relation to these terminals. It may cause these businesses to seek both legal and illegal means of escaping the tax net such as by tax evasion, avoidance or by leaving the jurisdiction altogether.

1.7 Administration of Tax Policies and Laws

Corruption also has a significant impact on the interaction between business and the tax system at the tax administration terminal. At this terminal, the interaction between business and the tax system is most direct.

By the use of corrupt methods, businesses may escape the tax net, reduce their tax liability or reduce the burden of administrative compliance on them. Apart from giving an unfair advantage to favoured businesses, corruption at this terminal may lead to the narrowing of the tax base. This may in turn result in the increase of the tax burden of those remaining within the tax net. The increased tax burden may result from the reaction of the tax system to the need to generate the required level of revenue for the provision of infrastructure or the maintenance of the welfare state. This reaction may, for instance, take the form of increased tax rates or the reduction in the number of general tax exemptions. The shortfall may also be replenished through over-enthusiastic or excessive enforcement of the tax laws on non-participating businesses.

The increment of tax rates or intensification of tax audits targeted at generating more tax revenue may cause both corrupt tax officials and businesses to adopt new strategic

positions. These corrupt tax officials may view this increment or intensification as an added opportunity to negotiate or obtain higher bribes. Businesses may be pushed to hide more revenue from the tax net. Consequently, the increment or intensification may yield less revenue for the state.⁶¹

Where businesses obviate oppressive compliance requirements or the application of archaic laws through corruption, this may reduce the incentive on these businesses to instigate change through their influence on the tax system. This may in turn reduce the interaction between business and the tax system at the tax policy and tax law terminals on this issue, thereby depriving these terminals of information and reducing the responsiveness of the tax system to the needs of business in this regard. Corruption in the relationship between business and the tax system may therefore be partly responsible for the continued existence of archaic and burdensome policies, laws and administrative requirements in certain tax systems. Corrupt tax officials may also resist any simplification of the tax system which may endanger their rent-seeking activities.

The increased tax burden, the general perception of unfairness or the sense of disillusionment which may result from the prevalence of corruption may incentivise disgruntled businesses to look for ways to avoid or limit their exposure to the tax system through tax avoidance, evasion⁶² or by leaving the jurisdiction entirely.

1.8 Resolution of Tax Disputes

Consideration of the impact of corruption on the interaction that takes place between business and the tax system at the courts, tribunals and other bodies that make up the dispute resolution terminal is essential. This mainly falls under the umbrella of judicial corruption which has been defined as utilising the court's authority for the private benefit of the court officials or other public officials.⁶³

The dispute resolution terminal plays a crucial role in the relationship between business and the tax system. Businesses as well as other actors rely on this terminal as the final regulator of actions and meaning. Its impartiality is integral to the performance of its functions. Therefore, where corruption is rife at this terminal, the entire foundation of the relationship

⁶¹ Amal Sanyal, Ira N Gang and Omkar Goswami, 'Corruption, Tax Evasion and the Laffer Curve' (2000) 105 *Public Choice* 61.

⁶² For instance, Smith has argued that businesses may resist tax laws and authorities as a result of corruption by tax officials. See Kent W Smith, 'Reciprocity and Fairness: Positive Incentives' in Joel Slemrod (ed), *Why People Pay Taxes: Tax Compliance and Enforcement* (University of Michigan Press 1992) 227.

⁶³ See Petter Langseth, 'Judicial Integrity and its Capacity to Enhance the Public Interest' (UNODC, CICIP8, 2002).

between business and the tax system may be put at risk. For example, in a valedictory speech a former justice of the Nigerian Supreme Court described the impact of a corrupt arbiter in the following words:

A corrupt judge is more harmful to the society than a man who runs amok with a dagger in a crowded street. The latter can be restrained physically. But a corrupt judge deliberately destroys the moral foundations of society and causes incalculable distress to individuals through abusing his office while still being referred to as honourable.⁶⁴

The decisions of the arbiters in the dispute resolution terminal may be steered by their receipt of financial or other corrupt considerations from businesses. Where corruption of this nature is rampant, the decisions of these arbiters will not only be unfair but will also be inconsistent. This will in turn increase the general level of uncertainty on the state of the law.

While increased uncertainty may empower the tax administration with regard to businesses that do not socially or economically purchase decisions, it may weaken the tax administration with regard to those that do and create an unfair advantage in favour of the latter. However, the number of persons in the latter group may be reduced by the high cost of purchasing decisions – which includes both the cost of instituting the action and the payment to (or some form of relationship with) the arbiter – leaving the majority at the mercy of the tax administration.

Uncertainty may also lead to an increased recourse to the dispute resolution terminal by businesses wishing to challenge the application of the law by the tax administration. This may in turn increase the transaction costs of these businesses. Conversely, where businesses perceive that corruption is prevalent in the dispute resolution terminal, these businesses may lose faith not just in the dispute resolution terminal but in the entire tax system. This may serve to limit their recourse to this terminal in the face of what they believe is a contravention or misapplication of the law by tax officials, thereby increasing the powers of the tax administration with regard to these businesses.

Corruption in the dispute resolution terminal may heighten the sense of unfairness and the disillusionment of non-participating businesses as well as increase their transaction costs. This may consequently incentivise them to seek legal or illegal means to reduce or escape their tax liability.

⁶⁴ See Samson Uwaifo JSC, ‘Valedictory Speech’ (2005) 1 Supreme Court of Nigerian Judgment 20.

1.9 The Interaction between the Terminals

Actors within a terminal of the tax system may possess and utilise a power to alter the impact of corruption at a different terminal of the tax system. However, this ability depends on the structural relationship between the terminals. It may also depend on the presence of different levels of corruption in these terminals.

It is important not only to consider whether an actor possesses the power to alter the impact of corruption but also the practicalities of the exercise of such power. This alteration can be achieved either by changing the constitution of the other terminal or by changing the nature of its output.

In terms of altering the constitution, actors within the tax policy terminal may have the power to determine the amount of corruption in the tax law terminal and vice versa. These actors may do this by investigating the activities of the members of the other terminal and facilitating the removal and prosecution of erring members. However, the relationship between these terminals may make the exercise of this power impractical or may lead to the infection of one with the ‘disease’ of the other. This is more likely to be the case in a system of government which lacks clear separation of powers and independent arms of government or a one party state as opposed to a system of government with clear separation of powers and independent arms of government or a multi-party state.

Actors within the tax policy and tax law terminals may also affect the amount of corruption in the tax administration and dispute resolution terminals through the exercise of their powers to appoint, promote and discipline staff of those terminals. For instance, they may increase the level of corruption and ethnic bias by appointing officers that are corrupt or share their ethnic bias.

Furthermore, actors within the tax policy and tax law terminals may enact (and enforce) policies and laws that regulate the procedures in other terminals in a manner that curtails or increases corruption. By a similar token, actors within the dispute resolution terminal may entertain (or refuse to entertain) challenges to policies and laws specifying procedures which may give rise to corruption. Businesses may be indicted for corruption by the tax policy, tax law and dispute resolution terminals, thereby curtailing their use of this societal factor to achieve their private goals. The aforementioned actions have the effect of changing the constitution of the receiving terminals, and thus regulating the impact of corruption on their activities.

As for altering the output of the terminal, in the process of enacting laws, actors within the tax law terminal may alter the impact of corruption on the bills received from the tax policy

terminal. For instance, these actors may reject corrupt bills or tone down the effect of unduly discriminatory bills after taking into account the interests of businesses that were hitherto excluded. Conversely, they may intensify the impact of corruption on these outputs by their amendments to it.

Actors within the tax administration may reduce the effect of discriminatory laws by granting extra-statutory concessions targeted at extending favourable policies to excluded businesses. These actors may also decide not to enforce laws that discriminate against a particular kind of business. Conversely, they may strengthen the discriminatory effect of laws or policies in the manner in which they implement them.

Actors within the dispute resolution terminals in most jurisdictions are authorised to modify the output of the tax policy and the tax administration terminals where this is tainted by corruption. These actors may also alter the output of the tax law terminal for a similar reason. However, this is usually only legally (as opposed to factually) justified in common law jurisdictions where there is a superior law which the said output contravenes. They may, however, intensify the effect of corruption through their exercise of (or failure to exercise) these powers.

Nevertheless, the power of the actors within the dispute resolution terminal to modify the effect of the societal factors in other terminals is limited by the fact that the said actors can only act when a dispute is brought before them for adjudication. Where the outputs of the other terminals are not challenged by businesses, these actors usually have no power to modify them. This has the effect of safeguarding outputs which are unduly favourable to certain businesses as a result of corruption from the scrutiny of the actors within the dispute resolution terminal. This is because a business that has avoided or mitigated its tax obligations with the aid of corruption would not challenge this state of affairs. Furthermore, other businesses that may wish to challenge this state of affairs through the dispute resolution terminal may be hindered from doing so by either a lack of information or procedural rules such as the requirement of *locus standi*.

Finally, actors within the tax policy and tax law terminals can alter the outputs of the tax administration and dispute resolution terminals by creating a new policy or law to counteract them.

This summary depicts the considerable role that corruption may potentially play in the two-way relationship between business and the tax system. It also provides sufficient basis for a study into the means by which corruption persists in the said relationship. This study will be carried out using the methodology described below.

1.10 Methodology

This research is socio-legal in nature. It seeks to determine the means by which corruption is sustained in the two-way relationship between business and the tax system. Using ANT, the researcher isolated and examined corruption as a possible actor-network in the two-way relationship between business and the tax system. The researcher gathered information needed to answer the core question of this research through an empirical study. Conducting an empirical study follows from the use of ANT as the theoretical approach in this research. As Law states, ‘Actor-Network Theory almost always approaches its task empirically’.⁶⁵

The empirical research used a mixed methods approach, comprising both qualitative and quantitative methods. Using qualitative methodology is appropriate for this research due to the delicate nature of its subject matter and the information it seeks to derive. This information includes the beliefs, fears, attitudes and perceptions of individuals on sensitive issues such as corruption, which may be too diverse to be captured by a rigid quantitative study. However, while a qualitative methodology may be used to obtain information on the potentially broad experiences of actors in the field, a quantitative methodology may be used to provide statistical data to back up certain conclusions reached, as was done in this research. This serves to mitigate concerns about anecdotism often associated with the usage of qualitative data. Hence, the research was divided into two phases: qualitative methodology was used in phase one, and quantitative methodology in phase two.

In phase one of the empirical research, semi-structured interviews were used as the primary tool for gathering data. Fifty participants were interviewed comprising business representatives (including tax practitioners) and tax officials. Interviews were conducted either face to face or by telephone depending on what was practicable in the circumstances. There is a concern that telephone interviews produce data of poorer quality than face-to-face interviews due to the potential for reduced rapport between the interviewer and interviewee.⁶⁶ Also, certain data such as body language may not be captured by telephone interview.⁶⁷ Nevertheless, telephone interviews remain a valid way of obtaining data, especially on sensitive and

⁶⁵ Law (n 4) 385.

⁶⁶ Roger W Shuy, ‘In-person versus Telephone Interviewing’ in James Holstein and Jaber Gubrium (eds), *Inside Interviewing: New Lenses, New Concerns* (Sage Publications 2003).

⁶⁷ Gina Novick, ‘Is There a Bias against Telephone Interviews in Qualitative Research?’ (2008) 31 *Research in Nursing and Health* 391.

potentially embarrassing issues such as corruption and taxation.⁶⁸ In the view of the researcher after conducting the research, there was no noticeable difference in the quality of data derived from both interview methods.⁶⁹

The face-to-face interviews took place at various locations including the offices or homes of the participants, and in restaurants and malls. With the permission of the participants, every interview was audio tape-recorded by the researcher and a transcript produced as soon as possible after the interview.

The researcher made direct approaches to various potential participants via LinkedIn or by visiting their offices. After concluding an interview, participants were asked to refer the researcher to fellow tax practitioners who may be willing to participate in the research. Owners of small businesses, who participated directly in the research, were randomly approached by the researcher at their offices or other place of business for the research.

The researcher sought information about the experiences of these participants at or with the terminals of the tax system, in relation to their business activities. The interview was conducted based on a topic guide which covered the following issues: the existence of interaction; the means of interaction; the frequency of interaction; issues affecting interaction; the expectations of businesses; the responses of businesses to unexpected actions, and the reasons for these responses.

On completion of phase one of the empirical research, the data collated was subjected to qualitative content analysis. The themes or codes used were partly derived from an analysis of the raw data and partly based on the research undertaken on the theoretical aspects of the thesis.

Based on the results of the qualitative content analysis, certain issues were identified which formed the subjects of the quantitative study (phase two). These issues included: business attitudes to compliance; the likelihood and means of protest against wrongdoing; the perception of the level of discretionary powers of tax officials and vagueness of the law; the levels of corruption engaged in by the different actors in the two-way relationship; the levels of access which businesses have to the various terminals of the tax system; and the levels of awareness of the main actors in the two-way relationship.

The researcher developed a questionnaire to elicit information that addressed these issues and tested the same in a pilot with three tax practitioners. The researcher also made

⁶⁸ Judith E Sturges and Kathleen J Hanrahan, 'Comparing Telephone and Face-To-Face Qualitative Interviewing: A Research Note' (2004) 4 *Qualitative Research* 107.

⁶⁹ *ibid.*

amendments to the questionnaire based on the results of the pilot before it was administered on the participants directly or online. About 90% of respondents in phase two of the research project completed the questionnaire on paper. The researcher met these respondents either in tax conferences in Nigeria or at their offices. Before handing the questionnaire over to them, the researcher introduced himself as a research student at the London School of Economics and gave a brief introduction to the topic of his research. The researcher also assured respondents that they would be accorded complete anonymity and that their responses would be used solely for his PhD research. The other 10% of participants completed the survey online through a link provided to them by email. The email also introduced the researcher and his research topic and promised anonymity to the online participants.

The results of the survey were analysed using the Qualtrics software. The hard copy responses were inputted manually into the software by the researcher, while the online responses were automatically recorded upon completion of the survey by the respondents. The results are mainly represented in tables and percentages. While the results of the qualitative phase form the primary basis for empirical findings in this research, the results of the quantitative phase provide valuable measures for various assertions and conclusions reached from the data obtained through the qualitative study.

1.11 Nigeria as the Case Study

Nigeria, a middle income country, is not only the most populous country in Africa but also has the highest GDP on the continent, following the rebasing of its GDP in 2014.⁷⁰ It is a rentier state as about 80% of government revenue is derived from the exploitation of oil and gas. The recent drop in the price of oil has severely affected the ability of the governments of Nigeria, at the state and federal levels, to meet their basic obligations such as the payment of government staff salaries.⁷¹ This has also brought to the fore the urgent need for a vibrant tax system capable of generating sufficient revenue to fund the cost of government, amongst other things.

⁷⁰ See Morten Jerven and others, 'GDP Revisions and Updating Statistical Systems in Sub-Saharan Africa: Reports from the Statistical Offices in Nigeria, Liberia and Zimbabwe' (2015) 51(2) *The Journal of Development Studies* 194; Olumuyiwa Olamide, 'Nigeria in Global Competitiveness Comparison' (2015) 3(2) *Journal of Economics* 146, 147.

⁷¹ See Editorial Board, 'Public Workers and Unpaid Salaries' (*The Guardian*, 9 June 2015) <<http://www.nguardiannews.com/2015/06/public-workers-and-unpaid-salaries/>> accessed 1 July 2015.

By current estimates, the GDP to tax ratio in Nigeria is at an abysmal level, ranging between 4% and 12%.⁷² This reveals huge potential for the ongoing reforms of the Nigerian tax system targeted at establishing a viable revenue generating alternative to the unreliability of oil and gas exploitation. To the extent that these reforms relate to business, the Nigerian government, in its drive to secure more revenue, must carefully consider the impact of whatever policy it introduces on the movement of capital. This is especially the case as capital becomes increasingly mobile against the backdrop of globalisation and advancements in technology.

Prior to Nigeria's independence in 1960, corruption was already conspicuous and featured prominently in the country's discourse.⁷³ The perpetration of corrupt acts, however, predates the country's creation in 1914 or its subjugation to British colonial rule in the late 19th century.⁷⁴ Powerful actors in pre-colonial times engaged in activities that fell short of ideal expectations in terms of the exercise of power, as recognised by the inhabitants of the landmass currently called Nigeria. However, the advent of British rule appeared to alter both the source and nature of expectations through the institutionalisation of formal rules with different ideal limits to the exercise of power. Britain partly justified its incursion into Nigeria by pointing out the prevalence of practices adjudged corrupt by 'British standards'.⁷⁵ In a bid to entrench law, order and efficient administration, the British government established various public institutions. These institutions facilitated the exploitation of the Nigerian state and people by the colonial masters and their local administrators respectively.⁷⁶

Despite relatively established rules governing corrupt practices, the British attitude to corruption was greatly influenced by political expediency. As a result, equally corrupt activities were accorded different treatments depending on the British political goals. For instance, corrupt actions by pro-independence activists in the south (eastern and western Nigeria) were

⁷² See Pelle Ahlerup and others, 'Tax Innovations and Public Revenues in Sub-Saharan Africa' (2015) 51(6) *The Journal of Development Studies* 689; Nnamdi Duru, 'Rebasing of Nigerian Economy Creates Huge Gaps in Tax to GDP Ratio' (*ThisDayLive*, 21 May 2014) <<http://www.thisdaylive.com/articles/-rebasing-of-nigerian-economy-creates-huge-gap-in-tax-to-gdp-ratio-/179014>> accessed 1 July 2015; Heritage Foundation, '2015 Macro-Economic Data' (2015) <<http://www.heritage.org/index/explore?view=by-variables>> accessed 1 July 2015.

⁷³ Robert Tignor, 'Political Corruption in Nigeria before Independence' (1993) 31(2) *Journal of Modern African Studies* 175.

⁷⁴ Moses Ochonu, 'Corruption and Political Culture in Africa: History, Meaning, and the Problem of Naming' (2011) 4(13) *Law and Development Review* 33. This goes against the assertions of academics that trace the origin of corruption in Africa to colonialism. See David Gould, *Bureaucratic Corruption and Underdevelopment in the Third World: The Case of Zaire* (Pergamon Press 1980) ch 2; Segun Osoba, 'Corruption in Nigeria: Historical Perspectives' (1996) 23(69) *Review of African Political Economy* 371.

⁷⁵ Tignor (n 73).

⁷⁶ Osoba (n 74).

subjected to intense public scrutiny. In contrast, similar actions by local allies of the British government in the north were either ignored or dealt with in secret.⁷⁷

Two local leaders from the eastern and western parts of Nigeria were publicly indicted for corruption in two separate reports by the colonial government.⁷⁸ However, no serious action was taken to punish these leaders for seemingly clear cases of corruption owing to several factors including the need not to be perceived as unduly prejudicing the transition into independence.⁷⁹ The local elites who took over governance on independence continued to allow the reproduction of corruption. Some argued that corruption by the leaders in the newly independent African countries was merely part of the initial difficulties on the road to full independence and self-governance.⁸⁰

However, corruption grew in prominence in the years following independence and became institutionalised during the country's many military regimes.⁸¹ This was despite the fact that the primary justification for most coup d'états was the need to tackle corruption. These military governments either lacked sufficient time to prove themselves or relapsed into corruption like their predecessors. Even the 'intermittent' democratic experiences in Nigeria failed to stem the tide of corruption in a similar fashion.

Assisted by an improved level of freedom of speech and free press, the discourse on corruption has blossomed since the country's return to democracy in 1999. Currently, corruption is reputed to have infiltrated all aspects of Nigerian society. In 2014, Nigeria scored 27 out of 100 and was ranked 136th out of 174 countries in Transparency International's Corruption Perception Index.⁸² This is evidenced by the diverse and alarming cases of corruption regularly reported in the media. According to the former Chairman of the anti-corruption body, Economic and Financial Crimes Commission, Nigeria lost US\$380 billion to corruption and mismanagement between 1960 (independence) and 1999 (the return to democracy). Foreign companies have also often been caught and punished for giving bribes to Nigerian officials. For example, Halliburton is reported to have paid US\$2.5 million to a Nigerian tax official to secure favourable tax treatment worth US\$14 million.⁸³

⁷⁷ Tignor (n 73).

⁷⁸ Osoba (n 74).

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² Transparency International, 'Corruption Perception Index 2014' <<http://www.transparency.org/cpi2014/results>> accessed 1 September 2015.

⁸³ Abel Ezeoha and Ebele Oganha, 'Corporate Tax Shield or Fraud? Insight from Nigeria' (2010) 52(1) *International Journal of Law and Management* 5.

Based on the ongoing challenges and reforms of the Nigerian tax system, coupled with the country's long history and current predicament with corruption, the researcher viewed Nigeria as an ideal case for the empirical study. The researcher has also lived and worked in Nigeria for many years. While working as a lawyer in Nigeria, the researcher was made to understand the importance of facilitation or grease payments to one's ability to practice law. Failure to provide such payments when filing documents in court, for example, may cause severe delays to the client's case and damage the prospects of client retention.

Even while conducting the empirical research in Nigeria, the researcher was confronted by corruption in its full force. Driving in Lagos to a meeting, the researcher took a wrong turn up a one-way street as there was no visible sign at the start of the street to indicate this. He was stopped by two police officers who were meant to be guarding an embassy on the street. The officers told the researcher that he would be taken to the station to face legal sanctions for the traffic offence. Soon after, the researcher noticed that other individuals who had also been stopped for making the same error quickly paid the officers some money, after which the police officers allowed them to continue their journey. The researcher then confronted the police officers about these payments threatening to report his observations to their superiors when he reached their offices. One of the officers agitatedly blurted out: 'Where is the evidence? When we get to the office, we will see where you will find the evidence.' However, the other police officer became friendly at this point. He was suddenly interested in the researcher's plans for the day; and inquired whether anything was recorded on the researcher's phone. When he was assured that nothing was recorded, he 'let the researcher go free'. This experience illustrates the means by which corruption might exploit the power gap, as buttressed by the levels of access, awareness, distortion and inaction.

1.12 A Synopsis of the Thesis

This thesis examines the mechanisms through which corruption may sustain itself in the relationship between business and the tax system. It is predicated on the belief that by subjecting this relationship to intense scrutiny, it is possible to observe the avenues for corruption in the said relationship.

It begins in Chapter 2 with the premise that business and the tax system are parties in a two-way relationship in which both institutions may influence each other. Business may influence the structure and contents of the tax system politically, practically and judicially. Likewise, the tax system may influence various aspects of business such as the location of

investment, choice of investment, the methods of financing investment and the levels of investment.

This relationship is dependent on the interactions between the actors representing both institutions. These interactions take place through a ‘communication link’ that connects business with the four terminals of the tax system and these terminals with each other. The efficacy of the communication link (comprising 10 individual channels of communication) and consequently the two-way relationship is affected by the levels of four mechanisms. These mechanisms are access, awareness, distortion and inaction.

This relationship between business and the tax system is the product of a ‘heterogeneous assemblage of human and non-human actors’.⁸⁴ These actors are enrolled into the network that constitutes the relationship using intermediaries. The potentially conflicting interests of these actors are controlled to maintain a façade of stability and avert the disintegration of the network. Achieving a good understanding of the two-way relationship in a given setting is only possible after the conduct of an empirical study of these actors, their interests and the means by which order is maintained despite the presence of conflicting interests. This empirical study was undertaken using Nigeria as the case study.

The primary tool for attaining influence and order in the two-way relationship is communication. It may be used for rule-setting, scrutiny, compliance or appointment. An actor’s communication is also prima facie evidence of his actual power in the two-way relationship. However, as explained in Chapter 3, rules and their accompanying expectations place limits on communications. These rules are sourced from different dimensions in society. Out of the many possible dimensions, this thesis focuses only on the dimensions that are directly relevant to the two-way relationship. These dimensions are the legal, economic and moral dimensions. These dimensions possess institutional mechanisms through which they secure compliance with their dictates or ideal expectations.

Despite these institutional mechanisms, an actor’s actual power as evidenced by its communications may either exceed or fall short of the ideal expectations of these dimensions. This constitutes a gap between the actual and institutional powers of actors. This ‘power gap’ may exist in three forms. The first exists where an actor fails or is unable to act in accordance with the dictates of a dimension in society. The second exists where an actor acts in accordance with these dictates but fails to secure compliance with his actions. The third exists where an actor acts in a manner inconsistent with these dictates, and yet secures compliance with his

⁸⁴ Law (n 4).

actions. The mechanisms that affect the communication link (access, awareness, distortion and inaction) also influence the breadth of this power gap. One may increase or decrease the power gap by adjusting the levels of these mechanisms.

Whilst recognising the controversy over the definition of the term corruption, this thesis argues that the tag 'corrupt' should be applied where an action (or exercise of power) and the gain derived therefrom breach the ideal expectations (or dictates) of a dimension in society. Hence, different acts may be considered corrupt depending not just on the jurisdiction and the time period but also on the dimension considered.

Based on the above premises, this thesis argues that corruption sustains itself in the two-way relationship by exploiting the gap between the actual and institutional powers of actors. As mentioned above, this 'power gap' may be increased or decreased by the levels of access, awareness, distortion and inaction in the communication link. Hence, any true attempt to tackle corruption in this relationship must address the levels of these four mechanisms in a manner that reduces the power gap and avenue for corruption. The findings of the empirical research, which are subjected to a descriptive analysis in Chapters 4 and 5, support the argument put forward in this thesis.

It is important to understand what role the law can play in tackling corruption in the two-way relationship. I argue in the penultimate chapter that law could have an impact on corruption in the two-way relationship directly or indirectly. Law directly affects corruption in the two-way relationship through its definition and punishment of corrupt actions. Actors who are adjudged to have acted corruptly by the law are subject to the force of the law. These actors are also likely to be subject to the force mechanisms of other dimensions to the extent that the law has an impact on these other dimensions. For instance, the illegality of corrupt acts and actors may contribute to their moral reproach and condemnation. However, by classifying an act as neither illegal nor corrupt, the law may inadvertently shield this act (and the actor responsible for it) from not just the force mechanisms of the legal dimension but also the force mechanisms of other dimensions. To reduce the likelihood of the law becoming an ally to corruption, the law should incorporate 'codes and programmes' that reduce the 'horizontal gap' between dimensions to the barest minimum. These codes and programmes should enable the law to observe and take into account the expectations of other dimensions in defining and prescribing punishments for corruption.

The law indirectly affects corruption in the two-way relationship through its influence on the four mechanisms. The law should focus on adjusting the levels of these four mechanisms in a manner that would reduce the power gap and avenue for corruption. However, this is not

always the case as the law may inadvertently aid corruption through its effect on the levels of awareness, access, distortion and inaction.

The concluding chapter calls for a shift in focus from traditional concepts such as monopoly, discretion, transparency and accountability to the power gap and its four mechanisms. Nevertheless, it recognises that this call will be more deserving of a positive answer after further research has been conducted on applying the power gap concept to other social contexts, which are different from the social context of business and the tax system in Nigeria.

1.13 Conclusion

Different aspects of the relationship between business and the tax system have been examined by academics of different fields. There has also been extensive coverage of the causes of corruption and its effect on tax effort, tax morale and private sector investments. Nevertheless, the means by which corruption sustains itself in the relationship between business and the tax system have not been comprehensively examined.

This research will contribute to existing knowledge by identifying and comprehensively examining the mechanisms through which corruption persists in the two-way relationship between business and the tax system. The issues which this research will resolve and the information derived from the empirical study will improve current understanding of the dynamics of the relationship between business and the tax system and its exposure to corruption (as well as other societal factors, such as ethnic bias). This will aid the design of a tax system which strikes a balance between the potentially conflicting needs for investments and revenue generation in countries where corruption is endemic. This is essential in these years of austerity and heightened international tax competition as the need to encourage, attract and sustain investments remains foremost in the minds of governments of both developed and developing countries.

CHAPTER 2 THE TWO-WAY RELATIONSHIP AND THE FOUR MECHANISMS

2.1 Introduction

Neo-classical profit maximisation theory posits that businesses are driven by the need to make profit or avoid loss. Since the structure and contents of the tax system can affect the level of profit made or loss suffered, it follows theoretically that they can affect the operations of businesses.⁸⁵

The tax system may affect the level of investments, the location of investments, the object of investments, the choice of financing investments, the organisational structure of investments and the compliance attitudes of businesses. Devereaux and Griffith⁸⁶ provide statistical evidence for the proposition that average effective tax rates affect location choices of businesses by examining the location decisions of US multinationals in four European countries between 1990 and 1994. Huizinga and others⁸⁷ provide evidence that companies are more likely to finance investments using debt than equity in a country where the tax rate is high. They also show that the impact of tax rate on debt policy is higher in multinational companies than single companies. Goolsbee⁸⁸ conducted a study in the US in 1992 which indicates that the difference in rates between company income tax and personal income tax influences business decisions on whether or not to operate as an incorporated entity. The study shows that an increase in corporate tax rate by a tenth of a per cent decreases the share of incorporated companies in the total number of firms by 0.25 percentage points. There is also existing research indicating a negative relationship between marginal tax rates and compliance.⁸⁹

The tax rate, method of tax administration, double tax treaty network and tax incentives are some of the aspects of a country's tax system capable of affecting the operations of

⁸⁵ Robert Tyson, 'Business Capital Spending and Investment Decisions' in American Enterprises Institute for Public Policy Research (ed), *Fiscal Policy and Business Capital Formation* (1967) 4.

⁸⁶ Michael Devereux and Rachel Griffith, 'Taxes and the Location of Production: Evidence from a Panel of US Multinationals' (1998) 68 *Journal of Public Economics* 335.

⁸⁷ Harry Huizinga, Luc Laeven and Gaetan Nicodeme, 'Capital Structure and International Debt Shifting' (2008) 88 *Journal of Financial Economics* 80.

⁸⁸ Austan Goolsbee, 'The Impact of Corporate Income Tax: Evidence from State Organisational Form Data' (2004) 88(11) *Journal of Public Economics* 2283; See also Ruud De Mooij and Gaetan Nicodeme, 'Corporate Tax Policy and Incorporation in the EU' (2008) 15(4) *International Tax and Public Finance* 478; Theiss Buttner and others, 'Taxation and Corporate Structure Choice: Evidence from a Panel of German Multinationals' (CESifo, Working Paper Series 1841, 2006).

⁸⁹ Charles Clotfelter, 'Tax Evasion and Tax Rates: An Analysis of Individual Returns' (1983) 65(3) *The Review of Economics and Statistics* 363; Joel Slemrod and Nikki Sorum, 'The Compliance Cost of the US Individual Income Tax System' (NBER Working Papers 1401, 1985); Werner Pommerehne and Hannelore Weck-Hannemann, 'Tax Rates, Tax Administration and Income Tax Evasion in Switzerland' (1996) 88(1-2) *Public Choice* 161.

businesses. Hines conducted a US-centred review of existing research which suggested that taxation influences FDI, corporate borrowing, transfer pricing, dividend and royalty payments, research and development activity, exports, bribe payments and location decisions.⁹⁰ The impact of tax policy on business investments was downplayed by Agodo.⁹¹ Existing research, however, shows a negative correlation between corporate taxes and inbound FDI.⁹² Neumayer⁹³ provides evidence that middle income (as opposed to low income) developing countries do benefit from double tax treaties entered into with the US in the form of increased FDI from the latter country. However, the link between tax incentives and investments is not clear from existing research.⁹⁴ Shah,⁹⁵ for example, argues that incentives have little or no effect on investments. This has been attributed to the grant of incentives to firms who may not be affected by it (i.e. the redundancy of tax incentives).

In designing their tax systems, governments of both developed and developing countries attempt to strike a balance between generating revenue and fostering investments in accordance with extant laws. Businesses may exert political, practical and judicial influence on this process in order to ensure that the resulting tax system is advantageous for their operations.

Businesses may politically influence the structure and the contents of the tax system through their direct and indirect interactions with the executive or the legislature.⁹⁶ These interactions may be made through organisations set up to pursue their cause.⁹⁷ Even without

⁹⁰ See Hines (n 2).

⁹¹ Oriye Agodo, 'The Determinants of US Private Manufacturing Investment in Africa' (1978) *Journal of International Business Studies* 9. See also, Dan Smith, 'Tax Policy and Business Investment' in American Enterprises Institute for Public Policy Research, *Fiscal Policy and Business Capital Formation* (American Enterprise Institute 1967) 19.

⁹² Michael Devereux and Giorgia Maffini, 'The Impact of Taxation on the Location of Capital, Firms and Profits: A Survey of Empirical Evidence' (CBT Working Paper WP/07/02, 2007); Ruud de Mooij and Sjeff Ederveen, 'Taxation and Foreign Direct Investment: A Synthesis of Empirical Research' (2003) 10(6) *International Tax and Public Finance* 673.

⁹³ Eric Neumayer, 'Do Double Taxation Treaties Increase Foreign Direct Investment to Developing Countries?' (2006) 43(8) *The Journal of Development Studies* 1561; See also Till Siegmann, 'The Impact of Bilateral Investment Treaties and Double Taxation Treaties on Foreign Direct Investments' (University of St.Gallen Law and Economics Working Papers 2008/22) on the positive impact of bilateral investment treaties and double tax treaties on FDI (cf Tsilly Dagan, 'The Tax Treaty Myth' (2000) 32 *Journal of International Law and Politics* 939).

⁹⁴ For a discussion of the usefulness of tax incentives, see Howell Zee, Janet Stotsky and Eduardo Ley, 'Tax Incentives for Business Investment: A Primer for Policy-Makers in Developing Countries' (2002) 30(9) *World Development* 1497.

⁹⁵ Anwar Shah (ed), *Fiscal Incentives for Investment and Innovation* (Oxford University Press 1995). See also Dan Usher, 'The Economics of Tax Incentives to Encourage Investment in Less Developed Countries' (1977) 4 *Journal of Development Economics* 119.

⁹⁶ By lobbying, for example, Ronald J Fox, *Managing Business-Government Relations: Cases and Notes on Business-Government Problems* (Irwin 1982) 137.

⁹⁷ Thomas Byrne Edsall, *Power and Money* (WW Norton 1988); cf Graham Wilson, 'Corporate Political Strategies' (1990) 20 *British Journal of Political Science* 281.

the use of organisations, the need to foster economic growth by encouraging investments is enough to pressure governments into designing their tax systems in a manner that favours businesses.⁹⁸ The strength of such influence by businesses in a polity may depend on the ideology of the political party in power.⁹⁹

Apart from exerting political influence, the practical realities arising from the way businesses operate have a considerable influence on the structure and the contents of the tax system. This is evidenced by the number of tax provisions enacted as a consequence of the operations of businesses. For instance, measures such as Thin Capitalisation rules, Controlled Foreign Companies rules and Limitation on Benefit clauses have been incorporated into the tax systems of various countries to tackle the tax avoidance activities of businesses. Thin Capitalisation rules¹⁰⁰ provide that interests incurred in situations where a company is excessively geared will not be deductible. Its purpose is to counteract the use of excessive debt financing to extract profits from a given jurisdiction. Controlled Foreign Companies rules¹⁰¹ attribute to domestic businesses foreign income of a related company which have not been repatriated in certain circumstances. Its purpose is to counteract the parking of profits in jurisdictions with low or no taxation. Limitation on Benefit clauses¹⁰² prevent multinational companies from artificially structuring their transactions to benefit from treaties which they would ordinarily not benefit from.

Businesses may also challenge the legality of tax policies, laws and regulations as well as their interpretation and application via judicial review or other forms of civil actions. Decisions reached by the courts or tribunals in actions instituted by businesses have the potential to affect not only the tax position of these businesses but also the structure and contents of the tax system. In *Philips Electronics UK Ltd v HMRC*,¹⁰³ for example, the Tribunal held that section 133 of the Corporation Tax Act 2010 (then sections 406(2) and 403D(1)(c) of the Income and Corporation Taxes Act 1988) was incompatible with EU law. This is because it unjustifiably required link companies to be UK-related (subject to UK corporation taxes) in

⁹⁸ Charles Edward Lindblom, *Politics and Markets* (Basic Books 1977) 187; Fred Block, *Revising State Theory: Essays in Politics and Post-Industrialism* (Temple University Press 1987) 61.

⁹⁹ Alexander Hicks, 'Social Democratic Corporatism and Economic Growth' (1988) 50 *Journal of Politics* 677; Dennis Quinn and Robert Shapiro, 'Economic Growth Strategies: The Effect of Partisan and Electoral Politics on Interest Rates' (1991) 35 *American Journal of Political Science* 656.

¹⁰⁰ Jeyapalan Kasipillai and Manoharan Mutihiah, 'Thin Capitalisation and its Impact on Taxable Income' (2009) 20(8) *ICCLR* 263.

¹⁰¹ See David Taylor and Laurent Sykes, 'Controlled Foreign Companies and Foreign Profits' (2007) 5 *BTR* 609.

¹⁰² See Jose Guerra, 'Limitation on Benefit Clause and EU Law' (2011) 51(2/3) *Euro Tax* 85.

¹⁰³ *Philips Electronics UK Ltd v HMRC* [2009] UKFTT 226.

claims for consortium relief. This led to the modification of the law via section 12 and schedule 6 of the Finance (No. 3) Act 2010 which inserts into the Corporation Tax Act 2010 section 134A. This new provision extends the consortium relief to situations where the link company is established in the EEA.¹⁰⁴

Based on the above premises, this thesis conceives of the relationship between business and the tax system as a two-way relationship. This implies that while the structure and the contents of the tax system have the potential to affect the operations of businesses, businesses may also influence various facets of the tax system.

In this chapter, I will take the analysis of the two-way relationship a step further by constructing a framework that makes apparent the vulnerability of this relationship to corruption. I will argue that understanding the relationship between business and the tax system requires an appreciation of the ‘communication link’ by which information is shared between both institutions.

In Part 2 of this chapter, I will explore the particulars of this communication link, highlighting in the process the mechanics of the interactions between business and the tax system. In Part 3, I will apply ANT to this communication link in order to uncover the operations of the complex networks of human and non-human actors behind it. In Part 4, I will discuss four mechanisms which affect the efficacy of the communication link. They are: distortion of communications, deficiency in awareness, restriction of access and inaction.

Understanding the communication link and its weaknesses provides a critical theoretical insight into the two-way relationship between businesses and the tax system. However, these can only be properly understood after an empirical study has been conducted as reiterated in the conclusion to this chapter.

2.2 Understanding the Communication Link

Any relationship based on interaction must depend on the efficacy of the connections through which information is shared by the parties to it. The two-way relationship between business and the tax system is not an exception. In order to fully understand this relationship, it is important to examine where and how both institutions interact.

¹⁰⁴ See Timothy Lyons, ‘Legislative Comment Finance Act Notes: Section 12 and sch 6: Consortium Claim for Group Relief’ (2011) 1 BTR 60; See also Case C-446/03 *Marks & Spencer v Halsey* (2005) 8 ITLR 358 (and its effect on loss relief for foreign subsidiaries in the UK); Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* [2003] STC 607; *Test Claimants in the Thin Capitalisation Group Litigation v HMRC* [2011] EWCA Civ 127 (effect on the Thin Capitalisation Rules in the UK); See Shiv Mahalingham, ‘UK Thin Capitalisation: Is it Time to Eradicate Domestic (UK-UK) Legislation’ (2012) 2 BTR 134.

The interaction between business and the tax system arguably takes place at four key ‘terminals of the tax system’. Named according to their outputs, these terminals are ‘the tax policy terminal’, ‘the tax law terminal’, ‘the tax administration terminal’ and ‘the dispute resolution terminal’.

The reference to terminals of the tax system rather than arms of government is due to the following reasons. Firstly, the use of the term ‘terminals’ reflects the fact that information is processed and shared at these locations. Secondly, not all aspects of the arms of government are involved in taxation. Using the term terminals therefore ensures that emphasis is placed only on those aspects of the arms of government relevant to the tax system. Finally, the functions performed at these terminals are not the exclusive preserve of the relevant arms of government. Dispute resolution, for example, is commonly associated with the courts or judiciary. However, dispute resolution in the tax system is also carried out by other bodies which are neither courts nor part of the judiciary. Consequently, using customary appellations such as the executive, legislature and judiciary would be unduly limiting.

Business and the tax system interact through the interchange of ‘communicative action’ at the terminals of the tax system. The term ‘communicative action’ (Action) is used loosely¹⁰⁵ and means an act or utterance of a business or a terminal of the tax system capable of conveying information or meaning. Such an act or utterance is communicated when it is understood by a recipient. Therefore, a ‘Communication’ in this thesis comprises an Action by an exercising actor and the understanding of the said Action by a recipient actor. This is an adoption of Luhmann's definition of Communication, which he defined as comprising utterance, information and understanding.¹⁰⁶ For instance, an arbiter's decision (or Communication) will: (i) usually contain facts, laws and legal arguments (information); (ii) be conveyed in a written document (the utterance) and; (iii) be communicated when understood by businesses.¹⁰⁷

In the tax policy or tax law terminal, business and the tax system interact in the process of formulating policies and enacting laws respectively. A tax policy or law communicated to businesses has the potential to affect the way in which they operate. The tax policy or law may also be a consequence of political or economic pressure exerted on the relevant terminal by businesses leaving or threatening to leave the jurisdiction. For instance, in 2011, the UK government increased the Supplementary Charge (SC) on companies in the UK Continental

¹⁰⁵ This usage differs from that of Jürgen Habermas, *The Theory of Communicative Action* (Beacon Press 1984).

¹⁰⁶ See Niklas Luhmann, ‘The Autopoiesis of Social Systems’ in Felix Geyer and J Van Der Zeuwen (eds), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* (Sage 1986) 178.

¹⁰⁷ John Mingers, *Self-Producing Systems* (Plenum Press 1995) 141.

Shelf (UKCS) from 20% to 32%. This continued the trend of increasing the state's fiscal take from the UKCS in light of rising oil prices. This increase was made in order to provide revenue to compensate for the shortfall arising from the reduction in fuel duty. In justifying its decision, the government pointed to the different fates brought about by the rising oil price on the oil industry and the state at large. The government argued that whilst oil companies enjoyed windfall profits, the rising price of oil had an overall negative impact on the state and the public at large. However, the government promised to reverse the increase in the SC in the event that the price of oil fell below a trigger price of \$75 per barrel on a sustained basis. This increment was heavily criticised by the companies affected, with some, such as Centrica Plc, threatening to pull back on investment.¹⁰⁸ In response to the backlash, the UK government in 2012 introduced a brown field allowance which permits a deduction of a portion of production income from the tax base subject to SC in relation to small or technically challenging oil fields to mitigate the burden of the increased SC on certain companies.¹⁰⁹

The leeway for interaction between business and the tax system is broadest at the tax administration terminal. Here, business and the tax system interact with the principal aim of attaining compliance with tax policies and laws. The tax system communicates to business through this terminal in various ways including by notices of assessment, audits, circulars and extra-statutory concessions. Business also communicates with the tax system via this terminal by different means such as by returns, notices of objection to assessment, payment of taxes and dialogue with tax officials.

Any dispute which arises in the formulation or administration of a tax policy or law may be submitted to the dispute resolution terminal for adjudication. The decision of this terminal has the potential to affect both the operations of businesses and the structure and the contents of the tax system. By participating in a dispute before this terminal, businesses communicate with the tax system. The facts and arguments contained in writs, pleadings and addresses, for example, are powerful tools through which businesses may influence the decisions of the dispute resolution terminal and in turn the structure and the contents of the tax system.

¹⁰⁸ Sylvia Pfeifer and Andrew Whiffin, 'Centrica Feels the Heat over Tax Rise' *The Financial Times* (London, 9 May 2011) <<https://www.ft.com/content/672af278-7a0b-11e0-bc74-00144feabdc0>> accessed 30 May 2017.

¹⁰⁹ Terry Macalister, 'George Osborne Unveils Tax Break for Older North Sea Oil and Gas fields' *The Guardian* (London, 7 September 2012) <<https://www.theguardian.com/business/2012/sep/07/george-osborne-north-sea-oil>> accessed 30 May 2017.

An Action by a business or a terminal may be understood differently by different recipients. For instance, the refusal by a business to comply with the tax obligations contained in a notice of assessment may be considered by the tax administration terminal as an infringement, by the dispute resolution terminal as compliance, and by the tax policy or law terminal as an invitation to change existing policy or law. This can partly be illustrated by the circumstances surrounding *Vodafone International Holdings BV v India*.¹¹⁰ This case involved a challenge to a tax assessment served on Vodafone by the Indian tax authorities in relation to its purchase of shares in a holding company in the Cayman Islands by which it acquired 67% interest in an Indian telecommunications company. The Indian tax authorities had assessed Vodafone on the basis that the latter company should have withheld capital gains tax as a result of this transaction. The court, however, ruled that the tax authority lacked the jurisdiction to impose tax on the transaction. This led to moves by the Indian government to introduce retrospective laws to cover transactions similar to this.¹¹¹

What then is the communication link? The communication link is the entire machinery through which business and the tax system interact. It encompasses the structural lines of Communication which pass through the terminals of the tax system connecting them with one another and each with businesses. The two-way relationship depends on the efficacy of the communication link. An effective communication link will enable the healthy flow of information between business and the tax system and consequently enhance the responsiveness of both institutions to each other.

2.2.1 The Communication Route

It is important to distinguish between the ‘communication link’ and the ‘communication route’. This is because the interactions that form the basis of the two-way relationship need not involve every terminal of the tax system. As distinct from the communication link, the communication route refers to the pathway of an Action from its conception to its final destination, which is usually the point of delivery to businesses or a terminal of the tax system. While the communication link remains relatively stable, the communication route varies depending on the form of Action involved. The chances that an Action will serve its purpose may depend on its communication route. This is due to the fact that different rules, personnel, practices and societal factors may play different roles in different communication routes.

¹¹⁰ *Vodafone International Holdings BV v India* 14 ITL Rep 431.

¹¹¹ See Rajendra Nayak, ‘India SC Rules in Favour of Vodafone’ (2012) 3 IT Rev 89.

A communication route may be direct or indirect. It is direct where the conception and final delivery of an Action take place at one terminal of the tax system. A grant of an extra-statutory concession by the tax administration to businesses, for example, may take place through a direct communication route. It is indirect where the Action transfuses more than one terminal of the tax system before reaching its final destination. On the other hand, a call for a change in the tax rates may have commenced at the tax policy terminal but any subsequent change in the tax rates may be delivered to businesses by the tax administration terminal during enforcement. In this instance, therefore, the Action reaches businesses in its fully processed form through an indirect communication route.

A single Action may trigger successive Actions by different actors in the two-way relationship communicated through different but connected communication routes. For instance, in response to pressure from businesses, the tax policy terminal may adopt a policy for the simplification of tax laws and forward a bill to the tax law terminal in this regard. The tax law terminal may in turn pass this bill into law. This law will then be forwarded to the tax administration terminal for enforcement. During enforcement, a dispute between the tax administration terminal and businesses may ensue as to the legality or interpretation of the said law. This dispute may be referred to the dispute resolution terminal for adjudication. Subsequently, the decision reached by the dispute resolution terminal may be communicated to the parties to the said dispute.

Generally speaking, the form of Action employed by businesses or the tax system will depend on the goal intended. For instance, a business wishing to alter a decision of the dispute resolution terminal directly will not normally leave the jurisdiction. However, a goal may be achievable by utilising any of a number of Actions. The effect of an unacceptable provision of the law, for example, may be mitigated by communicating (or inducing the communication of) a tax policy, an amendment of the law, an extra-statutory concession or a decision of the dispute resolution terminal annulling the said provision.

Where such an option exists, the choice of Action by a business or a terminal of the tax system may be influenced by their impression or prior experience of the effectiveness or other practicalities of the communication route relevant to the said action. Path dependence¹¹² may result in the use of an Action owing to historical experience with this Action even where the Action is not the most efficient of the available Actions. For instance, businesses within a given jurisdiction may lack the requisite organisation or expertise to interact with the tax policy and

¹¹² See Scott E Page, 'Path Dependence' (2006) 1 Quarterly Journal of Political Science 87.

law terminals so as to influence tax policy or law-making. Also, their demands may be too particularistic to be catered for by a change in policy or law. Such businesses are likely to engage the tax administration terminal to which they have greater access or where their particularistic needs can be addressed.¹¹³

2.2.1.2 Weight and Reliability of Actions

The weight of the Actions proffered by the different terminals of the tax system as measured by their impact on the executed (as opposed to strategic) operations of businesses varies.

The Actions of the tax administration terminal should normally have the strongest impact on the executed operations of businesses where it is not overruled by the dispute resolution terminal. This is because there can be no guarantee that the information derived by businesses from other terminals would tally with that which the tax administration will deliver. Therefore, businesses can only speculate on the effect of the Actions of other terminals on their executed operations prior to their interaction with the tax administration terminal.

Even where a decision of the dispute resolution terminal overrules an Action of the tax administration terminal, a further Action of the tax administration terminal may be required to give effect to the said decision. In this circumstance, the tax administration terminal may fail to take the required Action or may wrongly apply the decision. This may be an intentional exercise of power by the tax administration terminal, even at the risk of being in contempt of the dispute resolution terminal.

The tax administration terminal may also insist that a decision of the dispute resolution terminal overruling its position is restricted to the peculiar facts of the dispute and refuse to apply it in subsequent situations involving other businesses not party to the said dispute. In this circumstance, a business that wishes to enjoy a similar treatment as that meted out by the dispute resolution terminal in the previous dispute must not only institute an action challenging the act of the tax administration terminal but must also prove that the facts of the present dispute cannot be distinguished from those of the previous one. The business may be prevented from instituting the action by certain barriers. Also, the specificity and technicalities involved in taxation may make it difficult to prove that the present dispute is not distinguishable from a previous one.

¹¹³ See James Scott, 'Corruption, Machine Politics and Political Change' (1969) 63(4) *The American Political Science Review* 1142; James Scott, 'The Analysis of Corruption in Developing Nations' (1969) 11(3) *Comparative Studies in Society and History* 315 (the author argues that 'influence at enforcement stage often takes the form of "corruption" and has seldom been treated as the alternative means of interest articulation which in fact it is').

The decisions of the dispute resolution terminal should follow acts of the tax administration terminal in the hierarchy of Actions based on weight. This is because the dispute resolution terminal is the final interphase between business and the tax system in a small percentage of cases where a dispute has been brought before it for adjudication. An example of such cases is where the decision is declaratory as opposed to executory. A decision is declaratory where it establishes the rights of the parties to the dispute and requires no further action for its implementation. However, the ability of a business to seek a declaratory decision may be restricted by law.¹¹⁴ Nevertheless, the decisions of the dispute resolution terminal should have a higher impact on the executed operations of businesses than tax policies or laws which are more likely to be ambiguous and require further action for their implementation. Decisions of the dispute resolution terminal generally give weight to existing law especially in relation to the parties to the dispute. This is because it places a less ambiguous obligation on the said parties in most cases.

Tax laws should have more impact on executed business operations than tax policy. This is because while both Actions are frequently nebulous and their interpretation or application uncertain at the point of enactment, tax laws are binding until they are repealed. Tax policies, on the other hand, are more or less non-binding promises which are at best capable of giving rise to expectations in the minds of businesses. In exceptional circumstances, a policy or act of the tax administration terminal may give rise to legitimate expectations. This prevents the relevant terminal from renegeing on the policy without proper notice. Nevertheless, it must be established that the Action was such that it created a reasonable expectation in the minds of the businesses that they would be treated in a particular way and that acting contrary to this Action would be unjust or an abuse of power.¹¹⁵

It is, however, important to distinguish between the weight of an Action as measured by its impact on the executed operations of businesses and the extent to which a business will rely on the said Action when taking strategic decisions. Actions which are predictable, accessible and broadly applicable are solid bases for strategic decisions. Therefore, businesses may be more willing to rely on a law than an act of the tax administration terminal when making strategic decisions where the latter Action is relatively unpredictable. This is despite the fact

¹¹⁴ See Steven Kittrell, 'Administrative Prerequisites for Declaratory Judgements about the Tax Issues' (1980) 66(12) American Bar Association Journal 1570.

¹¹⁵ See *R (on the application of Davies) v Revenue and Customs Commissioners* and *R (on the application of Gaines Cooper) v Revenue and Customs Commissioners* [2011] UKSC 47; *R v Inland Revenue Commissioner ex parte Unilever Plc* [1996] STC 681; *R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd* [1989] STC 873.

that the latter Action may have a greater impact on the executed operations of businesses than the former. The Actions of the tax administration are usually very unpredictable. This is partly due to the fact that they can be reversed by the tax administration with relative ease in most cases. For example, in *James Couzens v Commissioner of Internal Revenue*¹¹⁶ the US court held that a tax commissioner was not bound by the valuation of shares of the claimant made by a previous tax commissioner. The predictability of such Actions may be improved where the doctrine of legitimate expectation applies.¹¹⁷

The interests and ‘decision frames’¹¹⁸ of businesses or the terminals of the tax system partly determine the effect of an Action on them. For instance, Actions by businesses targeted at securing a tax exemption are more likely to succeed where the terminals of the tax system place greater emphasis on fostering investment than generating revenue. Likewise, an Action by the terminals of the tax system targeted at securing compliance is more likely to have a greater positive impact on businesses that are pro-compliance. However, in both cases, the anticipated effect may not materialise where the recipient is improperly informed of the Action or misconstrues it.

2.2.2 Communications as Evidence of Power

Communication is a crucial element of the two-way relationship between business and the tax system. Without Communication, there can be no such relationship. It is the tool through which desires are expressed and demands are met. In this section, I discuss the nature, purpose and channels of communication in the two-way relationship.

2.3 Forms of Communication

While Actions may be oral, written or by conduct, Communications may be direct or indirect depending on the presence or absence of an intermediary actor between the actor devising the Action and the final intended recipient. Communication will be direct where there is no intermediary actor between the actor devising the communicative action and the recipient. It will be indirect where there is an intermediary actor between the main actor devising the communicative action and the recipient. However, an indirect Communication may take place through a direct communication route. Businesses, for example, may communicate with the

¹¹⁶ *James Couzens v Commissioner of Internal Revenue* (1928) 11 BTA 1040.

¹¹⁷ See *Gaines Cooper case* (n 115).

¹¹⁸ Decision frame refers to the interpretation which a business or a terminal of the tax system gives to available information. This is an application of Simon’s Bounded Rationality. See Herbert Simon, *Administrative Behaviour: A Study of Decision-Making Processes in Administrative Organisations* (MacMillan 1957).

tax law terminal using consultants representing their interests. While the communication route remains direct – as the Action does not pass through any additional terminal of the tax system – Communication is indirect as it flows through the consultants. These consultants as intermediaries possess their own interests and decision frames which may influence the nature and efficacy of the Communication.

Communications can be distinguished based on the level of confidentiality and the number of intended recipients. Here, Communication can be classed into two categories. They are: private Communications which are directed at a particular recipient or closed category of recipients and are usually accorded confidentiality; and public Communications which are meant for the public and therefore accessible with relative ease to the public at large or a considerable section of it.

Communications may be formal or informal depending on the settings or circumstances in which they are made. Formal communications are official communications made by an actor in official settings and through official channels of communication, while Informal communications are unofficial communications usually made in social or educational settings such as during seminars and conferences.

2.4 Purpose of Communication

It is pertinent to understand the purpose for which Actions may be dispatched in the two-way relationship. This purpose should shape the structure and contents of such Actions. In other words, the actors that need to be co-opted into the network which the Action represents should be guided by the purpose of such Actions. A failure to so consider the purpose before determining the constituting actors is potentially fatal to the ability of the Action to achieve its intended goal. For instance, where an actor seeks to overrule a law, this purpose informs both the processes and the nature of the Action which should be dispatched.

There are 4 main purposes of Communications in the two-way relationship. They are Communication for the purpose of rule-setting, compliance (or non-compliance), scrutiny and appointment. These purposes are discussed individually below.

Rule-setting is a main purpose of Communication in the two-way relationship between business and the tax system. Communication for this purpose is usually marked by some form

of negotiation. Here, the participating actors balance competing interests so as to arrive at the policies or laws that will govern their future interactions.¹¹⁹

After the rules have been set, the purpose of Communication usually shifts to compliance with the said rules. At this stage, negotiation of the terms of the relationship would have ceased and renegotiations are usually prohibited. Any planned renegotiation requires reference back to the tax policy or law terminal where the law or policy was set in the first place. Compliance, as distinct from rule-setting, should not involve renegotiations. However, a distinction must be drawn between the negotiation that takes place in settling tax disputes and the negotiation of the applicable rules. While the rules should not be renegotiated at the point of compliance, the terms of settlement may be subject to negotiation. Negotiating the terms of settlement is akin to creating new rules to guide current or future interactions between the parties. In the UK's Litigation and Settlement Strategy (paragraph 1), for instance, the negotiation of the law at the point of settlement is expressly prohibited.¹²⁰ The actors communicate primarily for the purpose of understanding the extant rules as well as the factual circumstances to which they should be applied.

Both the process of rule-setting and compliance are governed by certain pre-ordained rules against which they may be scrutinised. Scrutiny is therefore an important role of Communication in the two-way relationship between business and the tax system. Unlike Communication for the purpose of rule-setting, scrutiny does not involve negotiation or overt balancing of interests. Its objective is to ensure that laid down rules and processes have been adhered to. Nevertheless, it differs from compliance as the actors engaged in this activity are not burdened by the obligation to comply with the policies or laws in the instance subject to scrutiny. In other words, scrutiny involves a re-examination of compliance by actors other than those with the obligation to comply.

Communication for the purpose of appointment is another important purpose of Communication in the two-way relationship between business and the tax system. This form of Communication often involves some form of negotiation or balancing of interests along laid down rules but its main purpose is to institute the holders of power to whom certain roles would be distributed.

¹¹⁹ For instance, regarding the negotiations that characterise the process for the formulation of laws governing taxation of oil producing and exploration companies in the UK Continental Shelf, see Carole Nakhle, *Petroleum Taxation: Sharing the Oil Wealth: A Study of Petroleum Taxation Yesterday, Today and Tomorrow* (Routledge 2008).

¹²⁰ See HMRC, 'Resolving Tax Disputes: Commentary on the Litigation and Settlement Strategy' (2013) 9 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387770/Commentary_on_litigation.pdf> accessed 5 July 2015.

2.5 Channels of Communication

Communications flow through the communication link that connects businesses with the four terminals of the tax system. There are 10 two-way channels of communication that make up the communication link. These channels can be divided into two broad categories. These categories are: Communication between the institutions; and Communication between the terminals.

The channels of communication between the institutions include the channels between business and tax policy terminals; business and tax law terminals; business and tax administration terminals; and business and dispute resolution terminals.

Communications between the institutions are commonly either for the purpose of rule-setting or compliance. Communication for the purpose of rule-setting is commonly associated with the interactions that take place between businesses and the tax policy or law terminal. Here, the actors meet to negotiate the terms of their fiscal relationship in accordance with their respective interests. It is vital at this stage that the interests of all major stakeholders are taken into account and that the product of this negotiation process is communicated free from distortion. These are more likely to be achieved where the actors are fully aware of the setting and mechanics of the negotiation process, the actors utilise their formal and substantive access to this process, and the end product is communicated across the least possible number of terminals.

Communication for the purpose of compliance, on the other hand, commonly takes place between businesses and the tax administration or dispute resolution terminal. It is crucial at this stage that the rules and facts required for compliance are as certain as possible. Little or no room should be left for renegotiation of the already fixed terms of the fiscal relationship between the parties.

The channels of communication between the terminals of the tax system include the channels between tax policy and tax law terminals; tax policy and tax administration terminals; tax policy and dispute resolution terminals; tax law and tax administration terminals; tax law and dispute resolution terminals; and tax administration and dispute resolution terminals.

Communication between terminals of the tax system is commonly for the purpose of rule-setting, scrutiny or appointment. For instance, Communication may take place between the tax policy and tax law terminals for the purpose of formulating rules to guide the two-way relationship between business and the tax system. Similarly, the tax administration terminal may communicate its practical experiences of the implementation of tax policy or law to the

tax policy or law terminals respectively so as to facilitate the process of policy or law-making. Also, the policies formulated at the tax policy terminal are subject to scrutiny at the tax law terminal and the dispute resolution terminal. Likewise, the actions of the tax administration terminal are subject to scrutiny at the tax policy, tax law and dispute resolution terminals. Finally, actors within the tax policy terminal communicate for the purpose of appointment of holders of power at the tax law, tax administration and dispute resolution terminals.

2.6 Actors, Interests and Instruments

In addition to examining the purposes and channels of communication, it is also important to examine the proponents and recipients of Communications. This is because these are the primary sources of the interests and decision frames that shape the nature and effect of Communications. This section identifies and examines the main actors in the relationship and in doing so considers their duties (which shape their legal interests) as well as the instruments by which they attain influence at a distance.

2.6.1 Businesses

Businesses are profit-making in nature. It is therefore unsurprising that profit maximisation¹²¹ features as one of their main interests in much economic literature. In 1943, for example, Scitovszky described profit maximisation as ‘one of the most fundamental assumptions of economic theory’. In his words:

[T]he assumption that the entrepreneur maximises his profits is based on observation and implies a special hypothesis concerning the businessman's psychology. It is therefore an empirical law, which need not apply to every businessman, and may conceivably be untrue even about the representative entrepreneur. Its justification lies in its usefulness, which should be enhanced by a better understanding of its exact meaning and limitations.¹²²

However, this section focuses on the legal duties of businesses as created by law. This is linked to the way these businesses are structured.

Businesses adopt different structures with diverse legal implications. They may be sole proprietorships, partnerships or companies. The businesses who participated directly or indirectly in this research are predominantly structured as companies. This implies that they have legal personality. Also, their day-to-day affairs are under the control of directors who are

¹²¹ See Theodore Levitt, ‘The Dangers of Social Responsibility’ (1958) *Harvard Business Review* 41; Milton Friedman, ‘The Social Responsibility of Business is to Increase its Profits’ *New York Times* (13 September 1970) 33.

¹²² T De Scitovszky, ‘A Note on Profit Maximisation and its Implications’ (1943) 11(1) *The Review of Economic Studies* 57, 60.

divorced from their true owners or shareholders in many cases. These directors, who represent the will, mind or ego of these businesses, are subjected to certain duties under Nigerian Law as stipulated in the Companies and Allied Matters Act.¹²³ The most prominent of these duties is the duty to act in the best interest of the company.¹²⁴ What constitutes the best interest of the company is potentially debatable. This debate primarily centres on the following issues: a) who constitutes the company; b) who decides on what is the best interest of the company; c) to what extent should the directors consider the interests of stakeholders including employees, creditors and the community; and, d) how should the directors balance long term and short term interests of the company?

The term ‘best interest of the company’ was left out of the UK Companies Act 2006, for example, and has been described by Lowry as ‘obtuse’.¹²⁵ In the phrase, ‘best interest of the company’, the word ‘company’ is often equated with current and future members of the company. For instance, Megarry J stated in *Gaiman v National Association for Mental Health* that he ‘would accept the interests of both present and future members of the company as a whole, as being a helpful expression of a human equivalent’.¹²⁶ However, relatively recent modifications to the law in the UK have defined ‘best interest’ as expressly requiring the consideration of the interest of other stakeholders such as employees and the public at large.¹²⁷ The growing status of corporate social responsibility may further impact what constitutes the best interest of the company. The remits and effect of corporate social responsibility are disputed. Avi-Yonah, for instance, traced the history of corporate social responsibility and showed that the meaning of this term has shifted in a cyclical fashion over the years. Through these periods, he argued, the dominant conception of corporate social responsibility is the ‘real entity view’, as distinct from the aggregate and artificial entity view. The essence of this real entity view is that businesses have a social responsibility to increase their profits.¹²⁸ With

¹²³ See mainly sections 279, 280 and 282 of the Companies and Allied Matters Act, Laws of the Federation of Nigeria 2004 (CAMA). These duties are comparable to those applicable to directors in the UK in sections 170 to 177 of the Companies Act 2006 (CA 2006).

¹²⁴ Different jurisdictions have different formulations of this primary duty of loyalty of directors to the companies they represent. This is evident from a basic comparison of section 279 (3) of the CAMA with section 172 of the CA 2006.

¹²⁵ See John Lowry, ‘The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure’ (2009) 68(3) Cambridge Law Journal 615.

¹²⁶ *Gaiman v National Association for Mental Health* [1971] Ch 317, 330.

¹²⁷ CA 2006, s 172. For a general discussion of this, see Andrew Keay, ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s “Enlightened Shareholder Value Approach”’ (2007) 29 Sydney L Rev 577.

¹²⁸ Reuven S Avi Yonah, ‘The Cyclical Transformations of Corporate Form: A Historical Perspective on Corporate Social Responsibility’ (2005) 30(3) Del J Corp L 767.

regard to taxation,¹²⁹ for example, the need to be seen as contributing a ‘fair share’ to the general revenue pot is increasingly important to companies within certain jurisdictions. Failure in this regard may lead to backlashes from the public which may in turn hurt the revenues of the companies concerned.¹³⁰

Businesses may be categorised based on their size or their identity. Their size may be dependent on the level of turnover, profits, size of their field of exploration, number of employees or asset base. Owing to the fact that this thesis focuses on Communication, the classification of businesses will be based on factors that affect their capacity to interact. The number of employees is a good indicator of the capacity of a business to interact with the tax system. This is because it roughly reflects the ability of the business to exploit expertise within its ranks for the purpose of such interaction. However, some businesses, such as those engaged in oil and gas exploration, may have large turnovers despite their limited number of employees. While the limited staff may adversely affect their direct communications with the terminals of the tax system, their large turnover provides them with the capacity to engage external consultants to act on their behalf. This justifies their classification as large businesses for the purpose of this thesis. This thesis therefore recognises two broad classes of businesses based on number of employees and turnover. They are small- and medium-sized enterprises (SMEs) and large businesses. Adopting the formula for classification employed by the EU, an SME in this thesis is any business whose direct employees number less than 250. A large business on the other hand is one with employees numbering 250 or more.

In this thesis, businesses will also be categorised as multinational or local. Multinational businesses are usually large businesses. It is important to make this classification because multinational and local companies may be subject to different legal, economic, political and social conditions. For instance, in addition to the local laws in their sites of operation, multinational companies resident in the UK and the US are subject to the Bribery Act 2010 and the Foreign Corrupt Practices Act 1977 respectively. Such domestic laws with extra-territorial effect governing corrupt practices have grown in popularity across Europe since the OECD

¹²⁹ For a discussion of the relationship between corporate social responsibility and the actions of companies, see Doreen McBarnet, ‘Corporate Social Responsibility Beyond the Law, Through the Law, for Law: The New Corporate Accountability’ in Doreen McBarnet and others (eds), *The New Corporate Accountability* (Cambridge University Press 2007).

¹³⁰ Examples of such backlashes include the blockade of Vodafone stores in the UK. See Kevin Rawlinson, ‘UK Uncut Protesters Blockade Vodafone Stores Across Country’ *The Guardian* (London, 15 June 2014). For a discussion of the likely impact of public pressure on corporate tax behaviour, see, Scott Dyreng and others, ‘Public Pressure and Corporate Tax Behaviour’ (Fisher College of Business Working Paper No 2014-02-003) <<http://ssrn.com/abstract=2474346>> accessed 1 September 2015.

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions came into effect in 1997.

2.6.2 Associations and Professionals

Businesses may interact with the tax system through the aid of associations that represent their interests. These associations may represent businesses in general or specific forms of businesses along the lines of their differing interests. In many cases, associations are better able to interact with the tax system owing to their ability to utilise a better level of expertise within their ranks. There is an ongoing debate about the impact of vibrant business associations on the socio-economic situation of a state. On the one hand, some (usually pluralists) argue that strong business associations aid the advancement of the economy by encouraging macroeconomic stabilisation and reform, lowering costs of information, setting standards and also fighting corruption, to name a few.¹³¹ Others argue based on public choice theory that the focus of such associations on rent-seeking as well as their collective action problems may be harmful for the society.¹³²

These associations may specialise in different forms of negotiations on behalf of businesses. Associations are mostly involved in the communications that take place for the purpose of rule-setting. Influential associations are able to ensure that the interests of the businesses they represent are catered for during the process of rule-setting, thereby aiding future compliance with the resulting rules. It is arguable that in societies where corruption is prevalent, business associations are less likely to thrive. This is because corruption may create informal channels through which businesses may influence the tax system, thereby reducing the need for participation in business organisations.¹³³ Also, participation in such associations makes businesses more visible and, consequently, easier to extort.¹³⁴ However, research by Duvanova¹³⁵ rightly shows that, contrary to the above hypothesis, business associations do

¹³¹ See, for example, Sylvia Maxfield and Ben Ross Schneider, *Business and the State in Developing Countries* (Cornell University Press 1997) 5.

¹³² See John Toye, 'Interest Group Politics and the Implementation of Adjustment Policies in Sub-Saharan Africa' (1992) 4(2) *Journal of International Development* 183; Mancur Olson, *The Rise and Decline of Nations* (Yale University Press 1982). See also Deborah Bräutigam, Lise Rakner and Scott Taylor, 'Business Associations and Growth Coalitions in Sub-Saharan Africa' (2002) 40 *The Journal of Modern African Studies* 519; Arthur A Goldsmith, 'Business Associations and Better Governance in Africa' (2002) 22 *Public Admin Dev* 39; Richard Doner and Ben Ross Schneider, 'Business Associations and Economic Development: Why Some Associations Contribute More than Others' (2000) 2(3) *Business and Politics* 261 (for a useful view on the conditions under which vibrant business associations may be beneficial).

¹³³ See Dinissa Duvanova, 'Bureaucratic Corruption and Collective Action: Business Associations in the Post-Communist Transition' (2007) 39(4) *Comparative Politics* 441, 443.

¹³⁴ *ibid.*

¹³⁵ *ibid.*

thrive in corrupt environments as a means through which businesses collectively repel oppressive corrupt practices of bureaucrats or to fill the gap left by the absence of state institutions.

Businesses or the associations that represent them may enlist consultants and other professionals in their bid to communicate with the tax system. This is owing to the specialist knowledge usually possessed by these professionals. The type of professional enlisted will invariably depend on the nature of the communication intended. Political analysts and lobbyists may be engaged to represent the interests of businesses to the tax law or policy terminal in the process of rule-setting. Accountants and other technical tax experts may be engaged in the communication with the tax administration terminal. Finally, lawyers and other experts in dispute resolution may be engaged in the interaction with the dispute resolution terminal.

As experts in their fields, these professionals are more likely to have deeper knowledge of the processes within the terminals as well as the means for gaining access to these terminals. The duty of these professionals is to represent the interests for which they have been engaged. However, the extent to which they are able to represent these interests may be limited by extant laws and policies that govern the terminals alongside certain internal rules and codes of conduct peculiar to their respective professions.

Professionals may either be internal or external to the business or association that engages them. Internal experts seem more likely to adopt the interests of the businesses or associations they represent than external experts. This is owing to the relative absence of independence in the former.

Tax policy-makers, tax law-makers, tax administrators and arbiters also employ consultants and other professionals internally and externally to aid their interaction with businesses. These professionals increase their awareness of businesses, business activities, and other technical issues concerning interaction.

Professionals also aid the spread of normative views¹³⁶ on how interaction between businesses and the terminals of the tax system should be carried out (possibly including a role in preventing businesses from engaging in wrongdoing),¹³⁷ as well as what the product of these interactions should be in an ideal situation. This heightens their importance as actors in the two-way relationship between business and the tax system.

¹³⁶ Di Maggio and Powell (n 14) (on the role of professionals in the diffusion of norms).

¹³⁷ See for instance, Michael Davis, 'The Special Role of Professionals in Business Ethics' (1988) 7(2) *Business and Professional Ethics Journal* 51.

2.6.3 Tax Policy-Makers

Tax policy-makers are in charge of tax policy-making. By setting tax policy, they in effect set the tone for future interactions between businesses and the terminals of the tax system. As primary rule-setters, they should possess the requisite expertise to formulate rules that are not ambiguous and achieve their intended goal in a manner that avoids ‘unintended consequences’. One example of such unintended consequences in the UK is the considerable increase in tax motivated incorporations brought about by the nil rate band of corporation tax.¹³⁸ They should be aware of the interests involved as well as the means to balance them. They should also be aware of how past policies have fared so as to enable them to identify the positives and negatives of previous policy and suggest properly considered new policy.

In many jurisdictions, tax policy-makers can be classed into two main categories: the civil/public servants and the ministers/representatives of government. These categories are considered below.

2.6.4 Civil/Public Servants

Setting tax policy is an integral part of managing the finances of the state. Thus, tax policy-makers should be fully abreast of the state’s finances. In many jurisdictions, the task of determining the fine details of tax policy officially falls on civil/public servants in the employment of the government department in charge of finance. In Nigeria, this department is the Ministry of Finance. Although the Ministry of Finance has the legal duty to formulate tax policy, the formulation of tax policy in Nigeria has been undertaken by the Tax Policy Department of the Federal Inland Revenue Service (FIRS) (formerly the Tax Policy Research and Development Department – 2004-2007). Within the Ministry of Finance, there is a Tax Policy Unit through which tax policy formulated by the Tax Policy Department of the FIRS is channelled to the Federal Executive Council for deliberation and approval.¹³⁹ In the UK, this department is Her Majesty’s Treasury (HMT).

One flaw in centring tax policy-making in the department of finance is that this same department is not also in charge of the day-to-day administration of tax policies. Hence, the individuals within it are less likely to be aware of the practicalities of tax policy administration. They are also less able to draw from field experiences when formulating tax policy.¹⁴⁰

¹³⁸ See Vincent Oratore, ‘The Making of Tax Law’ (CIOT, 2010) 6.

¹³⁹ See Ifueko Okauru, *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria* (Safari Books 2012) 94, 95.

¹⁴⁰ Tracey Bowler, ‘Tax Policymaking in the UK’ (Tax Law Rewrite Committee Discussion Paper No 8, 2010) <<http://www.ifs.org.uk/comms/dp8.pdf>> accessed 5 July 2015.

However, this flaw can be remedied by ensuring that the channel of communication between the civil servants in charge of tax policy-making and those in charge of tax administration is effectively used. Through this channel, tax policy-makers can be made aware of the issues faced in practice that are relevant to the process of tax policy-making. This is the justification for the considerable involvement of tax officials (Her Majesty's Revenue and Customs (HMRC) and the FIRS) in the formulation of tax policy in the UK and Nigeria. In addition, the separation of tax policy from tax administration is beneficial as it ensures the autonomy of the tax administration, which protects it from the bureaucracy and other limiting aspects of civil service.¹⁴¹

Civil servants are governed by codes of conduct that stipulate what is acceptable and unacceptable behaviour. For instance, in Nigeria, the obligation of federal and state civil servants to abide by the Code of Conduct is enshrined in sections 172 and 209 of the Constitution of the Federal Republic of Nigeria (CFRN) respectively. The Code of Conduct for these officers is stipulated in Part 1 of the Fifth Schedule of the Constitution. Relevant provisions include:

Section 1- 'a public officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities.'

...

Section 6(1)- 'a public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties.'

Civil servants are not subject to election by the populace and are therefore not directly accountable to them. They are, however, indirectly accountable to the populace through their accountability to the minister in charge. Their prime interest as part of the machinery of government is to ensure the smooth administration of the state, and in particular the finances of the state, in line with the objectives or goals set by the minister in charge.

2.6.5 Ministers/Representatives of Government

While the civil servants are tasked with providing the details of tax policy, the minister or relevant representative of the government provides the objectives to be achieved and decides

¹⁴¹ See Robert Taliencio, 'Administrative Reform as a Credible Commitment: The Impact of Autonomy on Revenue Authority Performance in Latin America' (2004) 32(2) World Development 213; Odd-Helge Fjeldstad and others, 'Autonomy, Incentives and Patronage: A Study of Corruption in the Tanzania and Uganda Revenue Authorities' (Chr. Michelsen Institute, R 2003:9) <<http://www.cmi.no/publications/publication/?1688=autonomy-incentives-and-patronage>> accessed 5 July 2015.

on policy alternatives. In setting objectives and deciding on policy options, the minister represents the government and the state in general. In the UK, for instance, such ministers are responsible individually for the actions of the department under their supervision.¹⁴² This renders them accountable for the failures of the government department under their control. There is, however, no legal requirement that the minister in charge of the tax system is an expert in taxation or finance in general.

In the UK, the minister in charge of finance is the Chancellor of the Exchequer. He or she is customarily a member of the House of Commons elected to the post to represent a constituency. He is an appointee of the Prime Minister and is expected to act in accordance with the policy adopted by the cabinet as a whole, owing to 'the doctrine of collective responsibility'.¹⁴³

In Nigeria, the Minister of Finance is appointed by the President after confirmation by the Senate¹⁴⁴ and need not hold any political position acquired via election. Taking the oath of office as a minister is in effect resignation of his membership of the National Assembly or the State House of Assembly.¹⁴⁵ His or her prime allegiance is to the President, and his or her accountability to the populace is indirect as it is derived from the accountability of the President to the people. The Minister of Finance is more or less an appendage of the President and can be dismissed at his whim. In setting tax policy, this minister is acting under the authority and in the stead of the President.

The Minister of Finance indirectly possesses considerable power over the federal tax authority, the FIRS. This is owing to the fact that the board of the FIRS is obliged to comply with any directive or order given by the minister regarding the board's functions.¹⁴⁶ These functions include providing general policy guidelines relating to the functions of the FIRS; reviewing and approving strategic plans for the FIRS; employing and determining the terms and conditions of service including disciplinary measures of the employees of the FIRS, and stipulating the remuneration and other work benefits of staff of the FIRS.¹⁴⁷

¹⁴² Viscount Cranborne, 'Parliamentary Resolution on Ministerial Accountability' (Lords Hansard, Ministerial Accountability Col 1057, 20 March 1997) para 1; Matthew Flinders, 'The Enduring Centrality of Individual Ministerial Responsibility within the British Constitution' (2000) 6 *The Journal of Legislative Studies* 73.

¹⁴³ See Geoffrey Marshall, *Ministerial Responsibility* (Oxford University Press 1989).

¹⁴⁴ Constitution of the Federal Republic of Nigeria (CFRN), s 147(1).

¹⁴⁵ See *ibid* s 147(4).

¹⁴⁶ Federal Inland Revenue Service (Establishment) Act, s 51.

¹⁴⁷ *ibid* s 7.

2.6.6 Tax Law-Makers

Tax law-makers include the members of the legislative arm of government in charge of tax law-making. Their duty is to scrutinise tax policies before enacting them as law. In limited circumstances, they may introduce tax laws independent of the tax policy-maker. It is imperative that tax law-makers possess the time and expertise required for effective scrutiny of policies put before them for enactment. As rule-setters, they are also required to be aware of the interests of the stakeholders and how best to balance them. Tax law-makers will benefit from an effective channel of communication with the tax administration. This will increase their general awareness of the various issues surrounding the implementation of the laws which they have enacted in the past or will enact in the future.

The decision-making power of tax law-makers does not lie on one individual but on a team of individuals made up of a given percentage of either the entire house or a committee of the house. Beyond scrutinising policies and enacting laws, tax law-makers also engage in the scrutiny of the activities of other actors in the tax system such as tax administrators. In Nigeria, for example, section 88(1) of the CFRN empowers the National Assembly to direct or cause to be directed investigation into the conduct of affairs of any person, authority, ministry or government department charged or intended to be charged with the duty or responsibility for executing or administering laws enacted by the National Assembly. Section 88(2) of the CFRN stipulates the purposes for which this power can be exercised, which includes to expose corruption, inefficiency or waste in the execution or administration of laws.

In the UK, the doctrine of parliamentary supremacy which characterises its constitutional framework ensures that the UK Parliament can make or unmake any tax law¹⁴⁸ subject to certain restrictions. The original concept means that the laws created by Parliament cannot be illegal, as explained by Ungood-Thomas J in *Cheney v Conn [Inspector of Taxes]*¹⁴⁹ thus:

If the purpose for which a statute may be used is an invalid purpose, then such remedy as there may be must be directed to dealing with that purpose and not to invalidating the statute itself. What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliament's enactment, the highest law in this country, is illegal.

¹⁴⁸ See Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1996) 38.

¹⁴⁹ *Cheney v Conn [Inspector of Taxes]* [1968] 1 WLR 242, 244-5.

Various restrictions to the original concept of parliamentary sovereignty can be traced to the devolution of powers to the Scottish Parliament and the Welsh Assembly, provisions of the Human Rights Act 1998, and the UK's membership of the EU.¹⁵⁰

Although the UK practices a bicameral legislative system, only the House of Commons has responsibility for considering finance bills¹⁵¹ including tax laws. Members of the House of Commons are elected through a first-past-the-post system to represent the interests of their constituents as well as the general populace. Consequently, the governing party often possesses a clear majority in the House of Commons.¹⁵² This, coupled with a strong party system, ensures that important bills such as tax bills introduced by the governing party will most likely be made law with little or no amendments. The lack of scrutiny by tax law-makers is a main criticism of the tax law-making process in the UK.¹⁵³

Unlike the UK, Nigeria has a written constitution which considerably limits the powers of the legislature. Since gaining independence from the UK in 1960, and becoming a republic in 1963, Nigeria has had three functional constitutions – 1963, 1979 and 1999. For a major part of Nigeria's independent existence, the country has been ruled by military dictators. During the military regimes (1966-79 and 1983-1998), the country's constitution was suspended and the legislature abolished. There was also a fusion of the legislature and the executive (mainly under a Supreme Military Council). The military ruled using decrees and edicts.¹⁵⁴

As a federation, legislative powers are shared between the central government and the government of the constituting units or states. The CFRN distributes legislative powers between the federal and state legislatures through its creation of an Exclusive Legislative List set out in Part 1 of the Second Schedule to the CFRN, and a concurrent legislative list set out in the first column of Part 11 of the Second Schedule to the CFRN. The CFRN confers exclusive powers on the federal legislature to legislate on matters contained in the Exclusive Legislative List (see section 4(2) of the CFRN). Both the federal and the state legislature have powers to legislate on matters contained in the Concurrent Legislative List (section 4(4)(a) and section 7(b) of the CFRN). However, where the federal legislature has adequately legislated on a matter on the Concurrent Legislative List, the state legislature is precluded from doing so based on the doctrine of covering-the-field. The state legislature may also legislate on matters

¹⁵⁰ See Mark Elliot, 'United Kingdom: Parliamentary Sovereignty Under Pressure' (2004) 2 International J Const L 545.

¹⁵¹ This includes money bills as defined in Section 1(2) of the Parliamentary Act 1911.

¹⁵² See Philip Norton, 'The Case for First-Past-The-Post' (1997) 34(2) Representation 84.

¹⁵³ See, for instance, Geoffrey Howe, 'Reform of Taxation of Machinery' [1977] British Tax Review 97.

¹⁵⁴ See Ben Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Spectrum Law 1992).

not contained in the Exclusive or Concurrent List (a notional residual list – section 4(7)(a) of the CFRN).¹⁵⁵

However, the power to legislate on taxation of incomes, profits and capital gains falls solely within the powers of the federal legislature or National Assembly. This matter is contained in the Exclusive Legislative List.¹⁵⁶ In Nigeria, both houses of the bicameral federal legislature have equal responsibility with regard to enacting tax laws. The members of the houses are also elected to represent their constituency as well as the interests of the general populace. Election into the federal legislature is through a first-past-the-post system which often creates a clear majority in the National Assembly.¹⁵⁷

2.6.7 Tax Administrators/Officials

Tax administrators are in charge of enforcing tax laws and policies. In the UK, for example, the body in charge of tax administration is HMRC. In 2005, HMRC was created by the Commissioners for Revenue and Customs Act 2005 (CRCA) as a non-ministerial body to exercise functions previously carried out by the Commissioners of Inland Revenue and the Commissioners of Customs and Excise. Its responsibilities include the collection and management of revenue and the payment and management of tax credits.¹⁵⁸

Unlike the UK's unitary system, where tax administration is centred in HMRC, the federal nature of the Nigerian tax system means that the responsibility for the administration of taxes is shared between the FIRS, representing the federal government, and the Inland Revenue Service of the respective state governments. In 1993, the FIRS was created by the Finance (Miscellaneous Taxation Provisions) Act No 3 of 1993 as an operational arm of the Federal Board of Inland Revenue (itself established under the Income Tax Ordinance of 1958). However, its history can be traced to the Nigerian Inland Revenue Department 1943, a scion of the Inland Revenue Department of Anglophone West Africa.¹⁵⁹

While the FIRS handles the taxation of the profits of companies, including those engaged in the oil and gas industry, the state Inland Revenue Service administers the tax policies and laws applicable to unincorporated businesses. This amplifies the importance of the structure of the business for tax purposes as companies are likely to have more interaction with

¹⁵⁵ See *Lakanmi v Attorney-General Western Region* (1970) 6 NSCC 143; *Attorney General Ogun State v Attorney General Federation* (1982) 13 NSCC 1, 35.

¹⁵⁶ See Item 59 of Pt 1 of the Second sch, CFRN.

¹⁵⁷ Electoral Act 2010, s 69.

¹⁵⁸ Commissioners for Revenue and Customs Act 2005, s 5.

¹⁵⁹ See, FIRS, 'History of the FIRS' <<http://www.firs.gov.ng/aboutus/Pages/History-of-FIRS.aspx>> accessed 16 November 2014.

the FIRS than partnerships or sole proprietorships. However, there is still a lack of clarity as to which body has the power to charge and collect consumption taxes, including VAT. The federal government asserts that the FIRS has the exclusive responsibility to collect consumption taxes including VAT. This argument is based on the interpretation of the Value Added Tax Act (section 40) which places this responsibility on the FIRS, and in the opinion of the federal government, covers the field. The Supreme Court in *Aberuagba v AG Ogun State*¹⁶⁰ upheld this argument while declaring that sales tax by a state government was invalid. The Federal High Court in *Mama Cass Restaurant Limited & 2 Ors v Federal Board of Inland Revenue and Attorney General of Lagos*¹⁶¹ also held that VAT should be remitted to the FIRS.

Tax administrators communicate with businesses in order to ensure the latter's compliance with tax laws and policies. They also share their experience of the practical issues affecting the implementation of tax policy and law with tax policy- and law-makers. As a result, tax administrators must not only be experts in tax law and policy but must also be well aware of the factual circumstances arising from the activities of businesses relevant to the application of these laws and policies.

The main legal interest of tax administrators as shaped by their duty is to ensure that tax laws and policies are complied with. This does not equate at all times to ensuring that the maximum amount of tax is collected. The laws empowering tax administrators often confer on them broad discretion regarding the way and manner they enforce tax policies and laws (by collecting taxes). In line with these powers, the tax administration in different jurisdictions often issue guidance and statement of practice especially in areas where the law is ambiguous or difficult to apply. However, these communicative actions must not flout the express provisions of the law if they are to retain their legal validity.¹⁶² In *Global International Drilling Corporation v FIRS*,¹⁶³ the Tax Appeal Tribunal (TAT) in Nigeria held that a circular purportedly explaining a provision of the law cannot override the clear meaning of the law. This affirms the point that such communications would only be valid if they were in accordance with the law.

As Lord Hoffmann explained regarding the UK situation in *R (on the application of Wilkinson) v Inland Revenue Commissioners*:¹⁶⁴

¹⁶⁰ *Aberuagba v AG Ogun State* (1985) 3 NWLR 260.

¹⁶¹ *Mama Cass Restaurant Limited & 2 Ors v Federal Board of Inland Revenue and Attorney General of Lagos* (2010) 2 TLRN 1.

¹⁶² See *Campbell Connelly & Co Ltd v Barnett (Inspector of Taxes)* [1992] STC 316, 321.

¹⁶³ *Global International Drilling Corporation v FIRS* (2013) 12 TLRN 1.

¹⁶⁴ *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30.

This discretion [conferred on the HMRC by section 5 of the Commissioners for Revenue and Customs Act 2005] enables the Commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time ... It does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant.

Many tax authorities have a dedicated sub-department for dealing with large businesses in consideration of the huge turnover and the different risk profile of these businesses. In Nigeria, for instance, the Large Tax Office was established in 2004 to administer the tax matters of large taxpayers in accordance with this global trend. Large taxpayers constitute 10-15% of business taxpayers yet contribute 85-90% of the total tax revenue generated.¹⁶⁵

Businesses communicate more with tax administrators than any other actor representing the tax system. This is partly due to the fact that businesses are under a legal duty to interact with tax administrators. No similar duty exists with regard to the other actors representing the tax system.

2.6.8 Arbiters

Arbiters adjudicate on disputes between businesses and the actors within the tax system. These disputes may be legal or factual. A legal dispute is a disagreement concerning the status of a law or policy. A factual dispute, on the other hand, is a disagreement over the facts or events to which laws or policies will be applied. It is implicit in the nature of their role that they must be independent of the disputing parties and subject matter, as well as possessing clear tools and processes for determining the applicable law and facts.

There are three main arbiters in the tax system of many jurisdictions. They are tax administrators, tribunals and courts.

2.6.8.1 Tax Administrators

Most tax disputes arise between tax administrators and businesses during the process of compliance. Tax administrators of various jurisdictions have internal procedures for dealing with these disputes. These internal processes chaired by a special group of individuals within the tax administration are usually the first port of call when a dispute arises. Also, a majority of disputes are resolved through these internal means. A guiding factor in the communications engaged at this stage is the need to avoid the considerable cost and time which would be expended if the dispute escalated beyond this stage. Therefore, both businesses and tax

¹⁶⁵ Okauru (n 139) 35.

administrators are more likely to ensure that disputes are settled at this stage. Nevertheless, since the Communication should be for the purpose of compliance, the negotiation of rights should not feature at this stage. However, the temptation to negotiate is considerable owing to the likely unity of interest of the parties to avoid the escalation of the dispute.

Compared to the other actors dealing with tax disputes within the tax system, tax administrators are the least independent. This may cause some businesses to be dissatisfied with the end result of the process when the decision is not in their favour. Tax administrators are unlikely to proceed with the dispute where their internal process of adjudication produces a result that is not in their favour.

2.6.8.2 Tribunals

Where the internal dispute resolution process fails to appease both parties, the dispute is often referred to an administrative tribunal. The tribunals are more structurally independent from the tax administration than the internal process of adjudication. Concern about time and cost plays a major role in shaping the procedures of tax tribunals. The inclusion of tribunals in the process of adjudication also caters for concerns about limited access to court. Hence, the processes at tribunals are usually less formal and complex than courts. As a result of the simplification of these processes, a taxpayer is less likely to need expert representation by a legal practitioner to access tribunals. Order 5, Rule 1(a) of the Tax Appeal Tribunal (Procedure) Rules 2010 (Nigeria) provides that: ‘An appellant may appear for himself in proceedings before the Tribunal.’ Tribunals also enable adjudication by experts in tax law and accounting as well as other relevant professions. This distinguishes it from the courts which are mainly chaired by legal professionals who may or may not be experts in taxation.

In Nigeria, the TAT was created in 2007 to replace the Body of Appeal Commissioners which formerly heard appeals from the internal dispute resolution process within the tax administration. The tribunal currently has six zones across the country. The TAT has better structural independence than the Body of Appeal Commissioners. One major challenge faced by the TAT is the uncertainty surrounding its jurisdiction to entertain tax disputes. This uncertainty is due to conflicting decisions by the Federal High Court in Nigeria on this issue. In both cases, the court was called upon to determine whether the jurisdiction of the TAT conferred by the Federal Inland Revenue Service (Establishment (Act) 2007 (FIRSEA) conflicts with that of the Federal High Court as conferred by the Nigerian Constitution. In the event of such a conflict, the jurisdiction of the TAT would be null and void. In *Nigerian*

National Petroleum Corporation v Tax Appeal Tribunal & Ors,¹⁶⁶ the Federal High Court held that the TAT is an administrative tribunal and its jurisdiction does not conflict with that of the Federal High Court. In *TSKJ II Construces Internacionals Sociedade LDA v FIRS*,¹⁶⁷ the Federal High Court held that the TAT is a court and that its jurisdiction conflicts with that of the Federal High Court.

On the one hand, opponents of the TAT argue that section 251(1) (a) and (b) of the Nigerian Constitution confers jurisdiction on the Federal High Court over tax disputes to the exclusion of any other court. Since the TAT is deemed to be a court by the FIRSEA,¹⁶⁸ it is arguable that it is excluded from entertaining tax disputes by the Constitution. Also, the jurisdiction conferred on the Federal High Court by the Constitution under section 251 is original and not appellate. Hence, the jurisdiction of the Federal High Court will be usurped even where appeals from the TAT go to it.

On the other hand, proponents of the TAT argue that unlike other equivalent provisions in the Constitution,¹⁶⁹ section 251 only excludes courts and not tribunals such as the TAT. The fact that the TAT is deemed to be a court by the FIRSEA suggests that, in substance, the TAT is not a court. Most importantly, the Supreme Court of Nigeria has impliedly confirmed the status of a predecessor to the TAT as a mere administrative tribunal.¹⁷⁰ Thus, the jurisdiction of the TAT does not conflict with that of the Federal High Court under the Constitution. The uncertainty over the jurisdiction may adversely affect the willingness of both tax officials and taxpayers to have recourse to the TAT in the event of a dispute.

2.6.8.3 Courts

The courts are a more formal avenue for tax dispute resolution and operate within the judicial arm of government. Where a party is not satisfied with the decision of the Tribunals, they may refer the dispute to a court. Nigeria practises a common law system based on the doctrine of *stare decisis*.¹⁷¹ This doctrine, literally meaning ‘the decision should stand’, dictates that lower

¹⁶⁶ *Nigerian National Petroleum Corporation v Tax Appeal Tribunal & Ors* (2014) 13 TLRN 39.

¹⁶⁷ *TSKJ II Construces Internacionals Sociedade LDA v FIRS* (2014) 3 TLRN 1.

¹⁶⁸ See FIRSEA, Fifth sch, para 20(3) which states that ‘any proceeding before the Tribunal shall be deemed to be a judicial proceeding and the Tribunal shall be deemed to be a civil court for all purposes’.

¹⁶⁹ See, for example, CFRN (n 144) s 285(1).

¹⁷⁰ *Egyamwense v Amaghizemwen* (1993) 9 NWLR (Pt 315) 1. This confirmation is implied from the assertion of the court in this case that a party must exhaust all administrative remedies, including recourse to tax tribunals, provided by law as conditions precedent to instituting a legal action. See also *Benin Rubber Producers Ltd v Ojo* (1997) 9 NWLR (Pt 521) 388, 403, paras E-F, (Iguh JSC); *Ocean & Oil Ltd v Federal Board of Inland Revenue* (2011) 4 TLRN 135.

¹⁷¹ See *Ossom v Ossom* (1993) 8 NWLR (Pt 314) 678.

courts are bound to apply the reason behind previous decisions of higher courts in factual circumstances that are not distinguishable.

Section 251 of the CFRN bestows exclusive jurisdiction on the Federal High Court to hear disputes concerning the revenue of the federal government as well as the taxation of companies. Appeals from the TAT lie to the Federal High Court. This is distinct from the procedure in the UK.

In the UK, a two-tier tribunal system was introduced in 2009 made up of a First Tier Tribunal and an Upper Tier Tribunal. An appeal from the First Tier Tribunal lies to the Upper Tier Tribunal on points of law alone. An appeal from the decision of the Upper Tier Tribunal also lies to the Court of Appeal on points of law alone. Hence, the fact finding duty lies predominantly with the First Tier Tribunal. The restriction of the Upper Tier Tribunal and courts to points of law implies that they may only overturn the decision of the First Tier Tribunal where the said decision contains a fundamental error of law or where the decision is so factually incorrect that no reasonable tribunal would have come to that decision based on the applicable law.¹⁷²

In Nigeria, if the law that created the tribunals had provided that appeals from the tribunals skipped the Federal High Court to the Court of Appeal, the said law would conflict with section 251 of the CFRN and would therefore be null and void to the extent of this inconsistency. This is because the jurisdiction of the Federal High Court as stipulated in the Constitution would be usurped.¹⁷³

The FIRSEA stipulates that an appeal from the TAT to the Federal High Court will lie on point of law alone.¹⁷⁴ However, it has been the practice of the Federal High Court to treat ‘appeals’ from the tribunals as matters of first instance by entertaining both factual and legal disputes despite the appellation of the suit.

Strictly speaking, the duty of the courts is not to create new law or instigate fresh communicative actions but to interpret and apply extant laws to the circumstances before them.¹⁷⁵ This is particularly the case with tax laws as these involve a crucial balancing of interests that affect the wellbeing of the state. Tax law-making should be undertaken solely by

¹⁷² The principle is found in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14.

¹⁷³ See *Stabilini v Federal Board of Inland Revenue* (2009) 13 NWLR (Pt 115) 200; and *Cadbury v Federal Board of Inland Revenue* (2010) NWLR (Pt 117) 56.

¹⁷⁴ Fifth sch to the FIRSEA 2007, para 17(1).

¹⁷⁵ See *Araka v Egbue* [2003] MJSC 17; *AG Kano State v AGF* [2007] 3 SC (Pt 1) 59; *Adewunmi v AG Ekiti State* [2002] 2 NWLR (Pt 751) 474.

actors with the mandate to represent the state as there should be ‘no tax without representation’. Hence, the CFRN bestows exclusive powers to enact tax laws on the National Assembly.

Access to courts is commonly more difficult for taxpayers than the tribunals or the internal dispute resolution process primarily due to the considerable costs and delay involved amongst other factors. Hence, the courts are usually used as a last resort by taxpayers for disputes that have not been dealt with to the satisfaction of the parties by other arbiters.

Through its communicative actions, the court may give instructions to the actors on how best to comply with extant laws or policies, thereby furthering compliance, or review actions already undertaken by actors in order to determine their compliance or non-compliance with the extant laws or policies, that is, communicate for the purpose of scrutiny. For instance, in the US, the Supreme Court in *Pollack v Farmers Loan & Trust Co*¹⁷⁶ struck down a law imposing tax on property income on the ground that such direct taxes had to be levied in proportion to the population of each state. This led to the Sixteenth Amendment in 1913 that expunged the requirement that income tax should be proportionate to population.¹⁷⁷

2.6.9 Other Actors

The above list of main actors that may operate at the terminals of the tax system is not exhaustive. At least three other important actors (media, civil society and international organisations) have not been discussed. Not only do these three actors contribute to the interactions between business and the tax system but they also influence the extent to which corruption may sustain itself in this relationship.

The media is a tool through which businesses and the terminals of the tax system communicate. Businesses may express their views about the tax system and their possible reactions to changes made through the media. Similarly, tax laws, policies and decisions are often communicated to businesses through the media.

With or without prompting by others actors in the two-way relationship, the media may engage in analytical or investigative journalism targeted at explaining or exposing aspects of the two-way relationship. Thus, the activities of the media aid awareness where the information disseminated is true or otherwise constitutes a major source of distortions. The media may also

¹⁷⁶ *Pollack v Farmers Loan & Trust Co* (1985) 158 US 601.

¹⁷⁷ See Joseph Edrey, ‘Constitutional Review and Tax Law: An Analytical Framework’ (2007) 56(5) American University Law Review 1187; Bruce Ackerman, ‘Taxation and the Constitution’ (1999) 99 Columbia Law Review 1.

protest against or condemn certain actions by actors in acting as a quasi-representative of the conscience of the people or a section of the people.

However, the actors more likely to be regarded as true representatives of the people's conscience are civil society organisations. The voices of these organisations have seemingly grown louder in recent times against the backdrop of the painful government decisions occasioned by austerity, widening inequality, and the tax avoidance activities of multinational and large companies. These organisations have lobbied rule-setters, run campaigns about aspects of the two-way relationship, and challenged actions of tax officials in court – often acting as meddlesome interlopers. In contrast with the media, the seeming benevolence of civil society organisations may conceal or discourage a critical examination of the interests they serve. However, Khan¹⁷⁸ has called for the scrutiny of these interests so as to avoid the potential distortions of historical reality by the fixed distribution of benevolence and impropriety between the civil society, the state and multinational companies.

International organisations such as the UN, OECD and IMF have heavily influenced domestic and international rule-setting regarding both taxation and corruption. This justifies their summary inclusion as main actors in the two-way relationship.

2.7 Applying Actor Network Theory

The previous section provides a superficial analysis of the communication link and uncovers as a result three major components of this link. These components are: businesses, the terminals of the tax system and Communications. This is akin to describing an airline transportation link as composed of passengers, airports and planes which would suffice in many instances.

However, a deeper analysis of the communication link is required since the goal is to properly understand how corruption might sustain itself in the two-way relationship between business and the tax system. This section applies ANT in order to achieve the required level of analysis. As a result, it unearths the operations of certain less prominent networks of human and non-human actors behind the conspicuous components of the communication link.

¹⁷⁸ See Mushtaq Khan, 'The Role of Civil Society and Patron-Client Networks in the Analysis of Corruption' in Sahr John Kpundeh and Irene Hors (eds), *Corruption & Integrity Improvement Initiatives in Developing Countries* (United Nations Development Programme 1998) 111.

2.7.1 Actor Network Theory

ANT, also known as ‘the sociology of translation’,¹⁷⁹ explores ‘the processes by which organisations and other phenomena are created and sustained’.¹⁸⁰ Its principal argument is that every phenomenon is a product of the ‘heterogeneous engineering’ of a collection of human and non-human actors.¹⁸¹ Thus, ANT is sometimes referred to as the ‘semiotics of materiality’¹⁸² because it applies the concept that things are produced in associations.¹⁸³

These associations or networks are established by actors who ‘co-opt’ or ‘enrol’¹⁸⁴ other actors into them. However, these other actors possess their own endogenously generated interests which may differ from the overarching interest of the network. The existence of these private (and potentially converging or conflicting) interests may create some form of resistance which may continually threaten to destabilise or disintegrate the entire network.¹⁸⁵

Networks are therefore transient and their durability dependent on the stable participation of actors despite their private interests. The durability of a network also depends on its constituting materials. However, durability is an effect (an actor) and is therefore an unstable product of a heterogeneous network rather than a permanent state of being.¹⁸⁶

ANT’s definition of the term actor distinguishes it from other sociological theories which limit the term to individuals, organisations or a collection of one or both. It argues that anything (human beings, artefacts, texts, money, culture and so on) can be actors as long as they are capable of action. One possible criticism of ANT is its failure to clearly define the term actor. This term has been defined as anything that does things.¹⁸⁷ It has also been defined as a thing that possesses character.¹⁸⁸ What is clear is that the scope of what can be an actor is extremely broad.

¹⁷⁹ Michel Callon, ‘Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St. Bieue Bay’ in John Law, *Power, Action and Belief: A New Sociology of Knowledge?* (Routledge 1986) 196.

¹⁸⁰ John Law, ‘Notes on the Theory of the Actor Network: Ordering, Strategy and Heterogeneity’ (Centre for Science Studies, 2003); See also Latour (n 11).

¹⁸¹ Law (n 180) 5.

¹⁸² See John Law, ‘Actor Network Theory and Material Semiotics’ (25 April 2007)

<<http://www.heterogeneities.net/publications/Law2007ANTandMaterialSemiotics.pdf>> accessed 5 July 2015.

¹⁸³ John Law, ‘After ANT: Complexity, Naming and Topology’ in John Law and John Hassard (eds), *Actor Network Theory and After* (Oxford University Press 1999) 4.

¹⁸⁴ Law (n 180) 5.

¹⁸⁵ *ibid.*

¹⁸⁶ Law (n 180) 6.

¹⁸⁷ Bruno Latour, ‘The Sociology of a Few Mundane Artefacts’ in Wiebe Bijker and John Law (eds), *Shaping Technology/Building Society Studies in Socio-technological Change* (MIT Press 1992) 241.

¹⁸⁸ Madeline Akrich and Bruno Latour, ‘A Convenient Vocabulary for the Semiotics of Human and Non-Human Actors’ in Bijker and Law (n 187) 259.

However, things do not become actors by their mere existence. Their status as actors is derived from their participation in a network. As described by Law, ‘actors are network effects’.¹⁸⁹ This participation transforms them from mere actants to actors and imparts on them subjectivity and consciousness.¹⁹⁰ The identity and strength of an actor also lies in the heterogeneity of its network.

ANT argues that an actor, being a phenomenon, is itself a network comprising a heterogeneous assemblage of other actors.¹⁹¹ This creates the interesting enigma in which actors are networks and networks are actors. Consequently, new networks, being composed of actors, can only be built from existing networks.¹⁹²

In a new network, pre-existing actors represent the network from which they originate and are therefore intermediaries. An intermediary consists of anything that ‘passes between actors in the course of relatively stable transactions’¹⁹³ and may be humans, artefacts, texts or money.¹⁹⁴ Intermediaries are the principal tools through which an actor co-opts or enrolls other actors into its network, achieves action at a distance and diminishes resistance.

The ability of an actor to predict the interests of other actors which it intends to co-opt or enrol into its network is crucial. This will facilitate the fashioning of an intermediary (or intermediaries) capable of convincing these prospective actors that it is in their best interest to be part of the network.¹⁹⁵

An intermediary may be ‘ignored, altered, derailed, traduced, supplemented or appropriated’ by prospective actors in accordance with their interests.¹⁹⁶ However, these distortions can be counteracted by surveillance, control and the ‘interpretive inflexibility’ of the intermediary in question.¹⁹⁷

¹⁸⁹ Law (n 183) 5.

¹⁹⁰ Bettina Lange, ‘Social Dynamics of Regulatory Interactions: An Exploration of Three Sociological Perspectives’ in Michael Freeman (ed), *Law and Sociology: Current Legal Issues*, Vol 8 (Oxford University Press 2006) 149.

¹⁹¹ Michel Callon, ‘Society in the Making: The Study of Technology as a Tool for Sociological Analysis’ in Wiebe Bijker and others (eds), *The Social Construction of Technological Systems: New Directions in the Sociology and History of Technology* (MIT Press 1987) 9.

¹⁹² Felix Stalder, ‘Actor-Network-Theory and Communication Networks: Towards Convergence’ (1997) <http://felix.openflows.com/html/Network_Theory.html#6> accessed 5 July 2015.

¹⁹³ Bijker and Law (n 187) 25.

¹⁹⁴ Michel Callon, ‘The Dynamics of Techno-Economic Networks’ in Rod Coombs, Paolo Saviotti and Vivien Walsh (eds), *Technological Change and Company Strategies: Economic and Social Perspectives* (Harcourt Brace Jovanovich 1992).

¹⁹⁵ Michel Callon and John Law, ‘On Interests and their Transformation: Enrolment and Counter-Enrolment’ (1982) 12 *Social Studies of Science* 617.

¹⁹⁶ Silvia Gherardi and Davide Nicolini, ‘To Transfer is to Transform: The Circulation of Safety Knowledge’ (2000) 7(2) *Organization* 335.

¹⁹⁷ *ibid.*

With increasing stability, the participating actors in a network become less visible. At a point, the network becomes ‘punctualised’ or ‘black-boxed’¹⁹⁸ as a result of which observers will only notice a principal actor (as well as its inputs and outputs) rather than the heterogeneous assemblage that forms its substance. The stability of the resulting black-box is protected by the cost of re-opening it.

ANT recommends that the process by which actors are co-opted or enrolled into a network and their private interests ordered to attain the facade of stability should be studied through descriptive (thick) empiricism.¹⁹⁹ This process is termed ‘translation’.²⁰⁰

2.7.2 Actor Network Theory and the Communication Link

Rather than focussing on businesses, the terminals and Communications, ANT suggests that equal emphasis is placed on the internal and external personnel (such as tax accountants, tax officials, judges, legislators, tax lawyers, clerks, receptionists and lobbyists) as well as the non-human actors (such as notices of assessment, notices of objection to assessment, files, pleadings, addresses, law reports, computers, offices, culture, corruption and ethnic bias) and the roles they play in enabling (or hindering) the interaction between business and the tax system.

ANT reveals that businesses, the terminals and Actions are not just punctualised or black-boxed in the communication link but are also accorded a state of stability which should be questioned at the least. For instance, is it apt to classify the National Assembly (Parliament or legislature) as rule-setters in situations where they merely rubber stamp the policies put before them by the governing party? Are they factually more important than the governing party without whom the law would not exist in its current form, or even the mace or the official gazette – where these non-human actors are necessary for the law to take effect? Where businesses have the power to determine the policies, the laws, their tax liability and the outcomes of decisions of court, is it not apt to regard these businesses as de facto law-makers, policy-makers, tax administrators and arbiters? Is the tax authority not the de facto tax law-maker, tax policy-maker, and arbiter (a sort of one-stop shop) in situations where the tax reality of businesses is wholly determined by the tax authority? ANT shows that these ‘principal

¹⁹⁸ Latour (n 4); See also Michel Callon and Bruno Latour, ‘Unscrewing the Big Leviathan: How Actors Macro-Structure Reality and How Sociologists Help Them To Do So’ in Karin Knorr-Cetina and Aaron Cicouvel (eds), *Advances in Social Theory and Methodology Towards and Integration of Micro and Macro-Sociology* (Routledge 1981).

¹⁹⁹ Troels Krarup and Anders Block, ‘Unfolding the Social: Quasi-Actants, Virtual Theory, and the New Empiricism of Bruno Latour’ (2011) 59(1) *The Sociological Review* 42, 43.

²⁰⁰ See Callon and Law (n 195).

actors' are, in fact, transient networks battling to maintain order amidst the potentially converging or conflicting interests of the actors in their Constitution.

ANT reveals that the weight or reliability of an Action is not fixed. It is ephemeral and contingent upon the heterogeneity of its network. A law, for example, is only binding due to the network it represents. This law may lose its binding nature (that makes it superior to policy) with the loss of the support of the courts, the police force or other crucial actors in its network.

Prior to its formulation, a prospective Action is vulnerable to the actors that pervade the site of its formation. It must therefore secure the participation of texts, discourses, persons, institutions, laws and various other actors in its network in order to safeguard its existence. The number of actors which must be so secured depends on the nature of the intended task. The more difficult the task, the more actors an Action will need to co-opt to ensure its success. On creation, the Action is dispatched as a black-box and its stability is protected by the costs of re-opening it.

However, this punctualised Action may be re-opened as it transfuses through the terminals in its communication route, thus exposing its weakness to the vagaries of the actors lurking in these terminals. For instance, tax officials and arbiters may scrutinise the text of a policy or law to determine its certainty, legality and enforceability. The extent and result of this scrutiny may be influenced by the presence (or absence) of certain actors which may not have been present when the policy or law was created. This scrutiny may lead to the loss of participating actors which are important to the success of the network which an Action represents.

An Action may gain weight as it transfuses through these terminals by securing the allegiance of more actors, thereby enlarging its ranks. For instance, a law gains additional weight where its legality and scope has been confirmed by a decision of the dispute resolution terminal. This law is also an integral actor and intermediary in the decision made by this terminal.

ANT also shows that Actions may be dispatched as intermediaries through which an actor may attempt to attain influence at a distance. This dispatch may be made possible by the presence (or absence) of certain actors in the network of the said Action. Securing compliance²⁰¹ from businesses, for example, requires the heterogeneous engineering of an Action comprising other actors such as laws, institutions, procedures, money, infrastructure, culture, education, businesses and humans targeted at convincing these businesses that it is in

²⁰¹ See Boll (n 9).

their best interest to partake in the network of compliance. An analogy can be drawn with the process by which scientists try to enrol journals into their network to ensure that their work is published.²⁰² The proper understanding of the interests of these businesses will aid the use of the right intermediaries to achieve this task.²⁰³

However, the recipient actors may ‘ignore, alter, derail, traduce, supplement or appropriate’²⁰⁴ an Action dispatched to effect influence at a distance in line with their own interests. Consequently, this intermediary may fail to achieve its goal. Influence is therefore a product of a transient and heterogeneous assemblage of actors which include the actors in the terminals of the tax system and businesses alongside the various intermediaries through which these actors are co-opted into the network. Influence is also an actor and an intermediary in the fleeting network that produces change.

In sum, ANT unearths a complex web of interconnected actor-networks behind the communication link which must be studied empirically so as to understand their creation, expansion and durability. ANT also provides a platform through which one or more of these actors can be isolated and examined so as to determine their individual or collective roles in the network that forms the two-way relationship.

2.8 Issues Affecting the Communication Link

There are four issues which affect the efficacy of the communication link between businesses and the tax system and consequently the responsiveness of both institutions to each other. They are distortion of Communication, deficiency in awareness, restriction of access and inaction. These issues are discussed below.

2.8.1 Distortion of Communications

Distortion in this thesis means the alteration of a Communication as it travels through its communication route. This may involve the alteration of the action or utterance, the information contained in the action or utterance, or the understanding of this information. It may lead to imperfect communication which may affect the ability of an Action to have its desired or anticipated effect. The likelihood of distortion increases with every additional

²⁰² See Callon and Law (n 195).

²⁰³ See Valerie Braithwaite, ‘Dancing with Tax Authorities: Motivational Postures and Non-Complaint Actions’ in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate 2003).

²⁰⁴ Gherardi and Nicolini (n 196) 335.

terminal in the communication route as well as with the passage of time. A distortion may either be deliberate or non-deliberate.

2.8.1.1 Deliberate Distortion

A distortion will be deliberate where it results from the exercise of power by an actor with the express or implied intention to alter the Communication. Deliberate distortions are normally attributed to the terminals or businesses rather than the true perpetrators due to the punctualisation of the former. For instance, it is common for a deliberate distortion to be described as a decision of a court or an Act of Parliament. This has the effect of shielding the real actors and their private interests from scrutiny.

The ability of an actor to distort a Communication deliberately primarily depends on the content and practicalities of the powers conferred on the said actor by its network. While legislators acting as a network, for example, usually have the inherent power (and authority) to modify bills presented to the tax law terminal in the process of transforming them into law, the authority (and to a lesser extent, the power) of tax officials or arbiters to alter the law which they are meant to interpret or apply is normally severely constrained.

Generally speaking, tax officials do not have the authority to distort the law when applying it to a given situation. However, they may deliberately distort the law by exercising their power to do so. They may also deliver a new independent Action (such as granting extra-statutory concessions or reducing their policing of the law) to businesses which may dampen the effect of the law. In this circumstance, the law remains undistorted and may be applied in this undistorted form to other businesses or to the same business on the withdrawal of the concession or a reversion in the policing of the law.²⁰⁵

In theory, tax arbiters in common law jurisdictions can only deliberately alter a law to the extent that it is inconsistent with a superior law such as the Constitution. In such situations, these actors may extinguish this law by declaring it null and void.²⁰⁶ In reality, however, their networks often confer on them the power to distort the law deliberately even where they are not authorised to do so. However, this should be distinguished from situations where arbiters,

²⁰⁵ However, this withdrawal or reversion may be subject to the rule of legitimate expectation. See *Ex parte Unilever* and *Ex parte MFC Underwriting Agencies Ltd* cases (cf *Al Fayed and Others v Advocate General of Scotland* [2004] Scot SC 278 where the HMRC was held to be entitled to renege on an agreement which was made in contravention of their statutory powers in relation to the collection of taxes).

²⁰⁶ See *Philips Electronics* (n 103); See also *Stabilini Visinoni Ltd v FBIR* (2009) 13 NWLR (Pt 1157) 200 and *Cadbury (Nigeria) Plc v FBIR* (2010) 2 NWLR (Pt 1179) 561 in which the Nigerian Court of Appeal declared the law establishing the VAT tribunal inconsistent with the Nigerian Constitution.

exercising a penchant for judicial activism, create new laws which affect the application of an extant law.²⁰⁷ These new laws constitute fresh Actions delivered to businesses through a direct communication route.

Deliberate distortions may result from the manner in which an actor exercises its powers. A policy or law, for example, may confer on tax officials the power to decide who to audit or when to grant extra-statutory concessions. This policy or law may be distorted where this discretionary power is used as a tool for victimisation or to acquire economic rent, for example. Here, it is important to distinguish between an express grant of discretion and discretion arising from the ambiguity of the law. While distortions arising from the former are more likely to be deliberate, those arising from the latter are more likely to be non-deliberate. A General Anti-Avoidance Rule, for example, may confer discretionary powers of the former kind on tax arbiters. This Rule may be deliberately distorted by the manner in which it is applied by these actors.²⁰⁸ In contrast, an arbiter determining whether an act of a business constitutes tax avoidance by examining the meaning of the word ‘payment’ which may have been used ambiguously in the law will be exercising discretion of the latter kind which may lead to non-deliberate distortion.²⁰⁹

The power of an actor to alter a Communication may be constrained by other actors such as autonomy or corruption. Tax arbiters, for example, may be hesitant to declare a law null and void where they lack independence from the actors responsible for its creation.

Businesses may also play a role in the deliberate distortion of Communications through the network of actors through which they interact with the tax system. Acting through professionals such as lawyers, accountants, economists and the press, businesses may supply information to the terminals of the tax system which have been doctored to enhance their private interests. Businesses may also lobby legislators (or any other actor) to secure the deliberate distortion of a bill (or any other Action) in a manner that suits them.

Furthermore, businesses may engage in ‘creative compliance’.²¹⁰ This involves the calculated act of taking advantage of the loopholes in the law. Here, businesses comply with

²⁰⁷ For instance, the business purpose doctrine introduced by *Gregory v Helvering* 293 US 465 (1935) or the new approach in *WT Ramsay v IRC* [1982] AC 300 and *Furniss v Dawson* [1984] AC 474 (before its curtailment in *Barclays Mercantile Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51).

²⁰⁸ See Graham Aaronson, *A Study to Consider Whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System* (The Stationery Office 2011).

²⁰⁹ See *MacNiven v Westmoreland Investments Ltd* [2011] UKHL 6 (Lord Hoffmann).

²¹⁰ Doreen McBarnet, ‘When Compliance is Not the Solution But the Problem: From Changes in Law to Changes in Attitude’ in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate 2003).

the letter of the law in a manner that defeats or contravenes ‘the evident intent’²¹¹ behind its enactment. ‘Creative compliance’ is commonly referred to as tax avoidance. This may lead to deliberate distortion of the law, especially where this act by businesses is accepted by the tax administration or dispute resolution terminal.

Deliberate distortions are the result of an assemblage of human and non-human actors rather than the sole agency of humans. The legislators, tax arbiters, tax officials and businesses referred to above have been punctualised due to the relatively stable participation of the other actors in the network which they represent. These human actors are mere ‘actants’ without their mace, documents, files, halls, rules, and clerks, to name a few complicit actors.

2.8.1.2 Non-Deliberate Distortion

A distortion will be non-deliberate where it occurs in the absence of an express or implied intention to alter a Communication. Non-deliberate distortions are consequences of the attendant problems of transferring information between actors at the different terminals of the tax system. These distortions take place during the process of encoding, decoding or recoding Actions.

Distortions while encoding Actions are common in the tax system due to the difficulties involved in encapsulating an intended goal in a manner that excludes non-intended goals. Even where an Action is properly encoded, the resulting code may be very complex and highly susceptible to misinterpretation by a receiving actor. Such misinterpretations in the process of decoding may lead to non-deliberate distortions. The Action may have to be re-coded in a different language or form by an actor. This re-coding may also result in the non-deliberate distortion of the Action.

Both human and non-human actors may be complicit in non-deliberate distortions. The storage process (files, computers, papers) and officers, for example, may be equally responsible for the distortions that result from the inaccurate re-coding of Actions.

Some Actions are more susceptible to non-deliberate distortions than others. On one end of the spectrum, a change in the tax rate is easy to encode, decode and recode. On the other end of the spectrum, a law targeted at closing a tax loophole may be extremely difficult to encode, decode and recode, and therefore has a higher tendency to be distorted.

²¹¹ See *IRC v Willoughby* [1997] STC 995, 1004 (Lord Nolan).

2.8.1.3 Curbing Distortions

Distortions may be curbed where the Action is ‘interpretively inflexible’.²¹² However, interpretive inflexibility like durability is not a state of being but a product of a transient network of actors. For instance, while a constitutional provision which specifies the tax rate as 10% may seem interpretively inflexible, tax officials and tax practitioners working together with other actors such as texts, discourses, money, laws, conventions and culture may repeatedly distort it. Therefore, the interpretive inflexibility of an Action can only be sustained by the maintenance of a network of actors that guards against its distortion.

It is tempting to enthrone the actors at the dispute resolution terminal as ‘the guardians’²¹³ of the link’ whose duty it is to ensure that an Action is delivered in its pure form by the actors in its communication route. However, the actors at the dispute resolution terminal may not adequately perform this role for the following reasons. Firstly, the dispute resolution terminal would only come into the picture where a distortion leads to a dispute which is brought before it for adjudication. This only happens in a small percentage of cases. Secondly, even where a distortion is litigated (or otherwise brought before the dispute resolution terminal for adjudication), the ability of the actors within the dispute resolution terminal to affirm the intended meaning of an Action is questionable. This is due to the legal methods (actors) which may be employed by the dispute resolution terminal in resolving disputes.

For instance, the actors at the dispute resolution terminal in common law jurisdictions are known to employ either a literal or purposive method of interpreting laws. The actual approach adopted differs across jurisdictions and over time. Where they adopt a literal method, these actors will accord the legislation its ordinary and grammatical meaning – as long as that meaning does not lead to absurdity – notwithstanding the fact that this grammatical meaning may be at variance with the ‘true intent’ behind its enactment.²¹⁴

Even where these actors purport to adopt a purposive approach to interpreting tax statutes,²¹⁵ and therefore search for the intent of the legislators in passing the law, such intent is not always readily discernible. This is especially the case where tax avoidance techniques

²¹² Gherardi and Nicolini (n 196) 335.

²¹³ See Milton Seligson, ‘The Independence of the Judiciary: Appointing the Guardians’ (1991) 16(4) ILP 105.

²¹⁴ See, for example, *Inland Revenue Commissioners v Duke of Westminster* [1935] All ER 259; *Shell Petroleum Development Company of Nigeria v Federal Board of Inland Revenue* (1996) 8 NWLR (Pt 466) 256. Here, the intent of the Parliament is deemed to be contained in the wording of the legislation.

²¹⁵ See, for example, *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51.

have been employed.²¹⁶ In addition, the intent of the legislators may not tally with the idea behind its initiation by policy-makers (or its true originators).²¹⁷ Consequently, a purposive interpretation of a law by actors at the dispute resolution terminal may also distort it.

Ultimately, an Action may never or no longer achieve its goals due to the distortions it experiences as it circulates through the communication link, thus leaving its originators dissatisfied. In theory, this may lead to the instigation of a new Action with the accompanying hope that it will achieve the set goal.

2.8.2 Deficiency in Awareness

The efficacy of the interaction between businesses and the tax system via the communication link depends on the level of awareness which both institutions have of each other. The tax system should be fully aware of the existence and operations of all businesses within its jurisdiction. This will enable the exercise of better judgement on the part of the tax system when formulating and enforcing tax policies and laws.

Likewise, businesses should be aware not just of the existence of the various terminals of the tax system but also of the procedures for interacting with them. This will enable these businesses to interact effectively with the tax system, thereby enhancing the responsiveness of both institutions to each other. In ‘reality’, however, both the tax system and businesses are likely to be not sufficiently aware of the existence and operations of each other.

2.8.2.1 Awareness by the Tax System

The existence of businesses or business operations beyond the prying eyes of the tax system is somewhat inevitable. This lack of full awareness may cause the tax system to focus and consequently increase the burden on those businesses or business operations which are within its reach.

The extent of awareness by the tax system differs from society to society. Developing countries are more likely to have a larger shadow economy and consequently a broader range of businesses operating unobserved by the tax system. A study by Schneider showed that the average size of the shadow economy (as a percentage of official GDP) in 2002/03 in 96

²¹⁶ See Judith Freedman, ‘Interpreting Tax Statutes: Tax Avoidance and the Intention of the Parliament’ (2007) 123 LQR 53, 54.

²¹⁷ This problem may be mitigated where a recourse to ministerial statements is permitted in certain circumstances. Still, the use of such statements may not reveal the intent behind the enactment of the law. See, for example, *Pepper v Hart* [1993] AC 593; Aileen Kavanagh, ‘Pepper v Hart and Matters of Constitutional Principle’ (2005) 121 LQR 98, 121.

developing countries was 38.7%, in 25 transition countries 40.1%, in 21 OECD countries 16.3% and in 3 Communist countries 22.3%.²¹⁸ The tax systems in developed countries, on the other hand, are more likely to be unaware of the operations of businesses than their existence. Social, economic and political actors are largely responsible for the gap in awareness within and between countries.

The need for awareness differs amongst the actors in the tax system depending on their role. Tax officials require a high level of awareness of the existence and operations of businesses owing to the fact that they are charged with the responsibility of applying tax policies and laws on a regular basis to these operations. Policy-makers and law-makers require a reasonable level of awareness of the types of businesses in their jurisdiction and the kinds of operations they undertake as this will be instrumental in the process of formulating tax policies and enacting tax laws respectively.

However, the awareness requirement of tax arbiters is usually limited to the operations or a part of the operations of the businesses that are parties to a dispute before them. Nevertheless, the issue which tax arbiters may be called upon to determine may require these actors to be acquainted with the existence or operations of other businesses not party to the dispute. One such situation is where the issue for determination is whether a business applied the arm's-length price in a transfer pricing dispute.

Business, as a network comprising other actors such as tax experts, money, culture, laws, conventions, technology and globalisation (that is, as black-boxed), may aid the level of awareness by the terminals of the tax system by engaging in transparent operations such as complying with tax disclosure rules. Businesses may also hinder the awareness by the terminals of the tax system by engaging in tax avoidance and evasion practices such as transfer pricing, money laundering and the utilisation of offshore financial centres with bank secrecy laws. Tax avoidance and evasion are products of a transient network of actors comprising rules, laws, countries, practices, experts, monies, culture, offices, companies and so on.

The level of awareness which an actor in the tax system has of the existence or operations of businesses is the product of a transient network of human and non-human actors. For instance, where the dispute resolution terminal adopts an adversarial method of resolving disputes, their awareness of businesses and their operations is limited to the information supplied to them by the parties to the dispute. Usually, information is first supplied to the

²¹⁸ See Friedrich Schneider, 'Shadow Economies and Corruption All Over the World: What Do We Really Know?' (Kiel Institute for the World Economy, *Economics Discussion Papers*, No 2007-9, 2006).

lawyers by the parties to the suit or obtained by these lawyers through private investigation. This information is then screened by these lawyers before being reproduced in writs, pleadings and addresses. Their admissibility will thereafter be contested by references to rules and conventions as a result of which the information made available to the arbiters may be further limited. In the end, the amount of information available to the arbiters in this scenario is the product of a network comprising, at least, the following actors: businesses, lawyers, clerks, private investigators, writs, pleadings, addresses, rules and conventions (less the effect of deliberate and non-deliberate distortions).

2.8.2.2 Awareness by Business

Businesses can only actively interact with the tax system where they are aware of the existence of its terminals and their operations. Lack of awareness by businesses also affects the level of influence which businesses and the tax system can exert on each other.

In theory, the more successful a business is, the higher the prospect that the said business will be aware of the existence and operations of the terminals of the tax system. However, the size or success of a business depends on the number of actors it can amass within its network. Multinationals, for example, usually employ both internal and external experts as middlemen in their dealings with the various terminals of the tax system and are as a result well informed of both the existence and operations of these terminals. SMEs, on the other hand, are less likely to be informed of the existence and operations of the terminals due to the size of their networks.

Awareness by businesses may also vary from terminal to terminal. Businesses are more likely to be aware of the existence and operations of the tax administration terminal than any of the other terminals. This is because it provides greater scope for interaction between business and the tax system. Businesses are least likely to be aware of the tax policy terminal due to its usual lack of a fixed organisational structure and the expected low level of direct interaction between businesses and this terminal. Businesses are forced to interact with and therefore actively influence the terminals which they are aware of. This may lead to a disproportionate level of interaction between business and the terminals of the tax system.

The terminals of the tax system may through their practices enhance or hinder the awareness of their existence or operations by businesses. Publicity campaigns (actors), for example, conducted by the tax administration terminals are useful in informing business of both their existence and their operations. Where a terminal of the tax system is distant and

adopts practices that are secretive, the level of awareness which businesses may have of it or its operations will most likely be low.

Although the existence of the communication link is not affected by the levels of awareness which businesses and the terminals of the tax system have of each other, its usage is. Deficiency in awareness limits both the participants and the efficacy of participation in the interaction between the tax system and businesses, thus inhibiting the responsiveness of both institutions to each other.

2.8.3 Restriction of Access

Although restriction of access follows from awareness, both concepts are markedly different. Access as distinct from awareness refers to the ability of one institution to interact with the other where it is aware of the existence and operations of that other institution.

The two-way relationship between the tax system and businesses as facilitated by the communication link depends to a large extent on the access of both institutions to each other. In reality, however, while the tax system suffers from a restriction of access to business operations on the one hand, businesses suffer from restriction of access to the terminals of the tax system on the other. These restrictions affect their responsiveness to each other.

2.8.3.1 Access to Businesses

Restriction of access forces the tax system to interact with the aspects of the operations of businesses it can observe or to base its interaction on a fictional representation of such operations. This can be illustrated using the problems of imposing income tax on the operations of businesses.

The term 'income tax' implies that tax will be imposed on the income earned by businesses. This requires the maintenance of a network comprising actors which include in particular the income sought to be taxed. However, in order to co-opt this income into the 'right network', it is important to identify what it is, where it is located and who is responsible for it.

The immense difficulty involved in identifying the true economic income of businesses has forced actors within the terminals of the tax system in various countries to construct fictional models of income as the tax base.²¹⁹ These fictional models commonly involve a distinction between revenue and capital which bears no correlation with economic reality.²²⁰

²¹⁹ See, John Prebble, 'Ectopia. Tax Law and International Taxation' (1991) 5 BTR 383.

²²⁰ Prebble (n 219) 394.

For instance, section 27 (a) of the Companies and Income Tax Act 1990 (Nigeria) and section 53 of the Corporation Tax Act 2009 (UK) disallow the deduction of any expenditure of a capital nature. The term ‘capital expenditure’ was defined by Viscount Cave in *Atherton v British Insulated and Helsby Cables Ltd*²²¹ as follows:

When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of the trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

Ideally, income tax should be imposed on the net profits of a business earned through its lifetime. Based on a desire to tax observable operations of businesses, actors within the terminals of the tax system in various countries have constructed the income of these businesses as being earned annually even though this does not exactly reflect reality.²²² The resulting anomaly is mitigated through the grant of relief for losses.

These actors in many developed and developing countries are forced to further adopt a system of presumptive income taxation based on which the income of a business is derived by the application of some abstract criteria.²²³ Consequently, these constructs or intermediaries fashioned to identify income may co-opt an actor into an income tax network which is distinct from the true actor (economic income) which would have been co-opted but for the restriction of access.

The ability of a tax system to exercise jurisdiction over a particular income depends on the connection of the income or the owner of the income to the state served by the tax system in question. In reality, however, both the source of income and the ownership of income are difficult to determine. In order to overcome these difficulties, actors within the terminals of the tax system in many jurisdictions have adopted the concept of ‘permanent establishment’ based on which income will be deemed to have accrued within a particular jurisdiction where the income is attributable to a fixed base, dependent agent or a specified form of service or contract executed within the said jurisdiction.²²⁴ Yet, the adoption of this intermediary is not a complete

²²¹ *Atherton v British Insulated and Helsby Cables Ltd* [1926] AC 205, 213-14.

²²² *ibid.*

²²³ See Gunther Taube and Helaway Tadesse, ‘Presumptive Taxation in Sub-Saharan Africa: Experience and Prospects’ (International Monetary Fund, IMF WP/96/5); See also, Victor Thuronyi, ‘Presumptive Taxation of the Hard-to-Tax (2004) 268 Contribution to Economic Analysis 101.

²²⁴ See, for instance, Chapter 2 part 24 of the Corporation Tax Act 2010 (UK); section 13(2) of the Companies Income Tax Act 1990 (Nigeria); articles 5 and 7 of the OECD Model Tax Convention on Income and on Capital 2014.

panacea to the headache of attribution of income to a jurisdiction. In certain cases, it results in income being co-opted into the wrong network or more than one network.²²⁵

The tax avoidance activities of businesses (as punctualised) such as transfer pricing, treaty shopping and thin capitalisation further restrict the access of the tax system to their income. In response, actors within the terminals of the tax system in many jurisdictions adopt even more obscure legal constructs or intermediaries such as the Controlled Foreign Companies Rule²²⁶ or the arm's-length standard of transfer pricing²²⁷ with which they attribute ownership of income to businesses in a manner which is often divorced from the economic reality of the situation. Consequently, businesses and income are sometimes co-opted into an income tax network to which they do not belong due to restriction of access.

2.8.3.2 Access to the Tax System

Although businesses may be aware of the existence and operations of the terminals of the tax system, their access to these terminals may be restricted by certain social, political, legal, economic or psychological actors. These actors constitute barriers to the interaction between business and the tax system. Where the levels of access to the different terminals of the tax system differ, this may lead to a lopsided state of interaction between businesses and these terminals.

It is pertinent to distinguish between formal and substantive access of businesses to a terminal of the tax system. While a business may have unrestricted formal access to a terminal, this access will not be substantive where the Action tendered by the said business is not accorded due consideration by relevant actors within the terminal. This is, however, irrespective of whether the said Action is accepted or rejected.

The potential barriers to access are wide-ranging. A barrier may be consequent upon the status of businesses, the modus operandi of a terminal or a combination of both categories of actors. The culture, language, level of education, or the financial status of businesses may constitute barriers to their access to the terminals of the tax system. A negative perception of a terminal (about the fairness of its Action, for example) on the part of businesses may form a psychological barrier to their interaction with it.

²²⁵ See Mary Bennet and Carol Dunghoo, 'The Attribution of Profits to a Permanent Establishment: Issues and Recommendations' (2005) 33(2) Intertax 51.

²²⁶ See, for instance, Part 9A of the Taxation (International and Other Provisions) Act 2010.

²²⁷ See article 9 of the OECD Model Tax Convention (n 224).

The procedure for interaction with a particular terminal may be too complex or involve a high financial cost. Furthermore, access to the terminal may be hindered by its geographical location.

The impracticability of interacting with all businesses within its jurisdiction during a given process may force a terminal to formally restrict access to it by specified criteria. The dispute resolution terminal may, for example, require *'locus standi'* as a precondition for interaction. *Locus standi* means that a party instituting a suit must have sufficient interest in its subject matter.²²⁸ Likewise, the tax policy or law terminal may restrict access to it during consultations based on size, nature or mobility of businesses. Such criteria will formally exclude non-qualifying businesses from the process and may not ensure that the businesses interacted with represent the different kinds of businesses within the jurisdiction of the tax system.

In sum, the restriction of access between businesses and the tax system hinders the interaction between both institutions or alters the terms of such interaction. It therefore affects the efficacy of the communication link and the responsiveness of both institutions to each other.

2.8.4 Inaction

The final mechanism which affects the usage of the communication link and consequently the relationship between business and the tax system is inaction or inactivity by the actors in the said relationship. Even in the absence of challenges brought about by the levels of access, awareness and distortion of Communication, there will be no effective Communication between businesses and the actors representing the tax system if actors do not dispatch Actions. For example, actors within the tax law terminal and the policy terminal may not formulate laws and policies. Businesses may not take steps to comply and tax administrators may do nothing to secure their compliance. Inaction may be tied to other underlying challenges relating to access, awareness and distortion. For instance, business may refuse to interact with a terminal due to the fear of reprisals. This is particularly the case when businesses are expected to interact with the dispute resolution terminal. Certain businesses may fear that contesting an issue with the tax officials may result in increased audits, thus leading to the exposure of 'skeletons in their cupboards'.

²²⁸ See *R v Felixstowe JJ, ex parte Leigh* [1987] 1 All ER 583; *Ade Adesanya v President of the FRN* (1981) 2 NCLR 388.

Inaction may constitute action in relation to the endogenous interests of the actor concerned. It is therefore important to distinguish inaction by an actor and the state of being an actant. In the former, the inaction of an actor is the feature that guarantees its participation in an actor-network. For instance, non-compliance may result from inaction by the tax officials secured by the business through the dispatch of certain intermediaries sufficient to convince the said tax official that inaction is in its best interest. Inaction also encompasses some form of wilful delay in taking action. In essence, delay signifies the inability or failure to take action (inaction) at the appropriate time. Periods of orchestrated delay may be instrumental in achieving influence or attaining certain desired results.

Like distortion, awareness and access, the levels of inaction in the communication link are a product of transient networks of actors. The participating actors are potentially broad and their interests diverse. Hence, the creation, growth and durability of these networks are proper subjects of an empirical study.

2.9 Conclusion

Business and the tax system are parties to a two-way relationship in which the tax system may affect the way businesses operate while businesses may influence various facets of the tax system. This relationship is based on interaction and therefore presupposes the existence of a communication link between both institutions.

In this chapter, I have explored the operation of this communication link with the aid of ANT. I have also identified distortion of Communication, deficiency in awareness, restriction of access and inaction as four prime mechanisms that may affect the efficacy of the communication link and consequently the responsiveness of business and the tax system to each other.

A superficial observation of the communication link fails to reveal certain important human and non-human actors that may play a part in the relationship between business and the tax system. However, applying ANT unearths these hidden players and as a result exposes an interconnected web of actor-networks behind the communication link. ANT also shows that the actors that constitute the communication link are not stable. Rather, they constantly battle to maintain order and the façade of stability in light of the potentially conflicting interests of actors in their network. These actors may determine or result from the levels of distortion, access, awareness and inaction between business and the tax system. They will be better understood after an empirical study of their nature, their interests and the processes by which they strive to maintain order.

By unearthing the otherwise hidden actors, ANT also provides a suitable platform through which one or more of them may be studied empirically in a bid to decipher their individual and collective roles in the network that constitutes the two-way relationship between business and the tax system.

CHAPTER 3 THE POWER GAP, CORRUPTION AND THE FOUR MECHANISMS

3.1 Introduction

In Chapter 2, I argued that the relationship between business and the tax system is a two-way relationship as both institutions have the potential to influence each other. The nature and extent of this two-way relationship depends on the channels through which both institutions interact, or the ‘communication link’. Diagrammatically, the communication link can be presented as follows.

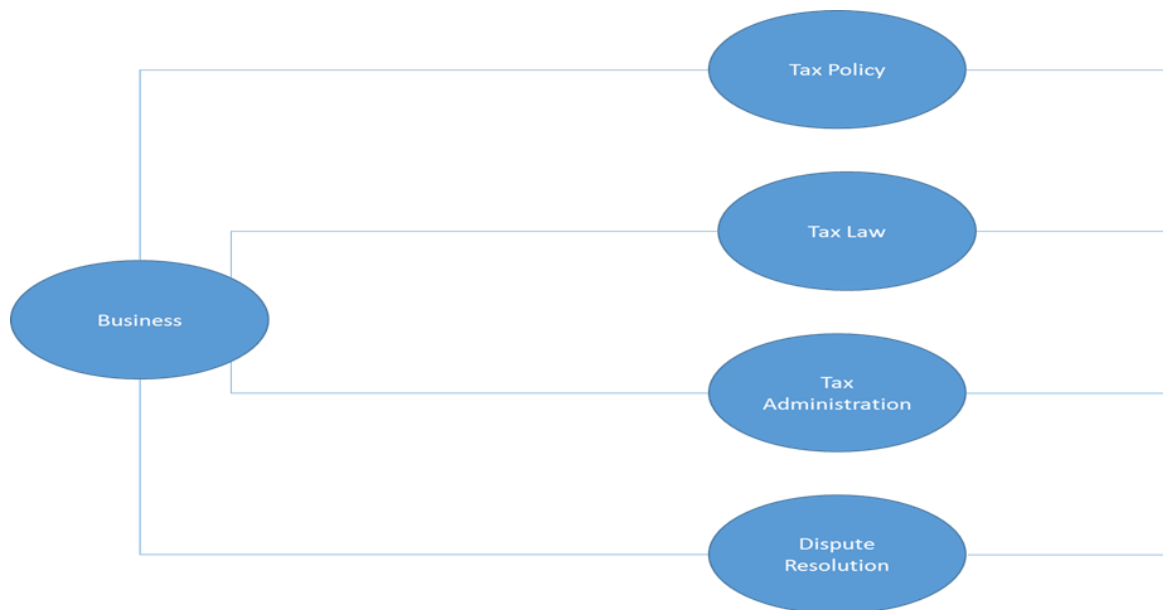


Figure 1 Communication Link

The attempts at attaining influence made through these channels of communication do not take place in isolation. They are guided by prevailing norms and their inherent limitations. Chapter 3 is concerned with unravelling these norms, their inherent limitations and their relationship with the communication link so as to provide support for the central argument of this thesis.

In this thesis, I inquire into the means by which corruption sustains itself in the relationship between business and the tax system. I argue that corruption achieves this by exploiting the gap between the ‘actual’ and ‘institutional’ powers of actors. I define the institutional power of actors as that which accords with the institutional limits of their social setting. An actor’s actual power, in contrast, refers to that which he may exercise in any given circumstance through the dispatch of communicative actions.

Therefore, in this chapter, I intend to resolve five main conceptual difficulties with this argument. The first difficulty involves explaining the sources and nature of the institutional

limits to the power of actors. Understanding the dynamic and multidimensional nature of these limits is crucial to my thesis because it enables a proper understanding of the contrast between an actor's actual and institutional powers. It also introduces the second difficulty, which involves explaining the 'power gap' and its mechanics. I argue that this power gap is increased or decreased by the levels of four mechanisms – access, awareness, distortion and inaction. The third challenge is the difficulty encountered by scholars and international organisations in distinguishing corrupt acts from those that are not corrupt. This distinction enables the proper identification and understanding of the phenomenon under consideration, and is therefore crucial to the analysis of the persistence of corruption in the two-way relationship. The fourth challenge involves establishing the relationship between the limits to power placed by the institutional settings and corruption. Finally, this chapter will examine how the four mechanisms (access, awareness, distortion and inaction) affect the power gap and avenues for the sustenance of corruption in the two-way relationship.

3.2 Institutional Limits to Communicative Actions

If an examination is carried out on any field of endeavour, there is usually in existence certain rules or norms through which social order is achieved. These rules define, constrain and enable actions. They do not, however, exist in a vacuum. They are often associated with a source or reference point at the societal level, which will be termed 'dimensions' for the purpose of this thesis.

The nature of the rules (from which certain expectations are derived) invariably depends on the state of development in the society under consideration. This ranges from a society of primitive hunters and gatherers to a technologically advanced modern society. The pressures of modernisation, for example, force human actors to arrange themselves in groups in pursuit of varied goals. Consequently, rules or norms are created or evolve to guide this pursuit or avoid violence. The survival of a rule is dependent on the presence of sufficient private or social enforcement mechanisms to guarantee its institutionalisation. With the institutionalisation of a rule, the said rule attains an objective status independent of the actors responsible for its creation. As the rule endures, the circumstances surrounding its creation or evolution become more silent and the rule exudes a false aura of stability (the rules are in fact unstable, and the potential for contestations remains despite the aura of stability). This is required to scare off potential contestations of its validity. Understanding rules, expectations and their associated dimensions require a deeper explanation of their origin and evolution.

3.2.1 Origin and Evolution of Rules, Expectations and Dimensions

There are different accounts of the origin and evolution of rules. The most popular of these is the contractarian view commonly associated with Hobbes, Locke and Rousseau.²²⁹ Hobbes²³⁰ attributed the creation of rules to agreements by actors that involved the shedding of some rights to ensure that violence is averted in the state of nature. According to Hobbes,²³¹ in a world inhabited by self-interested individuals guided primarily by their subjective notions of right and wrong, there is a tendency for these individuals, acting rationally, to barter certain rights in return for peace and order. This approach to the evolution of rules by Hobbes is distinguishable from that espoused by Locke. Locke²³² traced the evolution of rules to agreements entered under the aegis of certain God-given laws of nature to which men are ordinarily subject. For Rousseau,²³³ however, rules originated from agreements to protect the property rights of individuals in an unequal world.

While the above accounts place emphasis on an agreement between individuals, alternative accounts such as that proposed by Hume²³⁴ attribute the formation of rules and norms to repeated interaction between actors in the field. The rules spring up spontaneously as a result of these repeated interactions after periods of trial and error by the actors. As a result, the actors become accustomed to and expectant of particular ways of acting when faced with certain problems.

Following this line of spontaneous emergence of unintended rules of the game, Adam Smith²³⁵ in examining the origin of economic and political rules argued that the resulting rules competed with other extant rules. As a result of the competitive process, the more efficient rules are selected over the less efficient ones.

Unlike Smith, Spencer²³⁶ recognised that the competitions that lead to the emergence of a dominant rule are not between the rules but between societies. For Spencer, 'functional differentiation' occurs as societies develop over time. These societies rival one another through

²²⁹ This theory has been traced back to the Italian Marsilius of Padua. See Wolfgang Friedmann, *Legal Theory* (Columbia University Press 1967).

²³⁰ Thomas Hobbes, *Leviathan* (Bobbs-Merrill 1963) 142; Richard Tuck, *Hobbes: Leviathan* (Cambridge University Press 1991).

²³¹ Hobbes (n 230).

²³² Leo Strauss, 'Critical Note: Locke's Doctrine of Natural Law' (1958) 52 *The American Political Science Review* 490; John Locke, *Two Treatises of Government* (Peter Laslett (ed), Cambridge University Press 1988).

²³³ See Jean-Jacques Rousseau, *The Social Contract* (Penguin 1968) 10; David Lay Williams, *Rousseau's Social Contract* (Cambridge University Press 2014).

²³⁴ David Hume, *A Treatise of Human Nature* (LA Selby-Bigge and PH Nidditch (eds), Clarendon Press 1978).

²³⁵ Adam Smith, *An Inquiry Into The Nature and Causes of the Wealth of Nations* (Liberty Classics 1976) 163, 164.

²³⁶ Herbert Spencer, *The Principles of Sociology* (Archon Books 1969).

wars, for example. The result of the rivalry depends on the efficacy of their respective adopted rules. Some societies triumph as a result of the strength of their rules and pass these rules to later generations through inheritance.²³⁷

The above views paint a picture of coordination between the actors of the adopting society regarding a particular rule or norm. A rule is adopted in each case to serve the interests of the collective. However, theories on the evolution of norms put forward by Marx²³⁸ and Weber²³⁹ paint a different picture – one of internal conflicts between the actors or classes of actors in a particular society.²⁴⁰ The rules that emanate are therefore the products of a power-play guided by the conflicting interests of the actors or classes of actors in these societies.

Some relatively modern accounts of the evolution of norms bear a resemblance to those expounded above. Popular amongst these modern accounts is that postulated by Hayek. For Hayek, rules are unplanned products of the agency of actors and their continued existence depends on their ability to survive the existing competitive mechanism for the selection of norms.²⁴¹

In sum, rules seemingly evolve in different ways depending on their nature and the social context. It is common to identify two classes of rules based on the way they evolve.²⁴² The first class includes rules that are the direct products of human design which may or may not involve the rationalisation of challenges faced in a given social context. The second class includes rules that evolve naturally following the repeated process of interaction between actors in the field. It is, however, often difficult to place a given rule in one or the other class.²⁴³ This is because the right placement may change depending on the time and features observed as crucial to the creation of the rule. Consequently, it may be better to understand these classes of rules as opposing ends of a spectrum and place the evolution of rules within this spectrum. For instance, the abolition of slavery should be located somewhere in the spectrum between human design and a natural process of evolution.

²³⁷ *ibid.*

²³⁸ Karl Marx, 'A Preface to a Critique of Political Economy' in Jon Elster (ed), *Karl Marx: A Reader* (Cambridge University Press 1970) 187.

²³⁹ Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Unwin Hyman 1989); Max Weber, *Economy and Society* (University of California Press 1978) 39, 40.

²⁴⁰ Jack Knight, *Institutions and Social Conflict* (Cambridge University Press 1992) 8.

²⁴¹ Friedrich August Hayek, *New Studies in Philosophy* (Routledge and K Paul 1978) 96.

²⁴² See the invisible hand thesis and the distinction between cosmos and taxis. Robert Nozick, 'Invisible Hand Explanations' (1994) 84 *American Economic Association Papers and Proceedings* 314; Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) 18-22.

²⁴³ Iredell Jenkins, *Social Order and the Limits of Law* (Princeton University Press 1980).

Rules may also be divided into two categories based on the support provided to the rule by the state. These categories are formal and informal rules.²⁴⁴ Formal rules, on the one hand, are those that are officially backed by the state. Informal rules, on the other hand, are backed by society without direct involvement of the state. In early research, major focus was placed on understanding the role of formal rules in society. However, informal rules have gained recognition as a major player in relatively recent times.²⁴⁵ Attempts by domestic and international organisations to improve various facets of society through reform of formal rules while paying limited or no attention to informal rules, failed to yield the desired results. This contributed to the realisation of the importance of informal rules to the growth and success of economies. As North explained, ‘the outcomes of revolutionary changes will depend on the ongoing tension between informal constraints and the new formal rules’.²⁴⁶ Informal rules may complement, substitute, undermine or compete with formal rules.²⁴⁷ This is dependent on the existence, completeness, goals and effectiveness of the relevant formal rules. Also, changes in formal rules may affect informal rules and vice versa.²⁴⁸

Nevertheless, focusing on formal and informal rules hinders a deeper analysis of the expectations inherent in these rules as well as the various dimensions in society to which they may be linked. Such a focus also complicates the understanding of the relationships between different formal and informal rules in the society. In line with the aim of this thesis, therefore, rules will not be examined based on their levels of formality or informality. Rather, this thesis will examine rules based on their respective fields and functionality. This approach is justified because regardless of the origin or backing of a particular rule, rules are attributable to different fields or dimensions in modern societies. Also, the existence of these rules is maintained by, and appreciated based on, the functions they perform and the force mechanisms existing within these fields or dimensions.

Therefore, in this thesis, rules and their inherent expectations are classed as legal, political, economic and moral. However, the dimensions to which these rules may be ascribed are not exhaustive. Their number in a given society depends on the extent of functional

²⁴⁴ Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990).

²⁴⁵ Gretchen Helmke and Steven Levitsky, ‘Informal Institutions and Comparative Politics: A Research Agenda’ (2004) 2(4) *Perspectives on Politics* 725; Gretchen Helmke and Steven Levitsky, *Informal Institutions and Democracy* (Johns Hopkins University Press 2006).

²⁴⁶ Douglass North, ‘The Contribution of the New Institutional Economics to an Understanding of the Transition Problem’ (WIDER Annual Lecture 1, UNU/WIDER, March 1997) 91.

²⁴⁷ Anna Grzymala-Busse, ‘The Best Laid Plans: The Impact of Informal Rules on Formal Institutions in Transitional Regimes’ (2010) 45 *Studies in Comparative International Development* 311.

²⁴⁸ *ibid.*

differentiation that has occurred over time. However, this thesis will only focus on four dimensions that are directly relevant to corruption and the relationship between business and the tax system: legal, economic, political and moral dimensions.

Within the legal dimension are soft and hard rules (and expectations) that influence whether an actor has acted legally or illegally. The rules (and expectations) operative in the economic dimension influence the making or receipt of payments by actors in a field. The identity and tenure of holders of power are regulated by rules and expectations ascribable to the political dimension of society. The rules and expectations associated with the moral dimension influence our understanding of right and wrong (good and bad) in society.

One may question whether these mentioned dimensions are truly separate from or independent of one another. This is because the rules in each dimension seemingly possess the capacity to influence the rules in other dimensions. For instance, to the extent that the rules and expectations of the legal dimension inform what is legal or illegal, they may also inform our understanding of what is right or wrong. In other words, the rules that influence legality also possess a moral normative value. Likewise, these rules may determine who makes or receives payments. The substantive content and associated expectations of these rules do not always have fixed membership of any given dimension. Also, their membership and nature may change depending on the dimension under which they are considered. Considering that one may influence or shape others, is there a need to separate these rules into dimensions? The justification for the separation is predicated on the following premises. Each dimension determines its substantive content independently. As a result, a rule or action that is perfectly valid in one dimension may be invalid in another. Even where the same rule is considered in more than one dimension, the manner and result of such consideration may differ.

3.2.2 Rules, Actors and Expectations

When a rule is institutionalised within a given field or society, the rule attains an existence independent of the individuals in that field or society. For instance, laws created by the legislature become independent of the actual legislators that created them. Over time, the conflicts of personal interests and compromises that led to the creation of the said rule become silent. Although institutionalised rules exist independent of actors, they remain powerless in their applicable fields or society without the involvement of these actors. For these rules to have effect, an actor must recognise their existence, internalise them or apply them in the field or society.

It is arguable that institutionalised rules do exist in their pure or right form. It is this pure or right form that actors in the field should recognise, internalise or apply. However, the process of recognition, internalisation or application is potentially flawed. This is due to its susceptibility to distortions arising mainly from the decision frame and interests of the actors involved in the process. Such distortions are even more likely where the rule is indeterminate or ambiguous. For example, a police officer may arrest a person based on his conviction that an illegality has occurred. However, this conviction may be the direct result of a complete misapprehension of what the law truly is.

There is a need for a second order observation²⁴⁹ in the recognition, internalisation or application of institutionalised rules. The actor must observe what the rules state about a given action. To produce the effect in its pure form, the actor's observation of the rule's observation must be accurate. However, the potential for inaccurate observations is real.

Rules, by their very nature, require actors to comply with their dictates. Whether or not this requirement will be met depends on both the persuasiveness of the institutional mechanisms supporting the rule and the willingness of the actors to submit to the said rule. Di Maggio and Powell²⁵⁰ argue that rules constrain actors to act in line with their dictates by being coercive, by their normative value or by mimesis. Coercion, which is commonly associated with the law, involves the application of force to ensure compliance. Force is not necessarily physical. It refers to any factor that increases the cost of resistance of the actor to the norm.²⁵¹ With or without force, institutionalised rules may be normative; in which case, they secure compliance by speaking to the actor's belief that an action should be followed.²⁵² Mimesis, in contrast, refers to situations where compliance is secured with the dictates or expectations inherent in a rule, although neither by force nor based on a normative realisation, but simply as a result of the imitation of other actors in the field, especially in situations of uncertainty.²⁵³

While recognising the meaning given by rules to actions, the role of actors in shaping and giving meaning to rules must not be ignored.²⁵⁴ This is because the relationship between actors and rules is bidirectional. Even beyond contributing to the meaning of rules, an actor

²⁴⁹ This is based on Niklas Luhmann's modification of Spencer-Brown's explanation of observations as including a distinction and an indication. See George Spencer-Brown, *Laws of Form* (Allen & Unwin 1969); Niklas Luhmann, *Observations on Modernity* (Stanford University Press 1998).

²⁵⁰ Di Maggio and Powell (n 14).

²⁵¹ *ibid.*

²⁵² *ibid.*

²⁵³ *ibid.*

²⁵⁴ See Lauren Edelman and others, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406 (explains the role which organisation and professions may play in shaping the meaning and import of an existing law).

may appropriate rules for his own cause. In other words, rules may be reduced to intermediaries through which an actor achieves influence at a distance. For instance, a policeman may secure compliance with his arbitrary exercise of force against a suspect and resist protest from onlookers through the appropriation of the law into the network that produces this effect. In this case, while the legal rule may be construed as constraining the actions of the onlookers, the actions of the policeman can be interpreted as constraining the intended impact of the legal rule.

Rules inherently embody expectations regarding actions. For rules to attain social order, actors in a field or society should expect other actors to comply with their dictates. To the extent that rules are pure in their objective form or that actors expect others to comply with their dictates in their pure and objective form, the expectations emanating from these rules may also be regarded as 'pure' or 'ideal'.

However, as previously discussed, the recognition, internalisation and application process of rules is potentially flawed. As a result, what a given actor will consider to be pure expectations may be manifestly impure. Impure expectations may have significant effects, especially where they are shared by an actor or group of actors that possess the power to give effect to them. Thus, the expectations of a powerful section of society may be at variance with the rule from which they should emanate. This variance can be ascribed to the inability of a rule to self-enforce its 'true' expectations.

3.2.3 Legality of Communicative Actions

In dispatching a communicative action intended to attain influence at a distance, an actor in the two-way relationship between business and the tax system seeks to express power which he may possess. Therefore, the true extent of the power of actors in this relationship can be measured using their communications as evidence. Certain limits may be placed by the law on the exercise of this power. Hence, it is proper to assess the legality of communicative actions in order to understand the scope of the 'legal power' that can be exercised by a given actor within the legal dimension of a given social context.

While the analysis of the legality of communicative actions is important, it is also important to recognise other dimensions within which meaning may be accorded to these communicative actions. Based on the four main institutional dimensions outlined in this chapter, one should also consider the efficiency (economic dimension), the political expediency (political dimension) and the morality (moral dimension) of communicative actions.

In this section, however, I focus on the legality of communicative actions, owing to the fact that law can be seen as the foremost institution through which social order is achieved. I analyse for the purpose of illustration the legality of communicative actions, highlighting in the process the instances in which one communicative action, or evidence of power, may conflict with another.

In many cases, the legality of communicative actions will be clear and undisputed. For instance, policies and laws are binding and must be complied with by businesses, tax administrators and arbiters, as well as other actors to whom they are addressed. To be legally valid, the acts of tax administrators and arbiters must give effect to these laws and policies. However, the legality of communicative actions becomes more complex and uncertain where a conflict exists between two or more communicative actions. This conflict may exist between rules, between the rules and acts implementing them or between acts of implementation.

3.2.3.1 Conflict between Rules

The main categories of rules are tax laws and tax policies. A conflict may exist between rules of the same category or rules of different categories. Where the conflict is between rules of the same category (that is, between two laws or two policies) the subsequent rule will usually prevail as a direct or indirect amendment of the former rule. However, where the former rule is superior in hierarchy to the subsequent rule, the provisions in the subsequent rule that are inconsistent with the former rule will be void to the extent of this inconsistency.

For instance, due to the sovereignty of the UK Parliament, a subsequent law will usually prevail over a former law where there is an inconsistency. This is due to the application of the ‘doctrine of implied repeal’.²⁵⁵ Based on this doctrine, the subsequent law is deemed to have impliedly repealed the older law. This, however, does not apply to special categories of laws or constitutional statutes that are superior in nature such as EU law.²⁵⁶ This doctrine of implied repeal applies in a similar fashion in Nigeria. A major example of a superior law which negates the application of the doctrine of implied repeal in Nigeria is the CFRN. Any later law which violates the provisions of the constitution is null and void.²⁵⁷

Where there is a conflict between a law and a policy, the law prevails regardless of which predates the other. In certain limited instances, other actors may be empowered by tax

²⁵⁵ *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates v Ministry of Health* [1934] 1 KB 590.

²⁵⁶ *Thoburn v Sunderland City Council* [2002] EWHC 195.

²⁵⁷ CFRN, s 1(3).

law-makers to enact subordinate legislation. A subordinate (or delegated) legislation must be consistent with its parent law to be valid.²⁵⁸

3.2.3.2 Conflict between Rules and Actions implementing them

A conflict may exist between a communicative action that sets a rule and one that implements it. Since the implementation should comply with the rule, it follows that an act which contravenes a rule it purports to implement is, legally speaking, null and void. Therefore, an action of the tax administration or a decision of the arbiters will be invalid where it conflicts with the rules it seeks to implement.²⁵⁹ This remains the case if the action contradicts a rule other than that which it is meant to implement, in so far as that rule remains valid.

3.2.3.3 Conflict between Actions implementing a Rule

Two communicative actions purporting to comply or secure compliance with rules governing the fiscal relationship between business and the tax system may conflict. This may involve two actions by the tax administration, two decisions of the arbiters, or an action by the tax administration and a decision of the arbiters.

Where there are two conflicting communicative actions targeted at compliance, the legally valid action is the one that complies with the law or policy to be implemented. This will usually be the case irrespective of the timing of the communicative actions. This permits tax administrators to issue fresh communicative actions in accordance with the law that conflict with previous communicative actions that are inconsistent with the prevailing law. However, the ability of tax administrators to vary their previous communicative action in this manner may be limited by certain laws or policies governing their operations. In Nigeria, for example, certain laws place time limits on the ability of the tax authority to vary its previous communicative action in the absence of fraud or other vitiating factors.²⁶⁰

In certain circumstances, both conflicting actions of the tax administrator may comply with the relevant rule. This is usually the case where the actions in question are products of an exercise of discretion by the tax administrator. In this case, the one later in time still prevails prospectively. However, this most recent communication will usually be unable to have

²⁵⁸ See *R v Secretary of State for the Environment Transport and Regions ex parte Spath Holme Ltd* [2000] 1 All ER 884.

²⁵⁹ See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Attorney General, Bendel State v Attorney General Federation* (1982) All NLR 85.

²⁶⁰ See for example, Companies Income Tax Act 1990, s 66.

retrospective effect save where there is some other justifiable basis for the shift in position by the tax authority.

Where there is uncertainty concerning which of two or more conflicting actions of tax administrators accords with the law that they seek to implement, then the legal validity of the conflicting actions can only be determined by referring the matter to a tribunal or court. The court has a constitutional duty to resolve such uncertainties. Prior to this reference, the legal validity of the conflicting communicative actions remains questionable.

Where the conflicting communicative actions are decisions of arbiters and there is a lack of clarity about the action that complies with the applicable law or policy, the legally valid decision depends on the hierarchy of the arbiter making the decision as well as the timing of the decision.

Where the doctrine of *stare decisis* applies, arbiters are bound by decisions of a higher panel. Therefore, where an arbiter of a higher position in the hierarchy makes a decision which conflicts with that of an arbiter in a lower position, the former prevails over the latter regardless of when the decisions were made. Where the conflicting decision of an arbiter in a higher position in the hierarchy is later than that of an arbiter in a lower position, the former decision is deemed to have overruled the latter. Where the conflicting decision of the higher arbiter precedes that of the lower one, the latter is deemed to be made *per incuriam* and is liable to be declared void.²⁶¹

Where the conflicting decisions emanated from arbiters of the same level in the hierarchy, the litigant may rely on any of the conflicting decisions when presenting its case before a court. However, in the Nigerian legal system, the court or tribunal has an option to follow the decision that is later in time.²⁶²

Where the conflict is between an action of tax administrators and a decision of an arbiter, and there is uncertainty about which of the two upholds the law or policy to be implemented, the decisions of arbiters should prevail. This is because of the constitutional role of arbiters as dispute resolvers in the event of such ambiguity. If the decisions of arbiters do not prevail in these circumstances, the purpose of their existence will be greatly undermined.

The potential for conflict can be illustrated using a dispute between the FIRS and certain oil companies in Nigeria over the rate of tax relief for investments in natural gas liquefaction.

²⁶¹ See *Dalhatu v Turaki* (2003) 15 NWLR (Pt 843) 310; *Dairo v UBN PLC* (2007) 16 NWLR (Pt 1059) 99.

²⁶² See *Osakwe v FCE Asaba* (2010) 10 NWLR (Pt 1201) 1, 36.



OFFICE OF THE CHAIRMAN

15, Sokode Crescent, Wuse, Zone 5 P. M. B. 33, Garki Abuja, Nigeria.

Tel: 09-6701467, Fax: 09-5236612

FIRS/AUDIT.HQ/028/159

11 June 2007

Our Ref No. _____

Date _____

His Excellency the President and
Commander in Chief of the Armed Forces
State House
Abuja

**RE: ESCRAVOS GAS PROJECT PHASE 3 (EGP 3) AND
ESCRAVOS GAS-TO-LIQUID PROJECTS (EGPL) ALTERNATIVE
FUNDING ARRANGEMENT AND APPROVAL OF APPLICABLE
FISCAL REGIME**

His Excellency may please refer to our earlier letter of 8 May 2007 (copy attached for ease of reference) on the above subject matter, decision on which is still outstanding.

The substance of our request was for a clarification of a seeming mix-up in the Presidential approval therein. Whereas Mr. President's approval guaranteed the application of existing fiscal regime for the said projects irrespective of subsequent changes in the law, the text of the fiscal regime provided therein is inconsistent with the actual provisions of the existing law, that is, the Petroleum Profits Tax Act.

In view of the foregoing, His Excellency is respectfully invited to -

- (a) note that the rates of Petroleum Investment Allowance (PIA) approved by the Federal Government for the projects as contained on Appendix A attached are not consistent with that provided by the Petroleum Profits Tax Act; **and to**
- (b) **either reconfirm** the Presidential approval of the rate of PIA as contained in the said Appendix A; **or**

629

(c) direct that the rate be reverted to the applicable rates of 5% as provided in the Petroleum Profits Tax Act.

His Excellency's response is graciously awaited, please.

Accept, His Excellency Sir, the assurance of my greatest respects.

Ifueko Omoigui
Executive Chairman

RESTRICTED

Apply the rates provided by law. If there's need for a change, initiate legislative amendment.

MP
13/6

H.A.D./A.P.C.I.
Pls note & let's
implement
amendment
first 11/6/07

AST/General Investigation
Need carry out the
instructions & see
concerning the investigation
of Chevron which has
been put on hold because
of the P.I.A. issue.

 24/6/07

The Petroleum Investment Allowance dispute

To attract investment to the production of liquefied natural gas, the Nigerian government in 1999, through the then President Olusegun Obasanjo and Finance Minister Adamu Ciroma, promised in a budget proposal to increase the Petroleum Investment Allowance (PIA) from 5% to 30%. The PIA is a statutory provision.²⁶³ Thus, any increment should be by the amendment of the law. The proposed amendment of the law never materialised.²⁶⁴ However, the companies involved computed their tax liability with PIA at 30% for a considerable period of time. Following a change of government and an audit of these companies, this anomaly was discovered. The Chairman of the FIRS inquired from the new President, Umaru Musa Yaradua, about the steps to take. Yaradua responded that the companies should be taxed in accordance with the law (see letter above). Additional assessments were served on these companies. The companies then instituted an action in court challenging the additional assessments (*PIA case*).²⁶⁵

A similar issue arose with the grant of the ‘Pioneer Status Incentive’ to companies in Nigeria under the Industrial Development (Income Tax) Relief Act 1971. This Act provides for the grant of a tax holiday to companies involved in activities regarded as pioneering for an initial period of 3 years, which could be extended for a further maximum period of 2 years. However, there was also controversy over the grant of this incentive to certain companies, such as oil exploration and production companies, which did not engage in activities that would ordinarily be classed as pioneering or nascent. For administrative convenience, the administrative body responsible for this process – the Nigerian Investment Promotion Commission (NIPC) – granted this relief for a straight 5 years to several companies. This practice continued for about 14 years. Following the fall in oil prices and the pressure to generate tax revenue, the NIPC issued letters to these companies purporting to reduce the 5 year grant to 3 years, irrespective of whether the companies concerned were yet to enjoy or had

²⁶³ See Petroleum Profits Tax Act 1990, sch 2, para 5.

²⁶⁴ In order to encourage participation in its marginal field program, the Nigerian government similarly promised marginal field operators a preferential tax rate of 55%. This is yet to be enacted, thus creating some factual uncertainty around the tax rate applicable to these companies. However, the legal position remains that the statutory rate should apply until the government codifies the promise. See Deloitte Nigeria, ‘Pioneer Status and the Return of the 3 year Rule: Weep not Taxpayer’ (2015) <<https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/tax/inside-tax/ng-pioneer-status-and-the-return-of-the-3-year-rule.pdf>> accessed 17 May 2016.

²⁶⁵ *Chevron v FIRS* TAT/LZ/025/2012 (unreported) and *Chevron v FIRS* TAT/LZ/023/2012 (unreported). These cases were won by the company at the TAT in Nigeria and were appealed by the FIRS to the Federal High Court. The company had amended its appeal before the TAT. The new additional ground, which was the basis for the company’s victory at the TAT, was that they were entitled to Investment Allowance under the Companies Income Tax Act (as distinct from Petroleum Investment Allowance under the Petroleum Profits Tax Act, which they had originally claimed and in relation to which the additional assessments were made).

already enjoyed the relief for the full 5 years. The FIRS also issued additional tax assessments to these companies for the two years in respect of which the grant was withdrawn (*PSI* case).²⁶⁶

This *PIA* case illustrates the potential for an actor to exercise power which exceeds legal limits and for this exercise to persist for a period of time unchallenged. Although the statute remained the determinant of the applicable rate of PIA, the companies exercised an actual power to claim the rate specified in the budget proposal.

This *PIA* case also illustrates the potential variance between the legal and economic expectations. It is arguable that the ideal expectations of the economic dimension in the instant case justifies the companies' claim for the increased rate of PIA; to the extent that the increased rate of PIA leads to increased investment and tax revenue in the long run. An argument, however weak, can also be made that denying the businesses the benefits of the increased PIA after they made investments (and incurred sunk costs) on this basis is unfair (fairness being an expectation of the moral dimension of society).

More importantly, concerns about efficiency and fairness are not exclusive to the economic and moral dimensions of society respectively. Even the legal dimension may possess 'codes and programmes' that balance legal rules against the potentially competing demands of efficiency and fairness. One such code is the doctrine of legitimate expectations. This was a major ground for the action instituted by the companies.

3.2.3.4 Legitimate Expectations

The legality of communicative actions in the event of a conflict depends on the hierarchy of the action in question and its timing. Nevertheless, equity may intervene through the doctrine of legitimate expectations to vary this. As a result of such intervention, a seemingly inferior action may be validated retrospectively in certain defined circumstances. These circumstances include situations where the inferior action constitutes a clear and unambiguous representation that creates a legitimate expectation, which should be protected by law in the interest of fairness. This will usually apply where the recipient of the communication has acted to his detriment as a result of the communicative action.

The doctrine of legitimate expectation is a relatively recent development in the jurisprudence of UK and Nigeria.²⁶⁷ It is commonly employed in administrative law but it is

²⁶⁶ This was the *PSI* case. See Deloitte Nigeria (n 264).

²⁶⁷ Its origins can be traced as far back as the 18th century protection by the courts of a litigant's expectation of a hearing. For instance, *Rex v Gaskin* (1799) 8 *Term Rep* 209.

gradually growing in prominence in the realm of taxation. The remits of its application is yet to be fully defined in both jurisdictions.

The doctrine of legitimate expectation is an instrument of the dispute resolution terminal. Hence, any business seeking to benefit from its application must first gain access to the court, tribunal or other arbiter capable of applying the doctrine.

This doctrine is based on the general premise that a taxpayer's legitimate expectation is to be taxed in accordance with the law.²⁶⁸ Its application depends on the particulars of the communicative action under consideration. These particulars include its clarity, scope and effect on other actors; the means through which it was dispatched; and the strength of the action with which it conflicts.

A taxpayer seeking to evoke the doctrine of legitimate expectation in respect of any communicative action must establish that the message it contains is 'clear, unambiguous and devoid of relevant qualification'.²⁶⁹ Therefore, a communicative action capable of more than one interpretation constitutes a weak platform on which to base this doctrine.²⁷⁰

Certain legally valid communicative actions may be too strong to be defeated by the application of the doctrine of legitimate expectation. A statutory or constitutional provision cannot be easily discountenanced on the basis that a contrary communicative action by tax policy-makers, tax law-makers or tax administrators created certain expectations in the minds of taxpayers. Here, a distinction can be drawn between communicative actions that fall within the legal discretion of the actor and those that flout the express provisions of the law. While the former may constitute a valid basis for evoking the doctrine of legitimate expectation, the latter may not.²⁷¹

Where the communicative action is dispatched in an informal setting, it usually carries less weight than formal communications.²⁷² Likewise, a communicative action that is produced by a process vitiated by some form of impropriety is less able to give rise to legitimate expectations.

²⁶⁸ See *R v Inland Revenue Commissioners ex p MKF Underwriting Agents Ltd* [1990] 1 WLR 1545.

²⁶⁹ See Bingham LJ, *R v Inland Revenue Commissioners ex p MFK Underwriting Agents Ltd* [1989] STC 873, 892, 893; Wilson SCJ, *R (on the application of Davies and another) v HMRC*; *R (on the application of Gaines-Cooper) v HMRC* [2011] UKSC 47; [2011] 1 WLR 2625, 29, 47.

²⁷⁰ *ibid.*

²⁷¹ See *Al Fayed v Advocate General of Scotland* [2004] STC 1703; *Rowland v Environment Agency* [2003] EWCA Civ 1885; *R v North and East Devon HA, ex p Coughlan* [2001] QB 213.

²⁷² *R v Inland Revenue Commissioners ex p MKF Underwriting Agents Ltd* [1990] 1 WLR 1545 (Bingham LJ).

Legitimate expectation is less likely to be successfully evoked where the communicative action is private (that is, when it is meant for a specific recipient or category of recipients) than when the communicative action is public (that is, when it is meant for a broad range of recipients or the public at large). As Bingham LJ noted, ‘a statement formally published by the Inland Revenue to the world might safely be regarded as binding subject to its terms, in any case falling within them’.²⁷³ Evidence that the communication was made to the intended recipient indirectly rather than directly may weaken a plea for the application of the doctrine of legitimate expectation. For instance, a taxpayer may not be able to evoke successfully the doctrine where he has not received the representation directly from the tax authority, even though he received it through an external adviser.²⁷⁴

Also, the court is likely to consider the effect of the application of this doctrine on other stakeholders. Where the application of the doctrine of legitimate expectation will give rise to unfairness if the interests of other stakeholders (such as competing businesses) are taken into account, the court will be less likely to apply the doctrine.

In sum, the doctrine of legitimate expectation balances the dictates inherent in legal rules against legal expectations of efficiency and fairness. The legal concern for efficiency, on the one hand, may justify deviation from rigid rules in certain circumstances. The legal concern for fairness, on the other hand, may operate to prevent a return back to the rule, also in certain circumstances.

The illustration above and discussion of legitimate expectations should guide our understanding of the succeeding sections. The operative question remains: how does an actor sustain an exercise of power that contravenes the ideal expectations of a social setting for a period of time?

3.3 The Power Dynamics in the Two-Way Relationship

This section discusses the power dynamics in the two-way relationship. It begins by justifying the meaning of the term ‘power’ adopted in this thesis. Thereafter, it explains the power gap and its correlation with the levels of access, awareness, distortion and inaction in the two-way relationship.

²⁷³ *ibid.*

²⁷⁴ See *Hanover Company Services Ltd v HMRC* [2010] UKFTT 256 (TC).

3.3.1 Understanding Power

Like most sociological concepts, power has proved very difficult to define in a universally accepted manner. This is partly due to the fact that the meaning of this concept varies depending on the context in which it is used. As Haugaard explained, power is a ‘family resemblance concept’.²⁷⁵ This implies that across the different contexts in which this concept may be employed, the term ‘power’ has certain similarities and differences like the members of a nuclear family.

This thesis seeks to understand and apply power in a social context. However, this does not eliminate the considerable difficulties in defining this term as evidenced by the often conflicting understandings of it put forward by sociologists. These conflicts can be ascribed to the different purposes for which the term is considered.²⁷⁶

Morriss, for example, adopted a linguistic approach in analysing the term. Hence, he drew a distinction between power and ‘its nearest synonym’, influence.²⁷⁷ He explained that previous students of power²⁷⁸ have failed to draw this distinction owing to their obsession with power as existing in relations. As a result, they had limited the scope of power to the ability of A to make B do X, which is more akin to influence than power. He called for the recognition of ‘power to’ as a capacity of actors, which is distinct from ‘power over’ that exists in relations between two or more actors. Haugaard identified four different ‘language games within which the power debate has taken place’. Each language game potentially possesses their understanding of the term. These language games are ‘normative political theory of the analytical conceptual variety’, ‘political theory building of non-conceptual variety’, ‘social theory of modern orientation’ and ‘social theory of postmodern orientation’.²⁷⁹

Morriss also argued that power differs from the ‘vehicles’ or ‘resources of power’ on the one hand, and the ‘exercise of power’ on the other hand. To buttress his point, he drew an analogy between power and the solubility of sugar. He pointed out that sugar remains soluble irrespective of whether it is ever placed in water. Likewise, an actor possesses power irrespective of whether he ever puts it to use. He also pointed out that the elements within sugar

²⁷⁵ He quoted the philosopher Ludwig Wittgenstein, *Philosophical Investigations* (Basil Blackwell 1958) 32. Mark Haugaard, ‘Power: A Family Resemblance Concept’ (2010) 13(4) *European Journal of Cultural Studies* 419, 424.

²⁷⁶ See Mark Haugaard, *Power: A Reader* (Manchester University Press 2002) 2.

²⁷⁷ Peter Morriss, *Power: A Philosophical Analysis* (Manchester University Press 1987) 8.

²⁷⁸ Such as Robert A Dahl, ‘The Concept of Power’ (1957) 2 *Syst Res* 80; Herbert A Simon, ‘Notes on the Observation and Measurement of Political Power’ (1953) 15 *Journal of Politics* 500.

²⁷⁹ Morriss (n 277) 11-12.

that confer on it the quality of solubility ('the vehicles of its solubility') differ from the plain fact that sugar is soluble. Likewise, the vehicles of power are distinct from power as a capacity or disposition of actors.²⁸⁰

This approach can be distinguished from that employed by Lukes. Unlike Morris, Lukes was concerned with identifying the 'locus of power' for the purpose of ascribing practical, moral or political responsibility. Therefore, the distinction between the exercise of power and power as a capacity was of little importance to Lukes. Lukes argued that there is an inextricable link between power and responsibility.²⁸¹ Power resides where there is responsibility. Lukes therefore posited that an actor has power in relation to a particular outcome where this outcome can be linked directly to his action or inaction. However, Lukes was hesitant about attributing power to 'structures' as distinct from human agency. Thus, for Lukes, power does not lie in the collective of human actions and machinery that contribute to a given outcome. Lukes argued that ascribing power to these structures will enable actors to shirk responsibility.²⁸² Hayward, in contrast, points out that where the goal is to address the source of undesirable outcomes, it is imperative that responsibility and power are placed not only on human agency but also on structures. This will encourage productive thinking and action on ways to amend these structures that contribute to undesirable results.²⁸³

From the above, it is clear that Lukes and Morriss agree that power can be located within an actor. However, owing to the different purposes for which they utilised the term 'power', they disagreed on the utility of a distinction between power and its exercise. Other sociologists, especially Foucault, have distanced themselves from the point of agreement between Lukes and Morriss. They have instead argued that power does not inhere in the actor but in the relations between one actor and another.²⁸⁴ For Foucault, for instance, 'power is not something that is acquired, seized or shared, something one holds on to or allows to slip away'.²⁸⁵

²⁸⁰ *ibid* 14, 16.

²⁸¹ Clarissa Hayward and Steven Lukes, 'Nobody to Shoot? Power, Structure and Agency: A Dialogue' (2008) 1 *Journal of Power* 5, 7-8.

²⁸² The relationship between the usage of the power and its meaning can be seen from Lukes' seemingly inconsistent definition of the concept. While Lukes seems to suggest that power can be structural (see Steven Lukes, *Power: A Radical View* (MacMillan 1974) 22), he also disagrees with Poulantzas on this same point (*ibid* 55); Haugaard (n 276) 3.

²⁸³ Hayward and Lukes (n 281) 14-17.

²⁸⁴ Michel Foucault, *The History of Sexuality. Volume 1: An Introduction* (Allen Lane 1980) 3.

²⁸⁵ Michel Foucault, *The History of Sexuality. Volume 1: The Will to Knowledge* (Penguin 1981) 94.

Unlike Lukes and Morris, Foucault was concerned with the effect of power on the subject. For Foucault, there can be no power without the presence of at least two actors: the actor seeking to exercise power and the potential recipient of this exercise. Foucault argued that power cannot exist without the possibility of resistance from the actor over whom power is being exercised. Unlike Morris, Foucault does not give weight to the distinction between the terms ‘power to’ and ‘power over’. He argues instead that power is always exercised over another. Foucault also argued that power ‘exists only when it is put to action’, unlike Morris who separates the exercise of power from power as a capacity.²⁸⁶

While it is difficult to discountenance the existence of ‘power to’ where power is understood from a linguistic perspective, this is not the case where power is understood in a social context. In a social context, ‘power to’ only exists to the extent that the actor over whom power is exercised or the potential for resistance is ignored. The existence of this other actor becomes more apparent where the understanding of the term ‘actor’ is broadened to include non-humans and materialities as postulated by Latour and Callon.²⁸⁷ Simple examples of ‘power to’ such as Mr A sitting on a chair takes on new meaning as power exercised over the chair.

This thesis is concerned with the power that exists in the relationship between the actors representing business and the tax system. Therefore, understanding power as existing in relations between actors is more pertinent. It suffices, as a starting point, to define power for the purpose of this thesis as the ability of A to make B do X.

However, this definition of power is in dire need of expansion if it is to serve any useful purpose for this thesis. Both A and B exist within a social environment that gives meaning to or otherwise enables or constrains their actions. Often, in attempting to exercise power over B to do X, A would source support from this very social environment. This support may take the form of knowledge that is taken for granted, systems of thoughts/beliefs, habitual practices or texts. Thus, it is beneficial to include the social environment as a representative actor enabling or constraining the exercise of power.

The social environment will in most cases possess its ‘ideal (pure) expectations’ regarding the actions of both A and B. The nature and content of these ideal expectations are usually heavily contested. Nevertheless, they should be taken into account if the goal is to understand the capacity of A to make B do X.

²⁸⁶ Michel Foucault, ‘The Subject and Power’ (1982) 8(4) *Critical Inquiry* 777, 788.

²⁸⁷ Bruno Latour, ‘The Sociology of a Few Mundane Artifacts’ in Bjiker and Law (n 187) 2, 41.

It is helpful to draw an analogy at this point with the relationship between a business and a tax official in a normal setting. Let us assume that the prevailing expectation in this setting is that the business must comply with the content of a notice of assessment served on it by the tax official to the extent that this notice complies with the law. Limits are placed by the law on the notice of assessment to ensure that the tax official does not wantonly abuse the duty to comply owed by the business. In this relationship, four possible actions can be identified. They are: action in accordance with the ideal expectations of the social environment enshrined in the law (I); action in accordance with tax official's interests (TI); action in accordance with the business's interests (BI); and the actual action of the tax official (i.e. notice of assessment) which the business is expected to comply with in accordance with the dictates of the social environment (A).

Ideally, all four possible actions should be in agreement. In other words, the notice of assessment or action would agree with the ideal expectations of the social environment (the law), as well as the interests of the tax official and business. This births a power relationship between the tax official and the business in which consent by the business to the notice of assessment is very likely. Protest against the notice of assessment, on the other hand, is very unlikely and would be illegitimate since the notice of assessment accords with the ideal expectations of the social environment (the law). In the unlikely event of non-consent or protest by the business, both the social environment and the tax official should be capable of administering sufficient force through an adequate 'force mechanism' to secure compliance by re-aligning the actions of the business with the demand in the notice of assessment.

However, where issues with access, awareness, distortion and inaction affect the communication link, and in particular arise in the channel of communication between the tax official and business through which an attempt at the exercise of power is expressed, a power relationship in which there is agreement between the ideal expectations (I), the action of the tax official or exercising actor (A), the interests of the tax official or exercising actor (TI) and the interests of the business or recipient actor (BI) is less likely. These issues contribute to the existence of 11 additional power permutations represented in the table below.

S/N	PERMUTATIONS
1	<p><u>I, A, TI, BI</u></p> <ul style="list-style-type: none"> • All four actions are in agreement • Consent to the action and ideal by the business and the tax official respectively is likely • Protest by the business and the tax official against the action and ideal is unlikely • Any protest will be illegitimate • Third party involvement is not usually required to enforce the ideal
2	<p><u>I, A, TI</u></p> <ul style="list-style-type: none"> • The ideal expectation, the tax official's action, and the tax official's interest are in agreement • These three actions do not agree with the interests of the business • Consent of the tax official is likely while consent of the business is unlikely • Protest by the tax official is unlikely while protest by the business is likely • Any protest by the business is illegitimate • The tax official is likely to seek to enforce the action and ideal in the event of protest by the business • Third parties are usually not required to enforce the ideal
3	<p><u>I, A, BI</u></p> <ul style="list-style-type: none"> • The ideal expectation accords with the tax official's action and the business' interest • These three actions do not accord with the tax official's interest • Consent by the tax official to the ideal is unlikely • Consent by the business to the ideal and action is likely • Protest by the tax official against the action or the ideal is likely • Protest by the business is unlikely • The tax official is unlikely to take steps to enforce the action or ideal in the unlikely event of initial non-compliance by the business • Any protest by the tax official will be illegitimate • Third parties are usually not required to enforce the ideal

S/N	PERMUTATIONS
4	<p><u>I, TI, BI</u></p> <ul style="list-style-type: none"> • The ideal expectation accords with the interests of the tax official and business • These three actions do not accord with the Action taken by the tax official • Consent by the tax official and the business to the ideal is likely • Consent by the tax official and the business to the action is unlikely • Protest against the action by the tax official and business is likely while protest against the ideal is unlikely • Third parties are usually not required to enforce the ideal
5	<p><u>A, TI, BI</u></p> <ul style="list-style-type: none"> • The action accords with the interests of the tax official and business • These three actions do not accord with the ideal • Consent by the business and tax official to the Action is likely • Protest by the business and the tax official against the action is unlikely • Protest against the Action will be legitimate as it contravenes the ideal • Third parties are usually required to defeat the Action or prevent compliance with it
6	<p><u>I, A</u></p> <ul style="list-style-type: none"> • The ideal accords with the tax official's Action • Both the ideal and Action do not accord with the interests of the tax official or business • Consent to the Action by the business or tax official is unlikely • Protest against the Action by the business or tax official is likely • Protest will be illegitimate • Third parties may be required to checkmate the likely collusion between the business and the tax official to defeat compliance with the ideal or Action

S/N	PERMUTATIONS
7	<p><u>I, TI</u></p> <ul style="list-style-type: none"> • Only the tax official's interest accords with the ideal • Both the tax official's Action and the business' interest do not accord with the ideal • Consent by the tax official and the business to the Action is unlikely • Protest against the action by the business and the tax official is likely • Protest will be legitimate • Third parties may be required to notify the tax official of the inconsistency between the action and the ideal; especially where the business does not protest against the action
8	<p><u>I, BI</u></p> <ul style="list-style-type: none"> • Only the business' interest accords with the ideal • Both the tax official's interest and Action do not accord with the ideal and the business' interest • Consent by the tax official to the ideal is unlikely • Consent of the business to the ideal is likely • Consent to the Action by the business is unlikely • Protest by the business against the Action is likely • Protest will be legitimate • Third parties are usually not required to enforce the ideal
9	<p><u>A, TI</u></p> <ul style="list-style-type: none"> • The tax official's Action accord with the tax official's interests • They do not accord with the ideal or the interests of the business • Consent by the tax official to the ideal is unlikely • Consent by the business to the ideal and the tax official's Action is also unlikely • Protest by the business against the action is likely • Protest will be legitimate • Third parties are usually not required to enforce the ideal

S/N	PERMUTATIONS
10	<p><u>A, BI</u></p> <ul style="list-style-type: none"> • The tax official's Action accords with the business' interests • They do not accord with the ideal or the interests of the tax official • Consent by the tax official to the ideal is unlikely • Consent by the business to the Action is likely • Protest against the Action by the business is unlikely • Protest against the Action by the tax official (by failing to enforce it, for example) is likely and will be legitimate • Third parties will not be required in most cases (save where the tax official fails to protest against the Action)
11	<p><u>BI, TI</u></p> <ul style="list-style-type: none"> • The interests of the business and the tax official are in agreement, though with nothing else • The business and the tax official are unlikely to consent to the ideal or the Action • The business and the tax official are likely to protest against the Action • Protest will be legitimate • Third party involvement is usually required to prevent collusion between the business and the tax official against the ideal
12	<p><u>No Agreement</u></p> <ul style="list-style-type: none"> • None of the four potential actions are in agreement • Consent to the ideal by the tax official is unlikely • Consent by the business to the action is also unlikely • Protest by the business against the tax official's action is likely • Protest will be legitimate • Third party involvement is not usually required to defeat the action

Permutations of the exercise of power

The tax official's power in the circumstances depends on his power relationship with the social environment, which enables his action, as much as it depends on his relationship with the business over whom he seeks to exercise power. While his relationship with the social environment determines the likely Action he will take, his relationship with the business (as

well as the business's relationship with the social environment) directly determines the success or failure of such Action.

Where the tax official consents to the boundaries of the power conferred on him by the social environment, he will most likely seek to act within these boundaries. This will usually be the case where the dictates of his social environment accord with his interests in the particular circumstances. However, the tax official may seek to resist the dictates or confines of his social environment where his interests conflict with these dictates. This ambition of the tax official may be curtailed by the application of force or the increase in the cost of resistance by the social environment. The extent to which the social environment can increase the cost of resistance and the response of the tax official to this increased cost of resistance will determine the ambit of the tax official's actions.

In certain circumstances, the tax official's action may neither accord with his interests nor the dictates of his social environment. One such circumstance is where the tax official acts against his interests while labouring under a misapprehension of the demands of his social environment. For instance, it may be in a tax official's social interest to issue a notice of assessment to members of his community that requires them to pay the least possible amount of tax. The tax official, erroneously believing that his legal duty is to demand the highest possible amount of tax (as a result of a distortion of the communication between the tax law and the tax administration terminals), may issue a notice in a manner that neither accords with the law nor with his interests in the circumstances.

When a business receives the action of a tax official, the business may either consent to or resist this action. The business's consent may be based on either its acceptance of the action itself or the social environment enabling that action. Where the business's consent is based on the action, it is unlikely to scrutinise the congruence between the action and the dictates of the social environment. This makes possible a scenario in which the business consents and consequently complies with an action that runs contrary to the ideal expectations of the social environment against which that action should be defined.

In contrast, where the consent of the business is owed to the social environment, it is more likely that whatever action taken by the tax official will be scrutinised by the business to ensure that it is consistent with the dictates of this social environment. Where it is found to be inconsistent with the social environment, protest or resistance by the business will be very likely.

In the event of protest or resistance to the action by the business, the success of the action will depend on the effectiveness of the force mechanisms which the tax official can

employ. Where the action of the tax official contradicts the dictates of the social environment, it will be difficult (if not impossible) for him to seek assistance from the force mechanisms of this social environment in securing compliance with the action. He will most likely only be able to rely on the force which he can muster without the aid of the particular social environment whose dictates his action has contravened.

It is therefore apt to distinguish between legitimate and illegitimate protest. Legitimate protest occurs where the action of the tax official conflicts with the ideal expectations of the social environment. Depending on the power relationship between the tax official and the social environment enabling his action, this action would usually be unable to achieve its outcome in the event of legitimate protest. Illegitimate protest occurs where the business resists an action by the tax official which accords with the ideal expectations of the social environment. In this case, both the force mechanisms of the tax official and the social environment can be called upon to secure compliance by the business.

Business may be unwilling to protest against an action that goes against the ideal expectations. This will usually occur where such action aligns with the business' interests. Here, third parties may instigate resistance and apply force to prevent the action from succeeding. This may involve either an attempt to defeat the action or prevent compliance with same. Likewise, the tax official may fail or be unwilling to apply force to secure compliance with an action that accords with the ideal. Here again, third parties will be required to directly or indirectly instigate sufficient force to ensure compliance.

3.3.2 The Power Gap

The efficient operation of the power relationship between the business and the tax official in the traditional setting described above primarily depends on four mechanisms. Firstly, there must be full awareness of the ideal expectations, the interests of the tax official and the business, the actions of the tax official, and the response of the business.

Full awareness of the ideal expectations of the law and the actions of the tax official is important in determining the legitimacy of protests. Full awareness of the interests of the tax official will also help fashion the force mechanism through which the costs of resistance to dictates of the social environment can be increased.

Likewise, full awareness of the response of the business is crucial to determining the legitimacy of the application of force. Knowledge of the interests or desires of the business will also help fashion the force mechanism through which the costs of its resistance to legitimate action can be increased.

Secondly, full access to the machinery through which protests can be made as well as the machinery through which force can be administered is crucial. Where no such machinery exists or access to it is limited, the operations of the power relationship may be considerably affected.

Thirdly, the meaning and nature of actions, responses and the ideal expectations must not be distorted. Any distortion of meaning may affect the determination of the legitimacy of protests as well as the application of force; these may in turn affect the operations of the power relationship.

Finally, full awareness, unrestricted access and the absence of distortion affect the capacity for action and are not determinative of action in itself. The business (and all interested third parties) may be fully aware of the inconsistency between an action and the ideal and have access to a protest mechanism that operates without distortion of meaning but yet may not protest against that action. Likewise, the tax official (and other interested third parties) seeking to exercise power over the business may be aware of resistance and have access to an adequate force mechanism that also operates without distortion and yet may not apply force to secure compliance.

The effect of the possibility of inaction is that a gap between the actual and institutional power of actors may still exist even where there is full awareness, full access and no distortion. This indicates that deficiencies in awareness, restriction of access and distortion of Communications only increase the potential/capacity for a gap between the actual and institutional powers of actors. Action or inaction, in contrast, determines the width of this gap.

How then can the power gap be defined or explained? A power gap exists where the actual powers of an actor as conferred upon him by the prevailing circumstances in his social environment either exceeds or falls below his institutional powers. In the individual channels of communication between business and the tax system, the social environment confers powers on one actor to act in a manner with which the other actor should comply subject to certain constraints. Therefore, a power gap will exist where the actor upon whom power is conferred is:

- 1) unable (or fails) to act in the manner prescribed by the social environment;
- 2) able to act in the manner prescribed by the social environment but unable (or fails) to secure compliance from the recipient actor; or
- 3) able to act in a manner that the recipient actor complies with but which contravenes the dictates of the social environment.

Deficiency in awareness, restriction of access, distortion of communication and inaction play considerable roles in bringing about the power gap in these instances. The forms of power gap are examined in greater detail below with the aid of the *PIA* case discussed above. The overarching question remains: how were the companies able to continue claiming PIA at a rate contrary to the provisions of the law for a considerable period of time?

3.3.2.1 Power Gap 1

An actor seeking to exercise power may be unable to act in the manner required by the social environment owing to his unawareness of his obligation to act, the processes involved in taking action or the ideal expectations of the social environment. Unawareness of the obligation to act will usually be rare owing to the fact that the obligation to act follows one's appointment as an actor. Unawareness of the ideal expectation is more likely, especially where the said expectations are contested, volatile or uncertain.

Where these ideal expectations emanate from the legal dimension of the social environment, one can assume that they will be relatively certain. This is especially the case where these legal expectations are enshrined in a manner that is easily accessible to the actor seeking to exercise power. Even the dictates of the legal dimension of the social environment may be difficult to decipher. This will be the case where these dictates are encapsulated in texts that are ambiguous or technical in nature as is common within tax jurisprudence.

The ideal expectations of the political dimension are often contested and not easily accessible owing to their residence in the hearts and minds of the individuals with the power to enthrone actors. The collective wishes/demands of these individuals (usually the electorate or interest groups in a functional democracy) are characteristically difficult to determine prior to action. These demands are also very volatile and may not represent the best interests of the state.

The expectations of the economic dimension are frequently volatile owing to the changing economic/market conditions on which they are usually based. For instance, the price of oil may fluctuate from month to month making it difficult for tax policy-makers to make tax policies which take into account the price of this commodity without damaging the much-needed stability of the tax system.

The inability to act in the manner prescribed by the social environment may be due to the lack of access to the machinery for action. This includes any infrastructure without which action will be impossible. This invariably depends on the channel of communication and the

nature of the action in question. Finally, a deliberate decision against an attempt to exercise power by an actor who is expected to exercise power may cause the power gap.

In the *PIA* case, law-makers had the power and duty to scrutinise the activities of the tax administration and business through the relevant channels of communication to ensure compliance with the law. The failure to utilise these powers is a form of power gap, which allowed the continuation of the state of affairs in which *PIA* was claimed at the wrong rate. This failure may be attributed to the lack of awareness or inaction on the part of the law-makers.

3.3.2.2 Power Gap 2

Even where the actor seeking to exercise power acts in a manner that complies with the ideal expectation, compliance with such action by the recipient actor may not be forthcoming. This may result from a state of affairs in which the recipient actor is unaware (or deficiently aware) of the action or the ideal expectations of the social environment. It may also result from the lack of access to an efficient force mechanism through which compliance may be secured in the event of resistance. Distortion of the action, ideal expectation or response during the process of applying force may create this form of power gap. Here again, a voluntary decision not to access the force mechanism (where same is present and accessible) may be the cause of this form of power gap.

In the *PIA* case, the Petroleum Profit Tax Act constituted a demand for compliance directed at the tax administrators and businesses to collect and pay taxes respectively. Failure to comply with this demand is a form of power gap 3. This failure may be ascribed to a lack of awareness of the activities of the businesses on the part of the tax administrators, inaction or a deliberate distortion of the law.

3.3.2.3 Power Gap 3

A power gap may be created despite compliance by the recipient actor if the action by the exercising actor contravenes the ideal expectations of the social environment. This state of affairs may come about as a result of the recipient actor's lack of awareness of the dictates of the social environment. Such lack of awareness may prevent the said recipient actor (or interested third parties) from instigating legitimate protests on the grounds of the inconsistency between the action and the dictates of the social environment. Even where the recipient actor (or an interested third party) is aware of the inconsistency between the action and the ideal expectations, lack of access to an efficient protest machinery may lead to this form of power gap.

Also, where there is full awareness and access by the recipient actor and interested third parties, a distortion of the action, response or the ideal expectations during the process of protest may also bring about this form of power gap. Finally, this form of power gap usually arises where the exercising and recipient actor collude to defeat the ideal.

In the *PIA* case, businesses complied with a proposed tax policy that contravened a law. This is a form of power gap 3 as there was compliance with an illegitimate demand. This may have been due to unawareness on the part of the businesses or a distortion of the law.

In summary, understanding power gap and its mechanisms provides a good foundation for understanding the means through which corruption may sustain itself in the two-way relationship. This assertion will become clearer after the analysis of corruption undertaken below.

3.4 Understanding Corruption: A Process Definition

The term ‘corruption’ has proved difficult to define in a universally accepted manner. Like power, corruption has been said to have a family resemblance.²⁸⁸ This connotes that the term corruption applies to a long list of actions that may be viewed differently depending on the temporal and spatial context. These acts, which may be referred to collectively as the ‘corruption complex’,²⁸⁹ may include nepotism, bribery, neopatrimonialism, embezzlement and illicit campaign financing.

Part of the controversy in defining the term relates to its application. Corruption may apply either to individual acts or entire systems. Early expositions by political philosophers such as Aristotle²⁹⁰ applied this term not to particular transactions, events or persons but to entire systems of law or governance. They conceived corruption as the ‘disintegration of the beliefs upon which a particular system rests’, or ‘the general disease of the body politic’.²⁹¹ This is markedly different from how the term is conceived by many relatively modern academics. Based on their observations of the developments in society, these relatively modern academics place more emphasis on corruption as a transaction perpetrated by either a lone individual or a collusion of two or more such individuals.

²⁸⁸ See Laura Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (Yale University Press 2013).

²⁸⁹ See JP Olivier de Sardan, ‘A Moral Economy of Corruption in Africa?’ (1999) 31(1) *The Journal of Modern African Studies* 25.

²⁹⁰ Aristotle, *On Generation and Corruption, Book 1 Symposium Aristotelicum* (Frans Haas (ed), Oxford Clarendon Press 2004).

²⁹¹ Hayek (n 241).

This somewhat reflects the different underlying challenges addressed by these scholars. The ancient scholars were challenged by the injustice ostensibly legitimised by systems of law and governance that had gone awry.²⁹² In contrast, these modern scholars (especially those that theorised about the occurrence of the term in post-colonial times) are primarily concerned with the inability of seemingly progressive reforms or extant systems to produce positive results owing to corruption perpetrated by individuals in their dealings with other individuals.

Nevertheless, both ancient and modern scholars have undertaken a disproportionate analysis of corruption as a problem of the public realm of society.²⁹³ This neglect of corruption in the private sector can be ascribed to the absence of clearly sourced public obligations on private sector actors, which is otherwise somewhat intrinsic to the popular understanding of the term. In recent times, however, an increasing volume of research has focused on corruption in the private sector.²⁹⁴ This may be a partial reflection of the growing role of the private sector in shaping human existence globally and the consequential increase in the recognition of public obligations of private firms. These obligations include those owed to shareholders, employees, consumers, suppliers and, most importantly, the communities that harbour them. This thesis focuses on the considerable potential for corruption in the relationship between actors in the private sector and their counterparts in the public sector. There are discourses on this in the works of scholars irrespective of their prime focus.

One approach to understanding this complex phenomenon has been to identify different gradients of corruption. In this regard, a distinction has been drawn between political and bureaucratic corruption; petty and grand corruption; and need/survival based and greed based corruption. As their names imply, political corruption refers to that perpetrated by elected and appointed political office holders while bureaucratic corruption refers to that undertaken mainly by bureaucrats. Grand corruption refers to corruption of high economic or social significance and is usually perpetrated by political office-holders or senior bureaucrats. In contrast, petty corruption refers to corruption of low economic or social significance. It

²⁹² *ibid.*

²⁹³ Klaus Uhlenbruck and others, 'The Impact of Corruption on Entry Strategy: Evidence from Telecommunication Projects in Emerging Economies' (2006) 17 *Organization Science* 402.

²⁹⁴ See, for instance, Nnaoke Ufere and others, 'Merchants of Corruption: How Entrepreneurs Manufacture and Supply Bribes' (2012) 40(12) *World Development* 2440. See also the growing literature on state capture, for example, Joel Hellman, Geraint Jones and Daniel Kaufman, 'Seize the State, Seize the Day: State Capture and Influence in Transition Economies' (2008) 31 *Journal of Comparative Economics* 751; Mara Faccio, 'Politically Connected Firms' (2006) 96 *American Economic Review* 369; Transparency International, *Global Corruption Report 2009 – Corruption and the Private Sector* (Cambridge University Press 2009).

commonly occurs within the bureaucracy and amongst low-level public sector officials.²⁹⁵ The distinction between need/survival corruption and greed based corruption is predicated on the motivation for engaging in the act. Corruption will be need/survival based where the individual undertook the act out of financial or social necessity. It will be greed based in the absence of such financial or social necessity.²⁹⁶

Nye²⁹⁷ defined corruption as a ‘behaviour that deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique), pecuniary or status gains, or violates rules against the exercise of certain types of private-regarding influence’. This definition recognises deviance and illicit gains as constituting parts of corruption. However, it remains silent on the motivations or processes involved in corruption. Punch,²⁹⁸ in contrast, outlines various actions or omissions which may be classed as corrupt based on the impropriety of the process or the end result. In his words: ‘when an official receives or is promised significant advantage of reward (personal, group or organisation) for doing something that he is under a duty to do anyway, that he is under a duty not to do, for exercising a legitimate discretion for improper reasons, and for employing illegal means to achieve approved goals’.²⁹⁹

Modern academics and international organisations alike have come to accept a less controversial (minimalist) definition of corruption as workable for research. By this definition, corruption is the abuse of power (or entrusted authority) for private gain.³⁰⁰ However, this definition serves as a mere starting point for understanding the term corruption and its contextual differences.³⁰¹ It does not effectively delineate actions which fall within and without the boundaries of this term. The often cited definition also primarily caters for the individualistic and not the systemic notion of corruption. This is because, with systemic corruption, the concern is not an abuse or misuse of power by actors but the state of existing systems in a society.

Intrinsic to the modern understanding of corruption described above are the concepts of abuse of power and illicit gain. These concepts are not only context laden but also potentially

²⁹⁵ George Clarke, ‘How Petty is Petty Corruption? Evidence from Firm Surveys in Africa’ (2011) 39(7) *World Development* 1122.

²⁹⁶ Aaron Tornell and Philip Lane, ‘The Voracity Effect’ (1999) 89(1) *American Economic Review* 22.

²⁹⁷ Joseph Nye, ‘Corruption and Political Development: A Cost-Benefit Analysis’ (1967) 61(2) *The American Political Science Review* 417, 419.

²⁹⁸ Maurice Punch, *Conduct Unbecoming: The Social Construction of Police Deviance and Control* (Tavistock 1985) 103.

²⁹⁹ *ibid.*

³⁰⁰ Rose-Ackerman (n 30); Punch (n 298) 103.

³⁰¹ Eric M Uslaner, *Corruption, Inequality, and the Rule of Law* (Cambridge University Press 2008).

difficult to apply without inconsistency even within a given context. It is therefore pertinent to subject them to deeper analysis.

3.4.1 Abuse of Power

The presence of the element ‘abuse of power’ in the definition of corruption indicates that corruption is in effect an exercise of power. It also discloses that attached to this power is an expectation regarding how it should be exercised. Corruption occurs where this expectation has not been met. It is therefore worth asking what these expectations are, how they are established and how they evolve over time. As Scott stated,³⁰² ‘corruption, we would all agree, involves a deviation from certain standards of behaviour. The first question which arises is, what criteria shall we use to establish those standards?’

It is widely accepted that these expectations may vary depending on the jurisdiction and time period under consideration.³⁰³ For example, between the 15th century and 18th century in Western Europe, the demarcation between public and private property was unclear. Public officials utilising their power in a manner that would benefit them privately was widespread.³⁰⁴ This is not the case in present day Western Europe partly due to the clearer demarcations between the private and the public spheres of life. Likewise, what is corrupt may vary across jurisdictions. This can be seen in the different levels of acceptance (from a legal perspective) of campaign financing by companies seeking favourable government policies in different jurisdictions.³⁰⁵

However, the recognition of the differences in the meaning of corruption does not preclude the appreciation of the broad similarities in the said meaning across time and jurisdictions. The direct embezzlement of funds by government officials, the award of government contracts to inept family members, and the insistence by private officials on the receipt of financial remuneration as a precondition for the provision of public services are some examples of corruption which may transcend time and jurisdictions to a considerable extent. However, acknowledging the differences and similarities in the meaning of corruption across

³⁰² See JC Scott, *Comparative Political Corruption* (Prentice Hall 1972) 3.

³⁰³ Frank Anechiarico and James Jacobs, *The Pursuit of Absolute Integrity: How Corruption Controls Make Government Ineffective* (University of Chicago Press 1996) 4.

³⁰⁴ James Scott, ‘An Analysis of Corruption in Developing Nations’ (1969) 11(3) *Comparative Studies in Society and History* 315, 316; Ronald Wraith and Edgar Simpkins, *Corruption in Developing Countries* (Allen and Unwin 1963) 67.

³⁰⁵ See Keith Ewing and Samuel Issacharoff, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing 2006).

time and jurisdictions barely contributes to the resolution of the fundamental question about expectations and corruption.

The importance of the source of expectations cannot be overemphasised. It is also crucial that these expectations are clear so as to reduce the difficulty in determining whether they have been breached.

3.4.1.1 Law, Public Interest and Public Opinion

Three possible sources of these expectations can be identified in the existing literature. They are: the law, public opinion and public interest.³⁰⁶ Of these three, law seems the most supported source of expectations. Public interest and opinion have been criticised for their indeterminacy.³⁰⁷ A given state may have conflicting public interests.³⁰⁸ Also, the public interest of a state may differ depending on the perspective of the actors taken into consideration.³⁰⁹ Similarly, public opinion can hardly be measured with pinpoint or even workable accuracy.³¹⁰ It is also susceptible to rapid change depending on the event under consideration and other events occurring around it.³¹¹

It is commonly believed that the law should reflect the expectations of the society regarding permissible actions. Where the law describes an act as corrupt, it should follow that the said action is corrupt within the society which the law governs.³¹² However, a singular focus on law as the measure for abuse or deviance should be questioned. Proponents of such singular focus may argue that, relative to other possible determinants, law is easily accessible and represents in most societies the expressed collective wish of its people. Also, using law as the barometer for corruption provides an alleged violator the protections and assurances inherent in the notions of fairness and justice, which are part and parcel of a legal system guided by the rule of law.³¹³ However, some scholars recognise the failures of law to capture popular perceptions of the people, its tendency to legitimise seeming wrongs or render illegitimate

³⁰⁶ Robert Williams, 'Corruption: New Concepts for Old?' (1999) 20 *Third World Quarterly* 503, 505.

³⁰⁷ Oskar Kurer, 'Corruption: An Alternative Approach to its Definition and Measurement' (2005) 53 *Political Studies* 222.

³⁰⁸ Arnold Heidenheimer, 'The Context of Analysis' in Arnold Heidenheimer and Michael Johnson (eds), *Political Corruption Concepts & Contexts* (Transaction 2002).

³⁰⁹ John Gardiner, 'Defining Corruption' in Heidenheimer and Johnson (n 308) 31.

³¹⁰ Hazel Erskine, 'The Polls: Corruption in Government' (1973) 37 *Public Opinion Quarterly* 628.

³¹¹ *ibid.*

³¹² Michael Johnston, 'Political Corruption and Public Policy in America' (1983) 77 *The American Political Science Review* 208.

³¹³ Laura Underkuffler, 'Captured by Evil: The Idea of Corruption in Law' (Duke Law School, Legal Studies Research Paper Series, 2005) 5 <http://scholarship.law.duke.edu/faculty_scholarship/1245> accessed 5 July 2015.

seeming rights, and its rigidity (when flexibility is required) as factors that justify the insufficiency of law as a sole determinant of corruption.

Ackerman, for example, identified a scenario where an actor may have acted corruptly from a legal perspective but may not be considered corrupt from a moral perspective. This scenario involved the payment of a bribe by an individual in a Nazi concentration camp to an officer for the release of the individual and his young family.³¹⁴

Therefore, the question whether the term ‘corruption’ should or should not be applied to acts other than those which the law expressly describes as corrupt or not corrupt remains an important part of this debate. These acts may fall into three main categories. These categories are acts which are not expressly corrupt but illegal; not expressly corrupt and legal; and not expressly corrupt and in respect of which the law is silent.

3.4.1.1.1 Not Corrupt but Illegal

In a given jurisdiction, there may be no laws that designate the offering of bribes to government officials as corrupt. However, these acts are against the law. Does the failure to tag the act as corrupt absolve the same from the label of corruption – even though that act in question (as bribery does) leads to private gains to the officials involved? Put differently, is the illegality of an action sufficient to render that action corrupt (breach of expectations) if it also accords private gains to the public official, even though the act is not expressly tagged corrupt by positive law?

3.4.1.1.2 Not Corrupt and Legal

This relates to seemingly corrupt actions which are legalised by the law. Does the legalisation of a seemingly corrupt act absolve the said act from the tag of corruption? For instance, a law may make it mandatory for only a given set of individuals with connections with the government to be given employment. Does this legal backing prevent this act from being corrupt, despite the fact that employment on this basis seems like nepotism?

Not considering this act as corrupt creates room for bias in the analysis by giving privilege to those with power to set the law over others. These powerful actors may influence

³¹⁴ Susan Rose-Ackerman, *Corruption: A Study of Political Economy* (Academic Press 1978). This situation has also been described as a ‘noble-cause corruption’ – See Geoffrey M Hodgson and Shuxia Jiang, ‘The Economics of Corruption and the Corruption of Economics: An Institutional Perspective’ (2007) 41(4) *Journal of Economic Issues* 1043.

the state of the law to ensure that their likely actions are both legal and not corrupt despite their resemblance to corruption.

3.4.1.1.3 Not Corrupt and Silent

The law does not cater for all actions or inactions of individuals. For instance, due to the faster pace of technological advancements, certain actions may exist that the law has not provided for (by terming them corrupt, illegal or legal). Can these actions be corrupt and if so, when will they be?

The presence of these different categories partly reveals the insufficiency of the law in fully capturing the essence of corruption. Therefore, it is arguable that other possible standards should be applied in determining what is or is not corrupt. Also, it is pertinent to ask whether these other standards should be applied independent of, or in conjunction with, the law.

Considering public interest or public opinion independent of the law, for example, will relegate the law's designation of an act as corrupt or illegal to the extent that it does not influence the standards set in accordance with public interest or public opinion. In other words, law becomes at best an input in determining what the public interest or opinion is about the act.

Public interest or opinion may also step in where the law is silent or unclear about the act, or merely classifies the act as illegal. Likewise, law may augment public opinion or interest where the latter is unclear or ambiguous.

Considering the public interest or opinion in addition to the law raises the issue of how conflicts should be resolved between these standards. In the event of a conflict, which standard should be given priority? On the one hand, it can be argued that the law should be given priority because it is central to the functioning of society. On the other hand, it can be argued that the law exists for the protection of the public interest or as a rough reflection of public opinion. Therefore, the law should be subservient to these measures where a conflict exists.

3.4.1.2 Expectations and the Dimensions of Society

Rather than focus on law, public interest and public opinion, I argue in this thesis that the expectations that guide the definition of corruption may be sourced from different dimensions within a given society. These dimensions are the legal, political, economic, cultural, theological and moral dimensions, to name but a few. The number of dimensions will depend on the maturity of the society as a reflection of the extent of the functional differentiation that has occurred within it over time.

Each of these dimensions is capable of different expectations which may be observed by individuals both within and outside a social setting. However, not every dimension is directly important to the relationship between business and the tax system. This relationship is legal as it is facilitated by both hard and soft laws. It is economic judging from its prime purpose of generating revenue while attracting, encouraging and sustaining investments. It is political as it involves the empowerment of actors for the achievement of legal and economic goals. It is also moral to the extent that fairness and reasonableness are fundamental to the structure and contents of the said relationship.

It is therefore arguable that the legal, economic, political and moral dimensions are directly relevant to the two-way relationship between business and the tax system. Some dimensions may also be indirectly relevant to this relationship through their impact on fellow dimensions. The moral dimension, for example, is indirectly relevant to the extent that it has an impact on the law or on the economic or political circumstances of the actors involved.

In understanding corruption, therefore, it is important to inquire into what legal, economic, political and moral expectations guide or should guide the exercise of power by actors. Where an actor breaches these expectations and other elements of corruption are satisfied, then such an actor can be said to have acted corruptly within the dimension under consideration.

However, the dictates of these dimensions may conflict. The expectations of the legal dimension may differ from that of the economic or the political. For instance, an illegal act may meet the ideal economic expectations even more so than an alternative act which meets the legal expectations. The expectations of a given dimension may also be corrupt when considered in light of the expectations of another. Where the expectations of a given dimension are corrupt when viewed from the lenses of a different dimension, corruption may be described as systemic in the former dimension. Here, corruption is ostensibly applicable to the rule rather than a deviation from it.³¹⁵

The legal, political, moral and economic expectations exist in their pure form independent of the actors in the two-way relationship. The perspectives of these actors are only relevant to these expectations to the extent that they form part of the internal codes and programmes from which expectations are sourced within a particular dimension. For instance, a tax policy-maker's perspective on the law does not form part of or equate to the law until this

³¹⁵ Christoph Stefes, 'Measuring, Conceptualising and Fighting Systemic Corruption: Evidence from Post-Soviet Countries' (2007) 2(1) Perspectives on Global Issues 1, 7.

perspective is transformed into law via the legislative process. Likewise, a judge's interpretation of the law is not the law until the point where it is accepted as law by the codes and programmes that determine what law is and what law is not.

Nevertheless, these expectations are only relevant to the interactions between actors in the two-way relationship through the observations (or attempts at observation) by the actors. Hence, the perspectives of these actors on these expectations are crucial to the two-way relationship. However, it is important to distinguish the expectations of a dimension and an actor's observation of these expectations as both may differ. The difference may result from the incompleteness of information available to the actor or an improper analysis or understanding of the available information.

Regarding corruption, an actor may describe an act as corrupt or not corrupt based on the actor's observation that the act breaches the expectations of a dimension in society. An actor's choice of dimension may be influenced by his interests, decision frame or the general institutional setting within which he operates. For instance, judges are more likely to observe the expectations of the legal dimension when officially describing an act as corrupt or not corrupt. Politicians, in contrast, may be more concerned about how the action is perceived by the electorates or other actors with the power to determine their position of power.

3.4.1.3 Social Expectations and the Institutionalisation of Corruption

Beyond the observable expectations of these dimensions are the social expectations of actors in the two-way relationship. These social expectations arise from the regular interaction between the actors guided by the expectations of the different dimensions. The classification of an act as corrupt or not corrupt should not be made in light of these social expectations. This is because the mere fact that an act is 'socially expected' does not mean it is not corrupt.

An act may be corrupt when judged in light of the expectations of a dimension of a society but may still be socially expected. An illustration can be made using the payment of bribes to tax officers. The individuals paying and receiving the bribe may recognise their actions as corrupt based on their appreciation of the expectations of a dimension of the society. Nonetheless, they may see the actions as expected in the circumstances. Where it is socially expected in a particular setting, corruption may eventually become institutionalised. Corruption is institutionalised where it develops its own machinery for enforcing compliance with its dictates.

Like the expectations of the dimensions, social expectations can be observed by the actors in the two-way relationship. However, the observations of the social expectation by an

actor may differ from the expectation itself. Also, different actors may reach different conclusions about what the social expectations are in a given setting.

3.4.1.4 Understanding Expectations

As discussed above, different dimensions have potentially different expectations about how an actor in the two-way relationship should exercise power. Each dimension may possess expectations about whether an act should be taken but may also be silent regarding the act. In the situation where the dimension is silent about an act, the act cannot be said to be corrupt under the said dimension. However, the act may be corrupt when examined in light of the expectations of other dimensions.

As aforementioned, it is pertinent to ask how these expectations are formed and how they change over time. With the legal dimension, the expectations are embodied in the statutes, case law and other rules (internal codes and programmes) that form the legal system. These rules are relatively rigid and accessible. As these rules change, the expectations of the legal dimension change as well.

The expectations of the economic dimension encapsulate various norms that govern the economic goals of the tax system. An act will be an abuse where the act defeats or possesses the potential to defeat these economic goals. As the economic goals of the tax system within a given jurisdiction and time period change, the expectations about the actions of actors within this system will also change.

The expectations of the political dimension include the written and unwritten rules which affect the likelihood that a given actor in the two-way relationship will hold, retain or express power. Actors in the two-relationship are empowered to act by other human and non-human actors. Certain expectations exist which regulate whether the empowered actor may retain this position of power. In a democracy, for example, a tax policy-maker may have attained this position via an election. This position of power comes with certain expectations about how power should be exercised. Where these expectations are breached, the electorate may recall the said actor or otherwise prevent his retention of this position at the next election. It is this electorate that decides whether the power which they have accorded the individual has been abused for corrupt private gains within the political dimension. They also decide the repercussions of such a breach of expectations.

Due to the different sources of expectations across the various dimensions in a given society, a ‘horizontal gap’³¹⁶ in the limits set to the action of an actor by the different dimensions may exist. This horizontal gap is also reflective of the different pace at which the expectations of these dimensions develop.

For instance, the payment of bribes to a tax official to facilitate the performance of his duties may fall short of the legal expectations of the setting as enshrined in the law. It may, however, enhance the economic goals of the tax system if this payment incentivises lowly paid tax officials to work harder to ensure quality service delivery;³¹⁷ enables businesses to avoid cumbersome bureaucratic regulations;³¹⁸ or ensures more efficient prioritisation of tax officials’ workload³¹⁹ or distribution of public services, licences and permits. For example, Beck and Maher argued that bribery may be akin to a competitive auction especially where the ability to pay a bribe is reflective of the talent of the payee.³²⁰ In other words, it may yet accord with the expectations of the economic dimension. However, these arguments do not take into account the fact that tax officials may artificially create inefficiency such as administrative delays in the system so as to extract bribes.³²¹ Also, the illegality of actions may force actors to only deal with those they trust. This may create further inefficiencies in the system which fall short of its economic goals.³²²

Also, a defensive breach of legal expectations may accord with moral expectations in an environment where breaches are widespread; legal force mechanisms are either ineffective or non-existent; not engaging in the breach will cause serious harm to the actor involved; and engaging in the breach will not cause harm to innocent third parties.³²³

However, the expectations of one dimension may influence those of other dimensions. This influence is not direct. For example, the economic expectations of the exercise of power

³¹⁶ Helen Bakker, ‘Corruption and Legitimacy: An Institutional Perspective’ in Helen Bakker and Nico Nordholt (eds), *Corruption and Legitimacy* (SISWO Publications 2000).

³¹⁷ David Bailey, ‘The Effects of Corruption in a Developing Nation’ (1966) 19(4) *The Western Political Quarterly* 719; Colin Leys, ‘What is the Problem about Corruption?’ (1965) 3(2) *The Journal of Modern African Studies* 215.

³¹⁸ Leff (n 42); Samuel P Huntington, *Political Order in Changing Societies* (Yale University Press 1968); Pierre-Guillaume Méon and Laurent Weill, ‘Is Corruption An Efficient Grease?’ (2010) 38 *World Development* 2449; Pierre-Guillaume Méon and Khalid Sekkat, ‘Does Corruption Grease or Sand the Wheels of Growth?’ (2005) 122 *Public Choice* 69.

³¹⁹ Lui (n 42).

³²⁰ Paul J Beck and Michael W Maher, ‘A Comparison of Bribery and Bidding in Thin Markets’ (1986) 20 *Economics Letters* 1.

³²¹ See Gunnar Myrdal, *Asian Drama; An Inquiry into the Poverty of Nations*, Vol 2 (Pantheon 1968).

³²² See M Shahid Alam, ‘Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment’ (1989) 48 *American Journal of Economics and Sociology* 441.

³²³ Gregory Kavka, ‘When Two ‘Wrongs’ Make a Right: An Essay on Business Ethics’ (1983) 2 *Journal of Business Ethics* 61.

in the two-way relationship only affect the legal expectations to the extent that the former forms part of the internal codes and programmes of the latter. Likewise, the law becomes a mere cost/benefit input in computing whether an act falls short of the economic expectations of a given setting.

The recognition of different dimensions should not unduly downplay the role of the legal dimension as the prime source of ideal expectations in modern societies. However, this premier role is not necessarily due to the assertion that the expectations of the legal dimension are more representative of justice and fairness, neither is it necessarily due to the assertion that these expectations are better tools for achieving sustainable and inclusive development. Rather, it owes to the fact that the legal dimension is often more gifted in three important areas. These areas are certainty or clarity of source, the presence of interpreters and the likely availability of institutionalised force and protest mechanisms.

Social expectations may arise from the interaction which actors have with other actors in the field. Each actor possesses his own capital and pursues his own goals in line with his endogenously generated interests based on his social positioning in the setting. The pursuit of different goals, presence of varied interests and the possession of different capitals all contribute to the creation of social expectations in the two-way relationship.

The expectations of the dimensions and the social expectations of the setting enjoy an interesting relationship. Social expectations may influence the expectations of the legal, economic and political dimension in at least two ways. Firstly, there is the likelihood that an actor's observation of the expectations of these dimensions may be tainted by social expectations. Secondly, social expectations may bring about changes in the expectations of these dimensions. The expectations of the legal dimension as enshrined in statutes and case law, for example, may be targeted at reflecting social expectations and may therefore shift in line with them.

Social expectations may also be influenced by the expectations of these dimensions in similar ways. An actor's observation of these social expectations may be affected by the said actor's observation of the expectations of the different dimensions. The expectations of the economic, political, moral and legal dimensions may also contribute to the formulation of the social expectations within a setting.

3.4.2 Corrupt Gain

A crucial element of the popular conception of corruption is the idea that private gain should accrue directly or indirectly to the perpetrator. The term private gain is commonly accorded a

broad definition. It has been held to encompass all forms of gain, whether financial or social, accruing to the actor personally or to any other individual sufficiently close to him. This wide definition makes it imperative that the term gain is qualified. This is vital if a distinction is to be maintained between corruption and other acts of malfeasance.

Nevertheless, limits to the definition of the nature of the gain (as distinct from the nature of the act) are important because an actor will in most cases derive some form of gain from his actions. For instance, a policy-maker may gain from the policy he formulates in terms of public support in an election irrespective of the virtue of the policy.

One may ask whether the occurrence of an abuse of power is sufficient qualification for the gain. If this is the case, once there is an abuse, and any private gain accrues to the actor, then the act is corrupt. However, this blurs the distinction between a general abuse or misuse of power and corruption, considering the broad definition of gain. The need for a gain may be eliminated where the abuse of power itself is considered a corrupt private gain accruing to the public official concerned. Where the intention to abuse is not taken into consideration, this approach potentially eliminates the distinction between abuse of power and corruption. However, it is recognised that the act and the gain in certain instances may be inextricably linked. In such cases, qualifying the act as corrupt necessarily qualifies the gain as corrupt. One such instance is the embezzlement of public funds.

An additional qualification which may be sufficient to distinguish corruption from an abuse of power is the mental element often attached to corruption. Unlike a general abuse or misuse of power, an act may only be corrupt where the accrued gain was a motivation for the action in the first place.³²⁴ Kleinig, for example, made such motivation the focal point when defining police corruption as an act 'with the primary intention of furthering private or from the consideration of personal or political gain'.³²⁵ However, it may be difficult to establish that such motivation exists in a given case and not in another. Establishing this motivation will be relatively easy where the actor expressly demands or accepts the gain as a precondition for the action. It becomes less clear where the gain accrues to the actor after the performance of the required action without such an explicit demand. Nevertheless, a mere expectation of a gain may be insufficient as such an expectation may be present in certain seemingly non-corrupt acts. In the case of a non-benevolent policy-maker, for example, his desire to increase his

³²⁴ Intention has been identified as an integral feature of corruption. See, for instance, Robert C Brooks, 'The Nature of Political Corruption' in Arnold J Heidenheimer (ed) *Political Corruption* (Holt Rinehart and Winston 1970) 56, 59.

³²⁵ George Benson and others, *Political Corruption in America* (Lexington Books 1978).

support by the electorate may be an a priori incentive for his actions, yet his actions may be better classified as an abuse of power and not corrupt.

In this thesis, I argue that a distinction should be drawn between a corrupt action and a mere abuse of power by qualifying the gain itself rather than merely focusing on the mental element. In this case, a corrupt gain becomes a necessary element of corruption in addition to an abuse of power. As with the definition of abuse, it becomes necessary to identify a standard through which corrupt gains can be distinguished from non-corrupt gains.

Here again, expectations emanating from the dimensions in a given society can be helpful. Certain gains may flout these expectations, thereby making them corrupt. For instance, the law may expressly prohibit the accumulation of certain gains by public officials. Therefore, such gains will be corrupt when accumulated. However, the law may merely state the level of gain which should accrue to a public official without expressly or implicitly prohibiting the further acquisition of gain. This silence of the law may indicate that such gains are not corrupt within the legal dimension, and therefore an act targeted at their accumulation through an abuse of power will not be corrupt within the said legal dimension. However, this should be distinguished from situations where the law expressly describes an act as corrupt irrespective of the nature of the gain accumulated. Here, the express classification of the act as corrupt renders redundant an analysis of whether the act and the gain accruing therefrom breach the expectations of the legal dimension. Such acts are automatically corrupt within the legal dimension regardless of the results of such analysis.

The social expectations regarding gain may differ from the expectations of the dimension through which they may be observed. The accumulation of gain by a given actor may be socially expected but may yet be corrupt in light of the expectations of different dimensions in the society.

Therefore, for the purpose of this thesis, corruption will be understood in light of the expectations of the legal, political, moral and economic dimensions in a given society and at a given time. For an action to be corrupt, the action must be an exercise of power which falls short of the expectations of a dimension in a given setting. The gain accruing from the abuse of power must also fall short of the said expectations of the same dimension under consideration. This is despite the fact that the action in question or the gain accruing therefrom may accord with the social expectations of the setting.

3.5 Corruption and the Power Gap

Corruption may exist at three strata relevant to the two-way relationship. These strata include the expectations of the dimensions, the actions, and the social expectations. In this section, I will examine how corruption may sustain itself at these strata by exploiting the power gap in the two-way relationship (as increased or decreased by the levels of awareness, access, distortion and inaction).

3.5.1 Corruption and the Expectations of the Dimension

As already discussed, the expectations of a dimension within a society may be corrupt when judged from the lenses of a different dimension. The sustenance of corruption at this stratum is largely due to the absence of direct communication between the different dimensions. Borrowing the description of Luhmann in his theory on social systems, these dimensions are ‘cognitively opened but normatively closed’.³²⁶ This implies that while they are capable of observing the happenings in other dimensions, they independently determine their own rules, expectations and development trajectory. This is in addition to the absence of a free flow of information between the various dimensions.³²⁷ For instance, changes in the economic expectations of the tax system are determined by the internal rules of the economic dimension. These changes are not automatically reflected in the legal and political dimensions in the same terms as they are in the economic dimension. These changes may only be reflected in these other dimensions to the extent that they are observed as part of the latter’s internal codes and programmes. Hence, the law may legitimise actions which owing to changes in the economic dimension are inherently corrupt while the economic dimension may legitimise actions which if undertaken contravene the law in a manner describable as corrupt.

The existence of the different dimensions depends on the ability of each dimension to maintain its boundaries using its binary codes.³²⁸ Where a dimension fails to so maintain its boundaries, it may be taken over by or subsumed into other dimensions. The expectations of one dimension ordinarily counts as mere noise to the other dimension. However, this noise may be sufficiently loud enough to irritate the other dimension to action. As a result, in limited circumstances, ‘structural coupling’ may occur. This signifies that two dimensions may be

³²⁶ See Gunther Teubner, ‘Introduction to Autopoietic Law’ in Gunther Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter 1988) 3-4.

³²⁷ *ibid* 10.

³²⁸ Niklas Luhmann, Klaus A Ziegert and Fatima Kastner, *Law as a Social System* (Oxford University Press 2004) 173.

sufficiently tied together on an issue to the extent that they are similarly affected by changes on that issue. However, despite structural coupling, the different dimensions internally determine the trajectory of the change.³²⁹

The failure of the law to develop in line with goals of the economic dimension may lead, for example, to the improper development of property rights which is sufficient to distinguish the public domain from the private domain.³³⁰ The lack of a legal distinction between the public and private may entrench a state of affairs in which the legal expectations are economically corrupt.

In light of the four operating features, the mismatch that sustains the corruption of the expectations of a dimension may be ascribed to the following:

- lack of direct access of one dimension to another;
- lack of awareness by one dimension of developments in another;
- distortion of the expectations of one dimension when taken into account as an input in another dimension;
- inaction (to the extent that a dimension fails to change its expectations in light of the expectations of another).

3.5.2 Corruption and Social Expectations

Where the breach of expectations of a dimension continues unabated over time due to lack of awareness, restriction of access, distortions or inaction, corruption may become socially expected by actors in the field. The social expectation of corruption may breed more corruption to the extent that it affects future actions of actors. This may lead to a vicious cycle which may in turn reify the institutionalisation of corruption. Institutionalisation of corruption may also lead to systemic corruption. This will occur where social expectation of corruption is absorbed by the expectations of a dimension.

Contrarily, the institutionalisation of corruption may increase awareness of the corrupt act. Where such institutionalisation does not also cloud the expectations of the dimensions of the environment by which the act is adjudged corrupt, this awareness may lead to increased efforts to tackle corruption. Hence, the institutionalisation of corruption may counter-intuitively lead to its reduction in a given setting.

³²⁹ Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Review* 1419, 1427.

³³⁰ *ibid* 1432.

3.5.3 Corruption and Actions

Corruption, an exercise of power, exploits a gap between the actual and institutional powers of actors. This gap reflects the failure or refusal of an actor to act in light of the expectations of a particular dimension. It is also indicative of the absence of an effective mechanism through which the expectations of a dimension may be enforced.

There are four categories of actions which constitute an expression of power and which may fall short of the expectations of a dimension. These actions are the setting of an agenda for compliance (rule-setting); demanding compliance or complying (compliance); scrutinising compliance (scrutiny); and appointment. Each action is an exercise of power between an exercising actor and a recipient actor.

Corruption at the level of individual actions may be classified into two main categories. The first category involves collusion between the exercising actor and the recipient actor. Collusion may either exist between actors within the tax system (in which case it may be classified as internal/organised corruption) or between a representative of the tax system and businesses (in which case it may be classified as external/individual corruption).³³¹ In the second category, no such collusion exists.

Where there is collusion by the actors to act in a manner that breaches the expectations of a dimension, third parties may intervene to ensure that the expectations are not breached. However, these third parties must be aware of the fact that the expectations have been or will be breached. They must also have access to a protest mechanism through which the breach may be publicised, as well as a force mechanism through which the cost of resistance to the expectations by the colluding actors may be heightened in order to prevent further breaches. The protest and force mechanisms must be free from distortion. Such distortion may relate to the action or the expectations which the action should satisfy. Finally, inaction on the part of the relevant third parties or the protest/force mechanisms may ensure the sustenance of the breach of expectations.

Where there is no collusion, the recipient actor (as well as third parties) may also protest against the attempt to exercise power in a manner that breaches the expectations of the dimension. The occurrence of corruption will be minimised where there is awareness that the attempt at the exercise of power breaches the expectations of the dimension; access to an effective protest/force mechanism; absence of distortion in the protest/force mechanism; and

³³¹ Richard Cyert and James March, *A Behavioural Theory of the Firm* (Wiley Blackwell 1992); Tirole (n 34).

resistance of the temptation for inaction on the part of the recipient actor (third parties and the force/protest mechanism).

Therefore, in cases of collusion or non-collusion, the power gap needed for the sustenance of corruption will therefore be widened or limited depending on the:

- level of awareness by the recipient actor or interested third parties that the action breached the expectations of the dimension;
- level of access to an effective protest/force mechanism;
- level of distortion in the force/protest mechanism; and
- level of inaction by the recipient actor, interested third parties or the protest/force mechanism.

3.6 Conclusion

In this chapter, I set out to resolve certain conceptual difficulties with the model. I examined the potential for the existence of a gap between the actual and the institutional powers of actors in the two-way relationship between business and the tax system. I argued that this gap is increased or decreased by the levels of distortion, awareness, access and inaction that plague the ‘communication link’ between both institutions.

I analysed the meaning of corruption and examined the process definition of the concept to be applied in this thesis. Based on this process definition, an act will be corrupt where both the communicative action and the gain accruing to the actor therefrom breach the ideal expectations of a given dimension in society.

I pointed out that corruption may exist at three strata (dimensions, social expectations or individual actions). In each case, corruption sustains itself in the relationship between business and the tax system by exploiting the power gap as widened or limited by the levels of access, awareness, distortion and inaction in the two-way relationship.

This chapter provides the final aspect of the model which would be subject to further scrutiny through the remainder of this thesis using the data derived from the empirical study.

CHAPTER 4 THE RELATIONSHIP BETWEEN BUSINESS AND THE TAX SYSTEM: EMPIRICAL RESEARCH FINDINGS (1)

4.1 Introduction

This thesis aims to understand the mechanisms through which corruption sustains itself in the relationship between business and the tax system. It is predicated on the assumption that by subjecting the two-way relationship to scrutiny, it is possible to identify the gaps that corruption might exploit.

Empirical research was conducted of the two-way relationship in the Nigerian social context where corruption is reputedly rife. This chapter presents the first part of the findings of this empirical research. It contains a descriptive analysis of the research participants' views on the two-way relationship between business and the tax system.

It begins by recognising the importance of a good relationship to businesses. It also explains the differences between the experiences and actions of small and local businesses, on the one hand, and large and multinational businesses, on the other hand. It then reveals that the two-way relationship is plagued by issues with awareness, access, distortion and inaction at every terminal of the tax system and explains how these issues might influence the width of the gap between an actor's actual and institutional powers. The penultimate section discusses other actors who may also influence the width of the power gap through their actions or inactions. This leads to the conclusion which contains an overarching summary of the researcher's take on the two-way relationship in the Nigerian social context.

4.2 Maintaining a Good Relationship

Some participants commented that maintaining a relationship with the actors representing the tax system is key for businesses and the tax professionals that represent them. One of these participants explained the importance of a relationship with the tax administration in the following words:

Of course, you cannot be a successful tax practitioner without interacting with the FIRS. You should work with them, understand them and know how they eat and drink. (DK)

This need to maintain an amicable relationship extends beyond the tax officials. Businesses should also maintain a good relationship with tax policy-makers as explained by a participant thus:

There is a need to have a good relationship with the tax policy-makers. When you don't have a good relationship with them, it presents its own challenge ... That relationship in this environment makes a lot of difference. (DO)

Building an amicable relationship may help avoid delays in dealing with requests made by businesses to the actors representing the tax system. This was pointed out by another participant in the following words:

Well generally, even for the tax policy-makers as well, relationship is key. If you have good relationship with those guys, they may go out of their way to fasten the speed at which they respond to the policy requests you have made. So, relationship is very key in liaising with them. (IE)

Businesses also turn to these relationships in situations where they are faced with ambiguity, arbitrariness or oppression. A good relationship may ensure that a business avoids the adverse exercise of discretionary power by the actors representing the tax system, as a participant explained:

Based on the way tax law is, a number of things are left to the tax man's discretion. You don't want to confront them so that when it is time for them to apply their discretion, they will not apply it to your detriment. You always want to be on the side of the tax man. As it is, either because of cultural perceptions or out of fear, in Nigeria and in this organisation, we try to avoid any face-off or conflict with them. (MA)

Informal relationships may give businesses security against certain challenges faced when handling their tax affairs and are often utilised by those that have access to them. 69.16% of the survey respondents indicated that, where wronged or faced with a challenge when handling their tax affairs, small businesses rely on informal relationships always, very often or sometimes. 41.12% indicated that small businesses rely on informal relationships in this manner either always or very often. This is higher than the percentage of respondents who indicated that small businesses may take other listed steps either always or very often, such as: go to the legislators (1.87%); go to the media/press (3.74%); go to enforcement agencies (4.67%); go to Ministry of Finance officials (10.28%); go to court/TAT (6.48%); do nothing (27.88%); go to their representative body (19.63%); go to persons with influence (27.61%); or go to superior tax officials (33.96%). This indicates that relying on informal relationships is a highly utilised means through which small businesses deal with challenges faced when dealing with the tax system.

57% of the respondents indicated that in the same circumstances large businesses rely on informal relationships always, very often or sometimes. 21.49% of these respondents indicated that large businesses rely on informal relationships either always or often. This suggests that small businesses are more likely to rely on informal relationships than large businesses.

However, maintaining a good relationship may come at a cost. Certain businesses may ignore or forgo their rights to protest against wrongs on the altar of maintaining the said

relationship. Even beyond tax-related matters, the general closeness of businesses with the state may deter such protests as a participant explained in the following words:

[Businesses] are not likely [to take action against a tax official]. In Nigeria, you don't fight the government. Most of them depend on the government for their business. Most of my clients just let go most times. As you can't fight the government, let's engage them; rather than go to court to pursue redress and ensure punishment for the erring official. (AF)

Failure or unwillingness to protest in line with the limits of the institutional settings is an example of a power gap which corruption might exploit in sustaining itself in the relationship between business and the tax system. This is because it creates room for the success of an illegitimate demand or exercise of power.

In contrast, some businesses are frightened by the prospect of a relationship with tax officials. A relationship may lead to greater awareness of the business and its activities on the part of the tax officials, which may have adverse consequences for the business. This is especially the case where the business is wary of the power imbalance in its relationship with tax officials. Such businesses may worry that tax officials who are more aware of their activities may seek to exploit them where they are non-compliant or frustrate them where they are compliant. One participant explained this phenomenon in the following words:

In Nigeria today, the closer you get to the tax official, the more problems you experience. ... The closer you are to them, the more problems it creates, because they do not base their analysis on the factual. All they are interested in is creating problems that lead to discussion so that subsequently it will result in some form of payment. This is a big problem in Nigeria and it is really discouraging taxpayers. (AE)

4.3 Small Businesses vs Large/Multinational Businesses

The level of interaction between a business and the tax authority is influenced by the visibility of the said business. In an ideal setting, the tax authority should be aware of both the existence and activities of all businesses within its jurisdiction. The lack of visibility of certain businesses is an indication of a deficiency in awareness, which may extend the power gap. The deficiency in awareness may also result in an uneven spread of tax burden between businesses with a good relationship with the tax authority and those that are beyond their prying eyes.

Businesses that are less visible can afford to avoid building a good relationship with the tax authority. However, for large and multinational businesses, building a relationship of some kind is not only key but also in practice unavoidable. In explaining the different challenges in interacting with large and small businesses, a tax official commented as follows:

Like yesterday, I was in training with the tax controller in Lagos here. In fact, he is the man in charge of [a company's] tax issues. I noticed that he was in constant communication with their tax manager to bring the returns; that they [the tax authority] are already waiting The problem we have sometimes is bringing those small-small businesses into the tax net. For the big companies, it is consistent, effective and productive communication. (BI)

The experiences and actions of small and local businesses differ from those of large and multinational businesses when it comes to interaction with the tax system. The responses of participants suggest that small and local businesses are less likely to be aware of the tax laws as well as the procedures for protest in the event that an actor representing the tax system commits a wrong. While 6.36% of the survey respondents classified the awareness of small businesses as high or very high, 72.73% of the said respondents classified the awareness of small businesses as either low or very low. The awareness level of local businesses as indicated by the majority of survey respondents is very similar. Only 9.35% of respondents classified the awareness of local businesses as high or very high, while 69.16% of respondents classified their awareness as low or very low. This is in stark contrast with the respondents' description of the awareness of large and multinational businesses. 65.14% of respondents indicated that the awareness level of large businesses was either high or very high. Only 1.83% of respondents indicated that the awareness level of large businesses was low or very low. For multinational businesses, 88.18% of respondents indicated that their awareness level is high or very high, while 3.46% of respondents indicated that their awareness level is low or very low.

The creation of separate communication channels for businesses depending on their size by tax authorities around the globe may contribute to the difference in experience between large businesses and SMEs. This approach is usually justified on the basis that businesses of different sizes have different tax challenges which are better handled separately. The state also generates a disproportionate amount of tax revenue from large and multinational businesses. When a new policy or bill is to be introduced, participants at the stakeholder forums held by the tax offices are usually large or multinational businesses or tax consultants. As a participant noted:

I am not sure what the criteria is; but what I find when I attend those forums is, there are a lot of multinationals. ... I think they always invite guys that are registered in the large tax office because, really, probably 80 per cent of tax revenue comes from those companies. They try to engage guys that are registered in the large tax office. Many of them are multinationals; but you do have some of the Nigerian big businesses there. (SA)

Where large and multinational businesses participate more in the process for the formulation of policies and laws, they are more likely to be aware of the laws and policies emanating from this process. The difference in the levels of participation may indicate that small and local businesses have restricted access to the relevant terminal. These businesses may feel they lack substantive (as distinct from formal) access to these forums. Some of these businesses may be unaware of the existence of the opportunities to interact with the tax system.

Also, some businesses may be aware and have full access but may yet be unwilling to participate. This unwillingness indicates inaction.

Beyond participation, many interviewees commented that multinational and large businesses are more likely to be compliant with their tax obligations. As a participant explained:

What you find is most of the multinationals don't have the culture of doing that [not complying]. They will either find a way of proving that their debt is less than that or probably pay it. Nigerian businesses to be honest are not that disciplined. Those guys are more likely to negotiate with the tax authority. Because the truth is, from a compliance perspective, multinationals are way more compliant than Nigerian businesses and this is in terms of obvious compliance. So of course it's not that all multinationals are compliant. Multinationals could do things that are wrong unknowingly such that they are unwittingly robbing the government of tax revenue but generally they are way more compliant than Nigerian businesses. The average multinational will pay the personal income tax of their employees in full but the average Nigerian businesses would not So if you go to the average guy that works for a Nigerian business and ask him what his tax rate is, he will tell you 5 per cent or 5000 Naira which could come to 1 per cent of his total package. Meanwhile as a minimum you should be paying about 20 per cent of your salary as taxes. (SA)

When asked whether large businesses are more likely to comply with their tax liabilities than small businesses, 90% of the survey respondents either agreed or strongly agreed. Similarly, when asked whether multinational businesses are more likely to comply with their tax obligations than local businesses, 81% of respondents either agreed or strongly agreed.

Compliance is an exercise of power that is legally, morally and economically expected of actors in the tax institutional setting. That certain businesses are more compliant on average than others is an indication of the extent of the power gap in the relationship that the tax system has with both classes of businesses. The power gap in the relationship with multinationals and large businesses as a result of the higher levels of compliance is likely to be lower than it is in the relationship with their local and small counterparts, if all other factors are assumed to be equal.

In the opinion of some participants, the difference in attitude of both categories of businesses extends to situations where multinational companies are provided with the opportunity to pay less tax than they should, out of negligence by the actors representing the tax system. As a participant pointed out:

[If required to pay less tax due to negligence by the tax authority], well, I will imagine some companies especially those affiliated with the US SEC companies will like to pay the additional money. There are many others that will just carry on. If such negligence comes to our attention, we will bring it to their attention so they can pay. I am very sure that for the ones affiliated to the American SEC companies or the US companies, they have some strict rules and would always pay what they should pay. They will always pay their additional taxes. Some of the local companies may be happy that such negligence occurred. If it came to our attention as tax advisers, we will always bring it to their attention and leave them to make the decision. (DA)

Put differently, even where the initial demand falls short of the ideal expectations of the institutional setting and may accord with their interests, more multinational businesses than local ones are willing to close the potential increase in the power gap by responding in a manner that accords with the ideal expectation rather than the demand of the exercising actor. This willingness to meet the ideal level of compliance may be due to the business' realisation of the long term benefits and power gains of compliance.

Since multinational and large businesses are more likely to comply, they are less likely to be hindered from protesting by previous non-compliance unlike local or small businesses.

As a participant commented:

Like I said, companies with foreign backgrounds cry out more irrespective of if it is corruption or anything. The Nigerian companies: because they say he who comes to equity must come with clean hands, so most companies that feel that they are not even so clean may not cry out. Because, you will feel like perhaps crying out will expose other things that they have not found out. (IE)

Non-compliance is an indication of a power gap. It also widens the power gap further by preventing recipient actors from resisting or protesting against an illegitimate exercise of power. This power gap may continually widen in a vicious cycle starting with non-compliance, then followed by an illegitimate demand, and then with further non-compliance and so on. In the process, the business is further pushed away from the ideal by the increment in its 'proper' liability (especially where interests and penalties are charged – together with a potential for imprisonment for the commission of a crime). This is worsened as the tax authority is entitled to revisit previous non-compliance brought about by fraud or corruption indefinitely, due to an exemption to the statutory limits on this basis.³³² Businesses, in this situation, may in effect be rendered hostages to their previous malfeasance.

The survey results support the assertion that small businesses are less likely to protest where wronged or faced with a problem. For instance, 60% of survey respondents indicated that small businesses are likely to do nothing in these circumstances always, very often or sometimes. The percentage of respondents indicating that large businesses will do nothing always, very often or sometimes was just 14%. The difference in potential response between small and large businesses is consistent across the formal means of protest including going to court/TAT. 93.52% of respondents indicated that large businesses will go to court always, very often or sometimes, as against 21.29% for small businesses.

Some participants suggested that the difference in the propensity for multinational companies to protest against a perceived wrong compared to that of small and local businesses

³³² See Companies Income Tax Act 1990, s 66.

may be the result of a difference in experience or background. For instance, regarding protests by instituting actions in court, one participant commented as follows:

The multinationals also tend to be more inclined to go to courts. Nigerian companies generally want to settle things out of court. But if I look at a lot of the cases that have gone to the tribunals – that have gone as far as the High Courts or Court of Appeal – they are all cases involving multinationals. We can say the multinationals are more comfortable probably because of their background where in their country they are very happy to go and see what the judge has to say. I think the active people are really the multinationals. It is either the multinationals in the oil and gas sector or the multinationals in the manufacturing sector. It is mostly the big businesses. (SA)

From the above quotation, past or background experience ostensibly plays a role in shaping human action. The difference in such experience between businesses as a result of their different institutional environments may be partly responsible for their attitudes towards protest. This is despite the fact that in many other respects both the multinational and local businesses share similar legal, moral, political and economic institutional obligations as they operate in the same domestic settings where attempts at illegitimate exercises of power may take place.

Where protest involves going to court, an important consideration is the amount of money at stake as explained by a participant thus:

Most companies [that go] to the tribunal, to maybe try and have judgement in their favour, consider the liability involved. If it is huge and they don't agree with the position of the revenue, then they go to the tribunal; but when it comes to those small income earners and individuals, it is hard to get them to go to the tribunals. (MU)

Multinational or large businesses are more likely to be parties to tax disputes involving large sums of money. Hence, they have a greater incentive to interact with the dispute resolution terminal than local or small businesses. Certain issues are identifiable from this dynamic. Firstly, the difference in power resources (or constituent actors in their network) makes it more likely for multinational and large businesses to institute actions in courts or tribunals. Secondly, there may be an issue with access to a protest mechanism through which businesses may seek redress. In the event that their claims are not sufficiently large enough to support a case in court or at the tribunal, businesses may be said to lack substantive access to a protest mechanism if there is no other mechanism through which their concerns can be addressed. Finally, one may recognise a horizontal institutional gap between the expectations of the economic dimension and that of a legal or moral dimension. The expectations of the economic dimension, with its focus on efficiency and effectiveness, suggests that businesses should not protest through the courts where such a step is not economically viable despite a potential legal or moral expectation and power to do so.

One participant captured the issues discussed above by attributing the difference in likelihood that large or multinational businesses will protest compared to small or local businesses to their respective economic, social and political capitals. These often manifest in the levels of awareness of these businesses. According to this participant:

I think it will be a selective reaction [to a perceived wrong] because it depends on who has the financial muscle and who has the political capital or social capital to be able to confront the tax administrator. I know they will like to bamboozle their way and threaten you but most Nigerians don't know the tax laws, so how will you respond? How will you react? It will be a selective reaction. For the big businesses, they know what is at stake and they have in-house tax consultants. Most companies, except the big ones, don't have in-house tax officers or tax analysts that actually have a grip of the tax laws to be able to respond to such abuse of power. (OI)

Where businesses are faced with negligence by the actors representing the tax system, their responses may be influenced by the internal and external measures to which these businesses are subject. Multinational companies are more likely to be subject to more advanced internal and external measures as pointed out by a participant thus:

I don't think all businesses are likely to react this way [protest in the face of negligence]. I think given my experience what you refer to as international companies because of the higher or more stringent requirements they are subject to locally in their base countries will more likely react in that way. Local companies or those that are with small or limited governance structures will take it in their stride or find a way round the negligence. (DO)

Here, the difference in the legal institutional mechanisms to which both classes of businesses are subject is represented as vital. While large and multinational businesses may be subject to varied and stronger institutional force mechanisms capable of ensuring that their actions and reactions fall within the institutional limits, this cannot be said for small and local businesses.

As it pertains to corruption, multinational companies may be subject to domestic laws with extra-territorial effect in their home countries. Some participants directly related their impression of the difference in attitude between multinationals and their local counterparts to these laws. For instance, one participant explained thus:

The big business are listed on the stock exchange and they are already caught up in the Foreign Corrupt Practices Act (FCPA). They cannot afford to aid and abet a corrupt official in Nigeria because: number one, it is going to be a smear on their reputation and it is also going to affect everything about them, their capital, [and] their share price. So they have a lot more to lose. They will react more. But when you talk about some companies here in Nigeria, when you talk of corruption, it is a give and take thing. If I find out that you are corrupt and you are asking for money to be able to help me deal with the issues of tax liability, an average business will be willing to settle with peanuts and not go through the whole hog of compliance; if it is just going to give it some reprieve. For them, I would say that a corrupt tax official, they wouldn't mind. But for the big businesses, they have more to lose so they will react. (OI)

However, these foreign laws with extra-territorial effect in form do not contain more stringent obligations than the domestic laws on corruption in Nigeria to which both multinational and local businesses are subject. The likely difference is that the legal and other

force mechanisms in the case of the foreign companies are duplicated and seem to be more effective. That is, they are more likely to reveal inconsistencies between actions and ideal expectations, more frequently activated against erring actors, and freer from distortions.

Finally, non-compliance may lead to damage to reputation. The fear of damage to reputation may account for the difference in attitude between large/multinational businesses and small businesses. Large/multinational businesses are more likely to be concerned about potential damage to reputation due to non-compliance than small and local businesses.

4.4 The Tax Law Terminal

Some participants commented that their interactions with the tax system are adversely affected by the state of the Nigerian tax laws and the inactivity of the tax law-makers. Unlike in comparable jurisdictions in Africa and around the world, the Nigerian law-makers rarely modify existing tax laws. The laws governing taxation of companies engaged in the exploration and production of oil and gas has, for example, received relatively few amendments since its enactment in 1959. This is despite the dynamic nature of the oil and gas industry and its surrounding socio-economic and geo-political circumstances. As explained by a participant:

There is also the issue of how up to date the law is. The tax laws in Nigeria tend not to have been updated on a regular basis. The fact that some of the laws are outdated makes it a bit of a challenge interacting with these law makers (DO)

The relative inaction in the tax law terminal can be ascribed to various factors. These include the lack of tax consciousness on the part of the tax law-makers (they are not even taxpayers), military rule for most of Nigeria's independent existence, and the absence of sufficient political, legal or economic pressure on law-makers.

Tax consciousness is an issue of awareness. They are not tax conscious in the sense that they are not aware of the extant policies and laws, the nature of amendments required and the importance of an efficient tax system to the operations of the state. In comparison with other prominent actors representing the tax system, participants stated that tax law-makers have the lowest level of awareness. This was explained by one participant thus:

It [the level of awareness] becomes worse with tax law-makers [compared to policy-makers]. There are no specific tax law-makers in Nigeria. When tax law issues come up, they try to take it in their stride and try to get to know more about it. That presents its own challenge. So for tax law-makers you have to start from ground zero and do a lot of education but in a very nice way otherwise they will feel insulted and quite unwilling to work It is basically about education. They don't know it; we know it. So we need to start explaining to them, providing implications and scenarios for them to be able to cross that bridge and be on the same page before we begin to have a meaningful communication. (DO)

This is supported by the results of the survey. Only 37.14% of the survey respondents classified the level of awareness of law-makers as high or very high compared to 88% for FIRS

officials, 66% for state tax officials, 50% for Ministry of Finance officials, 67% for the courts and 90% for tax tribunals.

Some participants opined that tax law-makers merely regurgitate what is presented to them by the FIRS and tax policy-makers. A participant explained thus:

Because I believe most of the people there are not tax people, they do not understand it. It is whatever FIRS wants them to do that they do. So for me, interacting with them, they won't understand these issues you are even raising. So for me, I try to avoid it. (OLA)

The modification of existing laws is clearly not an ideal legal expectation. It may, however, be an ideal moral or economic expectation. It is a moral expectation where it is unfair or inequitable for the laws to remain in their unmodified state. It is an economic expectation where changes in the economic circumstances of the state, both domestically and internationally, should push the legislators to change the law.

The lack of sufficient pressure on tax law-makers to act is indicative of the breakdown in institutional mechanisms. For instance, since the amendment of the law is not a justiciable legal obligation of law-makers, an actor cannot take legal action to compel them to act. Also, Nigeria is a rentier state as most of its revenue is derived from the exploration and production of oil and gas. As a result, there is a perception amongst many within it that the state need not rely on tax revenues. It may take a massive drop in the price of oil (such as what is currently taking place) to push the state apparatus to emphasise the need to generate more tax revenues through an efficient system of taxation. Despite the growing maturity of the relatively nascent democracy in Nigeria, the law-makers remain sheltered from political pressure. There is a general deficiency in awareness of and restriction of access to their communicative actions. More so, the challenges faced by the electoral system³³³ make it difficult for those who want to vote out non-performing politicians to do so. Even where the above is not the case, many Nigerians are also not tax conscious. This reduces the likelihood that law-makers would be held accountable for their inability to modify existing tax laws.

The actual or perceived inactivity of the tax law-makers causes other actors to circumvent the tax law terminal where possible. For instance, tax policy-makers in Nigeria effected major changes to the tax circumstances of companies in the oil and gas industry in order to encourage investment in the face of falling oil prices in the 1980s via a Memorandum of Understanding. In 2011, they also introduced Transfer Pricing Regulations to govern transfers between related companies. Partly recounting the circumstances leading to the introduction of Transfer Pricing Regulations in 2011, one participant commented as follows:

³³³ Rotimi Suberu, 'Nigeria's Muddled Elections' (2007) 18(4) *Journal of Democracy* 95.

If you have been following the news, transfer pricing has become a big issue, it is either Action Aid is writing something or NGOs are talking of Mopani mines. And because a lot of other tax agencies are interested, they felt ... we need to get involved When they wanted to introduce formal provisions, they could not go through the legislative process because it would have delayed them. They are legislators that don't understand what it is: some of them will have their own personal interest; some of them will be influenced by other people that don't want the law to take effect. They just looked at the environment and said: what can we do within our power? They looked at the law. They have an anti-avoidance provision that says, FIRS has the power to make adjustments if it can be proved that [transactions are not] at arms-length;³³⁴ and they said if you have this in the law already, there is another piece of the legislation that says FIRS has the power to give guidelines to give effect to the law.³³⁵ Why don't we just do that since that is within our powers? For that, we just need to convince the Ministry of Finance. So they came up with regulations for transfer pricing that will say that each company that has related party transactions, these are the information you need to provide to us every year. This is the analysis you need to show us to convince us that you transacted at arm's-length. In some countries these things are in the law. They are part of the law. In Nigeria, trying to put it in the subsidiary legislation would have been a very long thing [would have been difficult]. The guys at the FIRS just looked at what they could do within their powers ... The legislators are concerned about other things. Whatever laws that come from them are always suspect. (SA)

Where the powers of the tax law-makers are usurped as a result of their inactivity, it can be described as a distortion of the identity of the actor holding power. The accompanying danger may lie in the over-concentration of powers in certain actors. This is a cause of concern as the tax law-makers' role extends to scrutiny of tax policy-makers and tax administrators. Where they have failed to exercise their primary powers, they may also fail to exercise their powers of scrutiny.

One participant pointed out that tax law-makers give a disproportionate amount of attention to scrutinising awards of contracts and to performing other similar oversight functions compared to the attention given to amending and reviewing tax laws. While attempts by the FIRS and policy-makers to instigate amendment of the laws or the enactment of new laws are often unsuccessful, interaction is often instigated by the law-makers regarding the general management of the FIRS rather than the specific needs of the tax system. In the words of the participant:

Sometimes, we are told that he [The Chairman House Committee on Finance] is in Revenue House to check FIRS. They don't come in respect of their core functions They don't often come because they have a constitutional responsibility to change the law If there [are] irregularities in awarding a contract, 'trouble don start'. 'Wahala has started' [there will be trouble]. They want to report the chairman to the EFCC [body responsible for prosecuting financial crimes]. People try to protect interests. The interaction is not really based on their core functions rather their oversight functions because that is where they may likely go back to their states a better person in terms of finances. (BI)

³³⁴ See section 22 of the Companies Income Tax Act 1990 which states:

Where the Board is of the opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be affected, by the transaction and any company concerned shall be assessable accordingly.

³³⁵ See FIRSEA, s 61.

This is an example of a situation in which interests control actions. The extent and direction of scrutiny as suggested by the participant is influenced by the interests of the law-makers. This leads to inaction regarding the performance of the neglected duties.

Some participants commented that even where tax law-makers enact laws, businesses and tax professionals are often not adequately consulted beforehand. Owing to their poor awareness of the tax laws and peculiarities of various industries, the end product is also often riddled with inconsistencies.

The inactivity of the tax law-makers preserves outdated laws sometimes borrowed from other jurisdictions without clear application to the circumstances in Nigeria. One participant complained that borrowing laws without ensuring that they fit into the context to which they are to be applied may create interpretation problems, thus:

We must start from the laws – the applicable laws; how useful are they? Most of time they just copy. There is an applicable law in the UK; you just copy it. There is a particular provisions of the law we don't understand today. If I give you these provisions of the law, you will give it a different interpretation. Everybody that reads it gives it a different interpretation. These provisions have been interpreted severally in such a way that makes the taxpayer to pay more than what he is supposed to pay. Well, we have to start from there. We have to take a look at our laws. Our laws have to make more sense. I will refer you to a particular provision of the Companies Income Tax Act, section 19. It discourages investment. The way it is being interpreted by the courts. It will make you not want to invest money in Nigeria. You will not want to be a shareholder. That section will have the effect on the dividend you will be receiving from the company you are a shareholder in. (MU)

Section 19 of the Companies Income Tax Act 1990 is a prime example of a provision of the Nigerian tax law which has remained problematic for stakeholders. This section provides as follows:

Where a dividend is paid out as profit on which no tax is payable due to:

- (a) No total profits; or
- (b) Total profits which are less than the amount of dividend which is paid, whether or not the recipient of the dividend is a Nigerian company,

Is paid by a Nigerian company, the company paying the dividend shall be charged to tax at the rate prescribed in subsection (1) of section 40 of this Act as if the dividend is the total profits of the company for the year of assessment to which the accounts, out of which the dividend is declared, relates.

This section provides for excess dividend taxation. In summary, it mandates that any dividend paid by a Nigerian company which exceeds its taxable profits for the relevant year should be subject to tax as the profits of the company for that year. The problem with this provision is that it does not make an exception for dividends paid out of retained earnings already subject to tax in previous years; franked investment income exempted from further taxation by section 80(3) of the same Act; and capital gains already subject to capital gains tax.

This provision is particularly damaging to holding companies and can have a detrimental effect on investments as it leads to double taxation.

The TAT gave a literal interpretation of this provision in *Oando Supply and Trading Limited v Federal Inland Revenue Service*.³³⁶ The tribunal held that dividends paid out of retained earnings that have already been subject to tax remained taxable under this provision if they exceed taxable profits for the year. This decision contradicts an obiter dictum of the Federal High Court in *Oando Supply and Trading Limited v Federal Inland Revenue Service*³³⁷ which suggests that dividends paid out of retained earnings that have already been taxed should not be subject to tax under section 19.

Both the FIRS and accounting firms have made requests to the tax law-makers for years to bring clarity to this issue by amending this provision. In spite of the potential detrimental effect of this provision to the Nigerian economy, the law-makers are yet to act.³³⁸

Vague or ambiguous laws heighten the risks faced by taxpayers and adversely affect their attitude towards compliance.³³⁹ They are also detrimental to the efficient functioning of the tax system as pointed about by another participant thus:

Sometimes the laws they make are not clear. They are not clear. They are vague; so it is subject to diverse interpretations. So, it exposes the client to risk depending on what interpretation holds sway. So they need to be clearer in the laws they make. . . Because you need more efficiency in the tax system- you need companies to be sure of what exactly, what taxes they should make provisions for and exactly what taxes they should pay; and it makes the businesses more efficient to run. (YE)

Many participants in the first phase of the empirical study identified the vagueness or ambiguity of tax laws as a challenge. However, only 29% of the survey respondents agreed with the proposition that Nigerian tax laws are vague. Rather, 53% of respondents disagreed with this proposition. This suggests that while certain aspects of Nigerian tax laws are vague, the laws as a whole are not vague or ambiguous.

Vague or ambiguous laws create difficulties for both taxpayers and the tax professionals they consult for clarification. Owing to vagueness or ambiguity in the law, tax professionals commonly render parallel advice to taxpayers about the law as they see it on the one hand and the interpretation of the tax authority on the other hand, leaving it to taxpayers to decide which option to follow depending on their aggressiveness or conservativeness. This was pointed out by a participant in the following words:

³³⁶ *Oando Supply and Trading Limited v Federal Inland Revenue Service* (2013) 11 TLRN 169.

³³⁷ *Oando Supply and Trading Limited v Federal Inland Revenue Service* (2009) 1 TLRN 61.

³³⁸ See Taiwo Oyedele, 'Still on Excess Dividends Tax: Why is the National Assembly Slow to Act' (2014) <http://www.pwc.com/en_NG/ng/assets/pdf/tax-watch-september-2014.pdf> accessed 5 May 2015.

³³⁹ James Alm and others, 'Institutional Uncertainty and Taxpayer Compliance' (1992) 82 *American Economic Review* 1018.

You find a lot of times when we are advising clients we have things like, this is what the law says, this is how the FIRS interprets it. So depending on whether you want to be conservative or aggressive you can take either position. When we advise clients we always have things like: in theory this is what the law says and in practice this is what happens. (SA)

These difficulties are worsened by the variance in perspective of tax officials and taxpayers when applying the law. Some participants accused tax officials of holding on to interpretations that suit their goal of maximum revenue generation so as to hit the revenue targets in their key performance indexes. They also accused tax officials of perceiving taxpayers as criminals, tax avoiders and tax evaders before the fact. One participant explained this in the following words:

Perceiving the taxpayers as criminals – that is the impression they have. To them any company that is filing an assessment is trying to hide something. (MU)

Such preconceptions may lead to distortions resulting from inaccurate interpretation of communicative actions or the improper exercise of power by tax officials wrongly motivated by the desire to amend a perceived wrong.

Ambiguous laws may also give tax officials increased (yet unintended) discretionary powers. Discretionary powers enable corruption to linger even in the presence of strong institutions. This is due to difficulties pertaining to awareness. Where an actor has broad discretionary powers, it becomes difficult to determine whether the said actor has exercised this power in a manner that is consistent with the dictates of the institutional settings. This heightens the possibility of covert distortions of the law.

The responsibility for resolving the ambiguity in laws often lies with the court (apart from the law-makers themselves). However, the process of deciphering the right meaning of the law is fallible and may lead to further distortions (rather than prevent distortions). Even assuming that the courts had the skills and tools to identify the right meaning of these vague or ambiguous laws, in an environment where both the taxpayer and the tax authority are unwilling to submit disputes to the court, such vague provisions are bound to remain unresolved for long. As discussed below, many respondents reported the unwillingness of actors to submit disputes to courts. Hence, the courts with power to resolve this problem may also have no access to the communicative action it is meant to interpret.

4.5 The Dispute Resolution Terminal

The dispute resolution terminal comprises both internal and external dispute resolution mechanisms. In Nigeria, recourse to the TAT, an administrative tribunal set up as the first step in the process for the resolution of tax disputes outside the tax administration, has been

negatively affected by two main factors. These factors are the ongoing debates about its constitutionality and lack of clear independence from the tax authority. These and other general issues that bedevil the formal dispute resolution system in Nigeria hinder the TAT from effectively achieving its goal of increasing access to the external dispute resolution terminal.

The external dispute resolution mechanism is a key instrument of protest in the relationship between business and the tax system. The restriction of substantive access to this mechanism is therefore likely to extend the power gap in the two-way relationship. This is because owing to such restrictions actors may either fail to protest where protests are ideally expected or comply with an illegitimate demand by an exercising actor. Currently, it is mainly patronised by large or multinational companies, especially those in the oil and gas industry. The various issues that specifically affect the dispute resolution terminal are analysed in turn below from the perspective of the participants in this research.

4.5.1 Independence and Objectivity of the Tax Appeal Tribunal

One crucial feature that gives credibility to the external dispute resolution mechanism (and justifies recourse to it after attempts at resolution by the internal dispute resolution mechanism) is its perceived and actual objectivity – and independence from the tax administration in particular. From the responses of many participants, the dispute resolution terminal seemingly faces a crisis of credibility owing to its perceived lack of objectivity and independence from the tax administration. This has led to applications by businesses before this tribunal and the courts seeking a declaration that the tribunal's alleged lack of independence breaches the business' fundamental human right to fair hearing³⁴⁰ and renders the tribunal unfit to entertain tax disputes.

Commenting on the independence of the Tribunal from the FIRS, one participant stated as follows:

The tribunal itself is a creation of the ministry of finance and this money you are recovering is supposed to be payable to the ministry of finance – payable to the federal government of Nigeria. So at the end of the day, you normally find it difficult to get justice. If you want to get justice so far as tax issues are concerned, be ready to go from the TAT to the Supreme Court. So, that is one of the difficulties we have in settling disputes ... It is a big problem. So what we normally do when we are being instructed by our client; we make them to realise that this is what is going to happen. You may not win here They are appointed by the minister and will want to give decisions that are favourable to the state; so just have that at the back of your mind, be ready to appeal. When you go to the tribunal, you go to tribunal with the mind-set that you are going to a place where they have already made up their mind to rule against you. I have that mind-set and that is the way I see them. (MU)

Another participant described the problem as mainly an issue of perception or image thus:

³⁴⁰ See *TSKJ 11* (n 167); *NNPC v TAT* (n 166).

In fact, until about a year ago, they were housed in the same office as the FIRS. That presents an image issue about their objectivity in decision-making. I mean given that their principal could be a party in tax disputes presents a challenge for us. (DO)

This sentiment is also recognised by some tax officials. As one tax official commented:

Going to the TAT is like a 'case closed'. They [taxpayers] see it as an extension of the revenue. The argument is broad. The FIRS takes general instructions relating to policy from the minister. The minister sets up the TAT, that is, officially. Practically, FIRS takes care of the TAT in terms of payment of their allowances and other things. Some taxpayers know this arrangement and that has affected their opinions about the TAT. That is why a committee is set up to look into the challenges of the TAT and how it can be resolved. (BI)

This concern about objectivity can be extended to the high courts. They are seen by some as agents of the state government despite the constitutional recognition of the independence of the judiciary.³⁴¹ This is what a participant had to say about this:

Let's take Lagos State for example, if you are having a tax dispute with Lagos, the court with the jurisdiction to entertain the dispute was the High Court before they amended the law. If you take Lagos State tax authority to the High Court, you will also encounter the same problem you encounter in the TAT. Because the Lagos state High Court, to him, you are trying to rob the state. (MU)

4.5.2 Tax Expertise of Judges/Commissioners

On this issue, the opinion of participants seemingly contradicts the results of the survey. 83% of the survey respondents rated TAT members' level of awareness of Nigerian tax laws as either high or very high, while this percentage in relation to court judges was 67%. The difference between the court judges and the members of the TAT reflects the fact that the TAT is a specialist court. These percentages are considerable when compared to those of other participants (Small Businesses 6%; Large Businesses 64%; Multinational Business 87%; Local Businesses 9%; FIRS 88%; State Tax Officials 66%; Legislators 37%; and Ministry of Finance Officials 50%).

However, in the opinion of many participants, the courts and the TAT suffer from a dearth of judges and commissioners knowledgeable in tax law. This has led to clearly incorrect and inconsistent decisions, which in turn dampen the faith that both businesses and the tax authority have in the external dispute resolution mechanism. It is noteworthy that the participants who complained about the arbiter's knowledge of the tax laws are those who go to courts or tribunals to resolve disputes. This will usually be multinationals, large businesses and the FIRS. Hence, their complaint is based on a relative assessment of knowledge. Secondly, the TAT and court are in the eyes of many 'the guardians of meaning'. Thus, a higher level of knowledge is expected of them. Finally, in many cases, the estimation of their knowledge would be based on this expectation rather than experience.

³⁴¹ CFRN (n 144) s 17(1)(e).

Knowledge of the law is an issue of awareness. Their lack of awareness creates uncertainty in the system and empowers actors seeking to distort it. An actor seeking to exceed its institutional powers may take advantage of the court's deficiency in awareness. Individuals willing to protest against such illegitimate actions may be prevented from doing so due to the uncertainty of the arbiter's decision. The impact of wrong and inconsistent decision-making by the courts is worsened by the fact that any decision rendered by the courts enjoys a presumption of regularity. The Nigerian Evidence Act 2011, s 168(1) states that 'when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with'. This is supported by the common law maxim, *omnia praesumuntur rite et solemniter esse acta* which means 'all things are presumed to have been rightly and regularly done'.³⁴² As one participant succinctly explained:

If, for instance, the TAT gives a ruling negligently, it does not deviate from a ruling, it is still a ruling. (DK)

While wrong decisions constitute distortions, inconsistent decisions give room for more distortions and awards additional discretion to actors empowered to give effect to these decisions. The presumption of regularity gives these inconsistent decisions validity, albeit temporarily.

The lack of judges with adequate knowledge of tax law is due to a combination of factors. Firstly, tax law is a relatively new area of legal practice in Nigeria. Until recently, taxation was widely considered the preserve of accountants. As a result, there is a limited pool of active tax legal practitioners. Secondly, the majority in this limited pool are unwilling to join the bench due to the relatively lucrative nature of private tax practice. Thirdly, members of the TAT are political appointees. Also, the procedure for their appointment is not subject to any formal process of scrutiny.

Different participants had accounts of instances where the lack of awareness or ineptitude of a tax judge led to a perceived miscarriage of justice. One participant, for instance, complained as follows:

I have had a particular case where the court in a state in Nigeria passed a judgement that I expect every tax practitioner to know that such judgements are completely wrong. When such judgements are passed, it creates chaos in the tax system. For example, an issue relates to withholding taxes. Withholding tax is driven by the resident address of the vendor. A vendor who doesn't live in a particular state even though he transacts business in that state is not obliged to pay withholding tax to that state. The courts in one of the states passed a judgement expecting that withholding taxes should be paid to the state because the vendor transacted business in the state. It makes a mess of the tax system. (CO)

³⁴² *Ogbuanyinya v Okudo* (1990) (No 2) 4 NWLR (Pt 146) 551, 570.

A different participant also recounted a case of ineptitude on the part of a tax commissioner which affected the said commissioner's awareness of the facts and arguments before the TAT, thus:

There was a judgement that was delivered against me. After the judgement was delivered the judge was trying to tell me why he delivered the judgement. 'How can you tell me this, how can you declare dividends and you will not be taxed on the dividends; it is not allowed', he said. I said, 'no my lord, we are not saying that we would not pay tax. We actually paid tax'. I referred him to a particular page. 'We paid tax. We are saying that the tax we have been assessed to pay is not what we are supposed to be assessed to pay. That we are supposed to pay tax at the rate of 10 percent and we have been assessed to pay that tax at the rate of 30 percent'. 'Did you write that in your written address', he asked. I said yes. I referred him to the particular page. The judge advised me to go and appeal and that he did not see that. Those that are to adjudicate do not have the knowledge of tax (MU)

Another participant also had a similar story of lack of awareness of tax laws by judges:

I can say about 97 percent of those adjudicating on tax know nothing about tax. They are just there to hold the job; that is the way I see it ... 99 percent of the time we file cases against the FIRS, we lose. And I am not mad, I cannot be going to court all the time fighting the same principle of law and you say I am wrong. At the Federal High Court level there is a judgment that just came out on SAIPEM and people are afraid but to me that judgment was badly written. ... If the judge had analysed the issue he may have come to the same conclusion, but as a student of tax for example, if you are reading that judgment, you won't learn anything because the judge didn't say anything. She kind of muddled up everything and I am sure you will find she didn't have sufficient training in tax. (OLA)

It is believed by some participants that some judges dismiss tax cases on preliminary or non-tax grounds due to their inability to understand tax issues. A participant commented as follows along these lines:

At the tribunals, there is a dearth of tax judges so to say. Sometimes, you have some of the tribunals being headed by people who have general knowledge in law and not necessarily tax. So sometimes, they don't take the difficult route of getting to the root of the issues. Sometimes, if your opposite in the litigation brings an issue of jurisdiction, a lazy tribunal will just accept that there is a jurisdiction problem and your case will be thrown out. You need to go to the higher court to get justice. (DK)

The zeal to dismiss suits on preliminary grounds not only constitutes a distortion of the legal process but also erects a barrier to substantive access for actors in the two-way relationship. It precludes the determination of the legitimacy of protests and may deter recourse to the dispute resolution terminal.

4.5.3 Legality of the Tax Appeal Tribunal

Another major challenge facing the dispute resolution terminal is the uncertainty concerning the legality of the TAT. Actors may be put off instituting legal protests where there is uncertainty over the proper channel of protest. One participant laid out this concern in the following manner:

Again, right now, there are two sides of the coin. Where the courts of higher competence have said the Tax Appeal Tribunal is illegal. Right now, another says it is legal. So, for a lot of businesses, we are kind of sceptical, how much weight can you put on the ruling or decision of the TAT if one court says it is illegal and another court both on the same level, the Federal High Court, ruled saying something different about the legality of the tribunal. Really a lot of people actually don't put a lot of emphasis on them. Yes,

we are guided by what they say ... the chances are the fact that they have issued an opinion even if it is not binding it may show the mind of independent arbiters on this matter, although it doesn't constitute the law. (OA)

This situation is exacerbated by the fact that the possibility of resolving tax disputes via other forums remains questionable owing also to conflicting decisions by the High Court on this issue. For instance, in *Federal Inland Revenue Service v Nigerian National Petroleum Corporation & 4 Ors*,³⁴³ the Federal High Court held that disputes related to taxation are not arbitrable.

However, the TAT and courts aid out-of-court settlement through their preparedness to stay proceedings to enable negotiations aimed at resolving disputes between businesses and the tax authority. This was explained by a participant in the following words:

When you are issued an assessment, you are under obligation if you want to challenge the assessment to file an objection within 30 days. If you don't file that objection within 30 days, the tax assessment becomes final and binding on you. You can't do anything about it. So, with that, as far as you are issued an assessment, you have a problem especially when you are desirous of settling or resolving the issue and you don't want to be seen as been antagonistic with the tax authority, you may be compelled to file your appeal or an objection – whichever you choose to do – within 30 days. This is what we do for our clients We normally go back to the tribunal to report to the tribunal that we intend to settle this matter. So they normally give us room to sit down and resolve the dispute. That is one positive thing about the practice. They will allow you ... maybe grant an adjournment to enable the parties to sit down and resolve their disputes. That is one of the main advantages we have. (MU)

On the one hand, this improves access, which may consequently narrow (or at least prevent the widening) of the power gap. Where this procedure is not available, businesses may be denied a means of protest in the situations where they need to explore the internal dispute resolution mechanism. However, awareness that this avenue is available is key. On the other hand, this may also further the concentration of activity at the tax administration terminal. Businesses and tax officials are given more room to negotiate compliance. This may lead to distortions, the widening of the power gap and consequently, greater opportunities for the preservation of corruption.

The flexibility of the TAT rules may enhance its fact-finding role by permitting the waiver of rules of evidence with the potential to constitute a hindrance to proceedings. This is also another factor that may increase access to the dispute resolution terminal and potentially reduce the power gap.

³⁴³ *Federal Inland Revenue Service v Nigerian National Petroleum Corporation & 4 Ors* (2012) 6 TLRN 1.

4.6 Undue Delays

The resolution of disputes via the Nigerian courts is commonly plagued by considerable delay. For instance, research shows that an average case before a superior court in Nigeria lasts for 5 to 6 years while an additional 3 to 4 years may be spent on appeal.³⁴⁴ However, delay in taking action is common to all the terminals of the tax system, not just the courts. Law-makers are known to deliberate on important bills for years as is the case with the Petroleum Industry Bill (PIB). Policy-makers may fail to respond in good time to requests for clarifications about laws and policies. Also, for example, the tax administration may unduly delay releasing the results of an audit or issuing tax credit notes. Most participants from both sides of the divide identified delay as a challenge. Delay can be particularly problematic for consultants caught between the slow turnaround time of the actors representing the tax system and the demand for speed from their clients. In the words of a participant:

I know the kind of expectations my clients have of me. So I will expect same from the people I am liaising with ... Some of these clients are not Nigerians. So when you are liaising with the tax authority on their behalf, they seem not to understand when you tell them that you are trying to get a response on their behalf and they are not forthcoming. I have a client that we assisted during an FIRS tax audit and it is like five months and the tax audit report is not out. The reason why I think it is being delayed is because our client ... They wouldn't really get much liability from that audit because it is a start-up company. (IE)

Similar delays in the enactment of laws or formulation of policies, as is currently the case with the PIB, have detrimental effects on business activities. A participant explained this in the following words:

We also have expectations that whatever changes or policies that have to be put in place will also be done speedily. There have been a couple of tax changes in Nigeria that have been ongoing for many years. That is not helpful for the business, because delays or lack of clarity about such tax policies also impact negatively on business decisions. (DO)

Some tax officials who participated in the research recognise that delay in responding is an administrative challenge which they struggle to tackle. However, a tax official suggested that the difference in turnaround time may depend on the status of the actor requesting the information or service:

The other challenge is an administrative challenge which is taking a lot of time before the taxpayer gets a response or feedback from a request that they have asked for But basically, there are some communications that are taken seriously. If it was coming from a small taxpayer, it may not be taken with all seriousness For those taxpayers that will enable us meet our target, we are always at their doorstep and communication with those taxpayers is very effective. (BI)

Despite the negative impact of undue delays on businesses, there is, in many cases, no conspicuous formal means through which they can be addressed. Hence, actors in these cases

³⁴⁴ See Jędrzej George Frynas, 'Problem of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' (2001) 10(3) *Social and Legal Studies* 397.

can be said to possess a discretionary power to delay. As already mentioned, such discretions are problematic as they make awareness of breach of legal expectations difficult to detect.

An integral aspect of the right to fair hearing enshrined in the CFRN is the legal obligation and expectation on courts to resolve disputes on time. Section 36(1) of the CFRN provides that persons are entitled to a fair hearing within a reasonable time by a court or tribunal. Also, section 294(1) places an obligation on courts to deliver their decisions in writing not later than ninety days after the conclusion of evidence and final addresses. Failure to comply with this provision may constitute a ground for setting aside the decision if it has led to a miscarriage of justice (CFRN, s 294(5)). Failure to comply with this provision may also lead to disciplinary action taken against the judge. The judge is mandated to report such failure to the Chairman of the National Judicial Council (the body responsible for disciplining judicial officers). In practice, however, judges circumvent this provision by calling parties to re-adopt their final addresses before delivering their judgment, thereby partly defeating the purpose of this provision.

However, the scope of this right is very limited. It does not create a justiciable legal obligation for many aspects of the court's activities. A major part of the delay in court processes is caused by interlocutory appeals (appeals against court decisions made during the pendency of the suit). Neither section 36(1) nor section 294 of the CFRN address this issue. Also, there is usually no corresponding legal obligation on tax administrators, policy-makers and law-makers to act without delay. Hence, for these actors, such delays are not usually a breach of the expectation of the legal dimension although they may breach the expectations of the moral dimension to the extent that delays lead to unfairness, or the economic dimension to the extent that they create inefficiencies. However, these other two dimensions do not normally possess effective force mechanisms through which this delay may be addressed.

One exception to the delays not breaching the expectation of the legal dimension is where the tax authority has failed to issue a notice of refusal to amend (in response to a notice of objection by the taxpayer) for an unreasonably long time. In a landmark decision by the TAT, the taxpayer was allowed to assume that action had been taken where there was a delay of 2 years.³⁴⁵ This assumption enables the taxpayer to institute an action in court without waiting for the receipt of notice of refusal to amend where there has been considerable delay

³⁴⁵ *Oando Supply and Trading Limited v Federal Board of Inland Revenue* (2011) 4 TLRN 119.

in the issuance of this notice. Therefore, delay that could hinder access to a protest mechanism was redressed by this decision.

In contrast, the Federal High Court in FHC/L/CS/1906/14³⁴⁶ struck out an application by a concerned citizen for leave to seek an order of mandamus compelling the National Assembly to enact the PIB, which had been before the legislature for over 6 years. The presiding judge stated as follows:

I am to grant leave with the view to getting an order of mandamus to compel the National Assembly to pass the Petroleum Industry Bill. That, in my view, is asking the court to go too far. I am pretty sure that this court understands the motive behind the principle of separation of powers as enshrined in the Constitution. I am certain that no court will compel the National Assembly to pass laws.

In the above case, the well-established legal doctrine of separation of powers barred an attempt by an actor to compel law-makers to act, thus leaving the actor with no legal force mechanisms at his disposal.

4.7 Tax Administration and Tax Policy-Making

Most businesses interact with the tax administration terminal more than any other terminal of the tax system. Taxpayers without direct access to policy- and law-makers may also communicate their grievances to the policy and law terminals through the tax authority. Where the views of businesses are communicated to the tax policy- and law-makers through such an indirect communication route, distortion in communication is likely to occur. This has resulted in situations where despite wide consultations with businesses and broad agreement on policy and legal issues, the final policy or law created is bereft of input from businesses.

As representatives of the tax authority, both the positive and negative actions of tax officials are usually attributed to the organisation they represent. Therefore, where actions need to be taken to address a perceived wrong by a tax official, this action is often taken against the tax authority. In effect, many respondents see the tax administration terminal as a black-box despite their obvious interaction with individuals and not the tax administration directly. These tax officials are merely intermediaries of the tax administration dispatched to secure influence at a distance. The tax authority is left to deal internally with the erring tax official. This point was communicated by a participant in the following manner:

When tax authorities send out their employees to work, the individual is not discharging its personal responsibility but the responsibility it has been assigned by the tax authority. So issues are addressed on a large scale on the business versus the tax authority not the business versus the tax authority employee. The business will handle the tax issues between them and the tax authority. The tax authority will then handle the internal issues with their employee. (CO)

³⁴⁶ Case FHC/L/CS/1906/14 (Unreported).

This further complicates the power dynamics between tax officials and businesses. In interacting with business on behalf of the tax authority, the tax official will often communicate through a direct communication route. The directness of his communication minimises the potential for distortion of Communication, thereby giving the tax official greater leeway to actualise his intentions or further his interests. In the event that this communication constitutes an attempt at an illegitimate exercise of power, the official communication of resistance by the business through the tax authority will be indirect. This increases the likelihood of distortion and creates an imbalance in the power relationship between the business and the tax official. The punctualisation of the tax authority may also shield the tax official and his interests from scrutiny in the event of legitimate protest by business.

Although the power to formulate tax policy rests officially with the Ministry of Finance at the federal level, this power is sometimes exercised by the FIRS. In such cases where policy is to be formulated on an ad-hoc basis by the FIRS, individuals with expertise in the relevant area are pooled together from different departments under the management of a coordinating director to perform this task. This is despite the existence of an official department within the FIRS charged with the responsibility of performing this function. The danger is that some tax policy-makers, as tax administrators, may retain a primary focus on maximising revenue for the government rather than ensuring the general wellbeing of the tax system as a whole.

Tax officials have been accused of having a ‘Nigerian civil servant mentality’, that is, seeing the performance of their duties as a favour to the taxpayer. This is despite the fact that the FIRS’ employees are not civil servants and have different working conditions. This may lead to situations in which the tax officials will fail or refuse to act save where they are incentivised to do so by means other than their basic salary. A failure or refusal to act is an example of a power gap which corruption might exploit. One participant distinguished his experience when interacting with tax officials at different levels of the hierarchy. In his words:

[T]he difficulties you have [when interacting with tax officials on a routine basis] is basically the fact that it is the civil service. The civil service is not very efficient. People think they are doing you a favour when it is their job. So I will say that is the biggest problem in interacting with the tax administrators especially interactions with the lower cadre. If it has to do with significant issues, big issues and you need to engage with the higher level of authority, you find them to be reasonable and cooperative. When you are dealing with the lower levels on routine issues it could be relatively frustrating due to lack of professionalism. The truth is a lot of improvement has been made. If I look back at when I started taxation like 9 years ago, I think there is a huge difference. There has been a serious campaign about trying to get their people to be more professional. Trying to get their people to do their jobs as customer service and see the taxpayers as customers. It is going to take a while. They have made a lot of progress but those issues are still there. You still don't have that level of professionalism you find when you are dealing with the private sector. It is not something that is restricted to the tax administrators; it is just the public service in general. But I think within the FIRS especially during the tenure of the last FIRS chairman, there was a lot of drive and movement towards making the Service a lot more professional. (SA)

In a similar fashion to courts and tribunals discussed above, in the opinion of many participants tax officials also lack adequate awareness of the law. This causes distortions and makes effective communication between the actors difficult.

The lack of awareness of tax officials can be ascribed to the absence of qualified professionals holding certain positions (compared to the situation in the private sector). This creates an imbalance as pointed out by one participant:

You find that maybe two out of the 10 tax administrators are actually chartered accountants – maybe 3 at best. ... We have a lot of people who are perhaps not as skilled as you will see in businesses. For example, for someone like me, anyone who is going to sit in my position will at least be a chartered accountant with certain number of years of experience. For goodness sake, you will not see that. You will see a number of fresh graduates come out of school at times. We see a number of people come from other maybe banks or whatever, join the revenue and start working. In terms of the level of knowledge you find that there is an imbalance. (OA)

One participant narrated a personal experience in which the lack of awareness could have led to adverse consequences for the business taxpayer:

I was trying to resolve a dispute with the LIRS and made reference to the Double Tax Agreement between the Nigeria and the UK because the company involved is a UK company. To my surprise, the person I was discussing with was not aware of the existence of that document. He even told me that, 'Has it been signed? Do we have a DTA with the UK?' He was very rude and harsh. He was saying that you people should go and pay your tax After discussing with them after 3 months, we realised we had to send a copy of the DTA to them. When they reviewed it, the liability that was as high as 183 million now has been reduced to 45 million. They realised that they should not have subjected some of the personnel of the company to tax in Nigeria. (MU)

Another participant had a similar experience with tax officials, which he described thus:

The skill, the resources at the FIRS level is lacking For instance there was a dispute we had on section 23 of CITA where the issue was that the exemption that the President can grant in respect of taxes should be gazetted. The law didn't say that but the FIRS said if the President grants exemption to anybody [it had to be gazetted] but I said, 'look that is not what the law says, you have to check and see that there is a difference between section 23 and 25. 25 says before the minister can sign the list of the areas where R&D can be ... then those must be gazetted but section 23 does not say that'. But FIRS is putting that in section 23. Well I said, 'I am not the President, they granted me the exemption which means they are to gazette it so why are they putting it on me?' (OLA)

Some businesses allege that relatively new tax officials who lack a historical perspective tend to interpret the law out of context. Participants also expressed their perception of a difference in the levels of awareness amongst the various actors representing the tax system. This may affect the communication route which businesses may utilise when dealing with the tax system. Businesses are likely to be more willing to interact with the terminal where there is greater awareness. This may lead to the concentration of activities and power in certain terminals and the further neglect of others. However, where the business is not interested in building a good relationship with the actors representing the tax system, the reduced awareness by the latter actors provides an opportunity for businesses to hide their existence or their activities from these actors.

Tax policy-makers within the FIRS were commonly identified as having the highest level of awareness. In the hierarchy, they were followed by other tax officials, and then the tax judges. Tax law-makers were fingered as the least aware group of representatives of the tax system. However, the gap in knowledge between the tax policy-makers and the tax officials is made complicated by the close relationship between them. In fact, tax policy-making in Nigeria seems to be carried out by tax officials of a higher level in the capital Abuja.

In explaining the relationship between tax officials and tax policy-makers, as well as their respective levels of awareness, one participant commented as follows:

In reality the policy-makers are part of the revenue. Like I mentioned earlier, they are like the elite group. A lot of them are well read; a lot of them are well travelled; a lot of them have gone on secondments and cross postings. So in terms of exposure and you see a lot of them also from consulting firms. In terms of exposure, a lot of them are actually very well exposed. You know but when it comes to actually implementing these policies, cascading the knowledge down in the chain to the people businesses interact with, you will find out that it breaks. Which is not in itself; I will not say it is deficient. I think it is systemic. You don't expect that there would be the same wide exposure across board. In terms of the disparity in my opinion, it is really high. You have a few people, maybe 20 or thirty people who are in tax policy department here who are in the FIRS here and you have maybe 500 tax administrators. So you have a few people who are well read and you have a lot of people who take instructions from them and in terms of cascading the knowledge, it does not come through and ... the interaction is not smooth.(OA)

One participant compared the skill level of the FIRS to that in other jurisdictions based on his reading of law reports thus:

The biggest thing is the issue of skill. The skill level at that point [the tax authority] is very low. Because I tend to read law reports from India very frequently and you see when Tax officials appear before the court, the kind of views they express; I mean how convincing their arguments are. But here, you talk to tax policy-makers and you wonder where they are from. (OLA)

On a more positive note, many participants noted that the level of awareness of tax officials has improved steadily over the years. One participant explained this in the following words:

Previously, their understanding of the law was pretty low. It is way better now because I think internally there is a move towards trying to train their people well, making them better So their level of education and understanding of the law is improving and better than it was 3-4-5 years ago. (SA)

This improvement is crucial. It signifies an improvement in general awareness by the tax administrators which reduces the power gap as it relates to interaction with the tax administration terminal. However, it may widen the knowledge gap across terminals which may in turn lead to an over-concentration of interaction with the tax administration terminal.

In addition to deficiencies in their knowledge of the tax policies and laws, participants also identified tax officials' deficient knowledge of industry as a challenge to interaction. As one participant explained:

I am into maritime, you have officials that want to audit me and if I say this transaction is all about temporary importation bond, they don't know it. They don't know what is called temporary importation bond. Maybe you are even hearing it for the first time, then I try to explain why a transaction should be

exempted from a particular tax and they are arguing with me. I don't know if you understand what I am trying to say. What I am trying to say is that if you have some officials that are going to be in the maritime sector, give them necessary training to understand the sector so as to understand the transactions. They need to focus on this to ensure that they carry on their work effectively and efficiently, professionally without arguing unnecessarily. (AE)

Given that tax officials are not usually directly involved in the day-to-day running of the business, a factor contributing to this deficiency is the dynamic and specialist nature of certain businesses. This was explained by an interviewee in the following words:

You expect more collaboration, deeper knowledge of industry. They [tax officials] are however far removed from trends and recent happenings in the business. So they are fixated on their idea and knowledge of how things used to be even though things have changed. For example, where you are in Nigeria today, derivatives are being traded. The tax man does not know what derivatives are. (AM)

The tax authority may delegate enforcement powers to private consultants with revenue targets. The use of these independent consultants with their own interests creates room for distortions, which may widen the power gap. Where they are used, the power relationship between the tax authority and businesses becomes an indirect one. The ability of the tax authority to exercise effective power over the businesses becomes dependent first on its ability to exercise effective power over the private officials as well as the ability of the private officials to exercise effective power over the businesses. Some participants complained that pressures on these consultants to reach targets as well as the computation of their reward based on a percentage of total revenue generated may cause them to adopt aggressive stances when dealing with taxpayers. Another criticism of the engagement of private consultants is the inadequate procedures by which they may be engaged, especially by state governments. An interviewee called for measures to be put in place to scrutinise the procedures for engaging private consultants and their activities or a ban on the practice altogether. He commented thus:

These private companies that carry out audit, what they are paid is a defined percentage of what they can recover from the taxpayer. So if I know that if I get something very high from the taxpayers, I will get something very high from the state, my results will not be fair. So, I think they should put something in place that will serve as a basis for screening companies that can carry out audit on behalf of the revenue. Or as so many people suggested in the past, that they should scrap the idea of using private companies at all and concentrate on the individuals in the Federal Inland Revenue Service. That is what they have been employed to do. They have audit departments I think the major problem is using private companies and it may just be a one man show. Someone that just started business today, writes a proposal to Edo State government to operate as an auditor; the state government will appoint him. And the procedure is normally to pay him 10 percent of whatever. I think the best way is just to scrap the idea of private companies ... so that if it is the employee of the revenue that is demanding for bribe, I would know what to do (MU)

While the extent of its occurrence cannot be uncovered by this research, some participants identified cases of abuse of power by the tax authority. These cases are note-worthy at this juncture. A common case of abuse recounted by participants is the misuse of the power to distrain the assets of taxpayers or seal their offices. As a participant commented:

I have seen instances where a person in the revenue service issued a demand notice, it was responded to within the required time frame and the business was expecting the response from the tax authority. Rather than getting a response what was received was a warrant of distraint or an intention to levy the warrant of distraint. For me, that is an abuse of power. (CO)

In such instances, the business is faced with a seemingly illegitimate application of force without the prior determination of the legitimacy of their initial resistance to the tax authority's exercise of power. The issuance of the warrant of distraint constitutes violence in itself even where it is subsequently revoked following adequate protest by the business. The business stands to lose revenue as a result of the sealing of its premises. This threat to its economic wellbeing together with the social stigma attached to the sealing of the business premises may be sufficient in certain cases to prevent protests against illegitimate and arbitrary demands by the tax authority. Another participant recounted a similar experience thus:

I have so many instances where the tax authority arbitrarily issued an assessment. They don't serve the taxpayer with the assessment. He is not aware that he has been assessed. They wait for one month to expire. After the expiration of the one month, they now issue you with a final conclusive notice – that your assessment has become final and conclusive; and they attach the first assessment to it. They do it in some states. [The tax official will say] that you were issued [an] assessment notice and you failed to pay. They will go to the court and get an ex parte order to distraint your premises. You will just find them coming to your premises and they will seal your premises. That is a good example of what you are talking about, it happens almost all the time. You will not be aware that you have been assessed, there would even be an acknowledgement on it that you acknowledge the receipt of the document. I think I did one case on behalf of a company that was sealed that way. They went to the last registered address of the company and they posted the notice. They were aware that the company had relocated. They did not bother to go to the new office. In that case, because you don't want your business to suffer and you may not be willing to go to court. ... If maybe they seal your premises today it may take three months before you get an order from the court to vacate the order they got to seal the premises. So most businessmen will want to pay the money. (MU)

Here, the tax authority capitalises on the orchestrated lack of awareness of the business to successfully exercise illegitimate power over it. However, the success of the exercise depends on the willingness of the business to challenge the practice in court. Where the business is prevented from instituting protest by the delay in court (which in effect denies the business substantive access to a protest mechanism), the attempt at the illegitimate exercise of power may succeed. The likelihood of success of such illegitimate exercise of power is widened in situations where the business is barred from protesting (denied formal access to a protest mechanism) as a result of the assessment becoming final and conclusive. One such instance was also recounted by the same participant thus:

There is a case I am doing now which is very unfortunate to me because they carried out the sealing, everything was done, arbitrarily. The company in question was compelled to pay. They were losing money every day. They could not go to the court. So, when they were paying, they had the understanding that they will pay but they will revisit the issue; they will come back to reconcile documents. The tax authority agreed and accepted the money. After collecting the money, the company met them to request for a meeting. Their response to the company was that the tax assessment has become final and conclusive and they have paid. Now the company has instructed us to file an action and I have advised the company that they don't have any cause of action because they have paid and the assessment has become final and conclusive. (MU)

4.8 Third Party Organisations

From the observations of participants in this research, other actors may play a considerable role in determining the breadth of the power gap in the two-way relationship. This is usually the case where both the exercising actor and the recipient actor collude to breach the expectations of the dimension. They also perform this role in situations without collusion – especially where a recipient actor over whom illegitimate power is exercised is unable to protest. Three examples of such actors mentioned by the participants are business associations, public sector watchdogs and big accounting firms.

Associations play a major part in the interaction between businesses and the tax system. They help champion causes that affect their industry. In particular, they lobby tax policy- and law-makers to secure changes to adverse policies and laws. Prominent examples of these associations in Nigeria are the Oil Producers Trading Section of the Chamber of Commerce, Nigeria (OPTS) and the Manufacturers Association of Nigeria (MAN). A participant explained the important role played by the organisation to which his business belongs in interacting with both tax policy-makers and tax law-makers in the following words:

Currently the industry I represent ..., we are also a member of a larger body called the OPTS. That is the Oil Producing Trade Section of the Chamber of Commerce and Industry. What we do is channel our needs to the policy-makers through the OPTS umbrella. Recently, there has been the need to create a Petroleum Industry Bill in Nigeria. Therefore as a matter of necessity, there was need to interact with the policy-makers on a frequent basis. Apart from interacting with them on a need basis, the OPTS also organises regular meetings with policy-makers quarterly or biannually. The OPTS [also] writes to the National Assembly directly [and] gets invited to meet the National Assembly. (CO)

The importance of associations was felt recently in the banking industry. After deliberation with the association representing the banking industry, a FIRS circular was issued granting exemption to banks from certain provisions of the tax law that would have caused hardship to the industry following certain necessary steps taken by banks in response to regulation. As a participant narrated:

CBN made this rule that going forward banks must only do banking business. Banks had to sell their non-banking financial business, for example, insurance, stock brokerage, and all of that. Banks had to do away with those. Of course, CBN had a very good reason for saying that but along the line people started studying the impact of all of that. For banks that have other businesses, non-banking businesses, if you are going to sell that there is going to be a big payment in terms of value added taxes, capital gains, and all of that. So banks had to come around it. Each bank had to evaluate its own situation; that look if I am going to do what the CBN has said, what is it going to be in terms of tax? How much am I going to pay? They had to seek certainty from the FIRS and because of that they had to exempt them from some of these taxes. So it is specific to banks because it is a regulation that was made specific to banks as well. Other people also wanted the same thing but government has said no because you are not in the same situation as they are. (OA)

One may challenge the legality of this exemption by the FIRS on the grounds that it lacks the power to alter the effect of a legal provision through the issuance of a circular. That

this exemption was granted in the first place indicates a lack of confidence in the proper channels through which such changes should be actualised (that is, through the law-makers). Also, the fact that this exemption remains in operation without challenge or protest is an indication of a power gap in the two-way relationship. Such a challenge or protest may come from businesses in other industries that want this same exemption.

A similar experience was recounted by hoteliers who were faced with double taxation as a result of the decision of the Lagos State government to impose consumption taxes on the services they provided. Through their association, an action was instituted in court challenging the actions of the Lagos State government. Such a challenge may not have been possible for these businesses acting individually as many of them are SMEs and lack the capacity to institute such actions. Associations usually have better access to the terminals of the tax system and promote awareness of businesses within their ranks. By doing this, they potentially reduce the power gap in the two-way relationship.

Other agencies of government also play a role in the interaction between businesses and the tax system. This may be industry specific. For instance, the Nigerian Extractive Industries Transparency Initiative (NEITI) scrutinises the interaction between businesses in the oil industry and tax officials to ensure that there is no collusion to defeat the law. As one participant pointed out:

You also have challenges of some other agencies of government who are always on the watch. Who watch over the tax administrators themselves keeping them on their toes and thinking they are in league with the taxpayers; like the NEITI for example. They do not go just after the taxpayers. They do go after the administrators. They sometimes write very incriminating opinions about the tax administrator saying they are in league with the taxpayers. Those kind of opinions seep into how they [tax officials] interact with you. (DK)

Big accounting firms play a significant role in most aspects of the interactions between businesses and the tax system. For example, they provide assistance in the formulation and development of laws and policies through their leadership initiatives. They also help promote general awareness of tax laws through seminars and media publications. These big firms offer better access to the terminals of the tax system, a reduced risk of exploitation by the tax authority and quicker resolution of issues to taxpayers that utilise them. Many businesses engage these firms to battle perceived injustices such as an abuse of power as explained by a participant in the following words:

[Where there is abuse of power by the tax official] what the taxpayer usually does is to involve the big firms as an intermediary between the taxpayer and the authority. If you involve them, I am not sure they will insist on it. Even the tax law makers consult the big four firms for this purpose. ... The names of the big four go a long way. They have a very good relationship with the tax authorities as a result of the issues they have resolved with them. If you talk about PWC, KPMG, they have a very good relationship

with the tax authority. It is because of their level of professionalism and with that the issues will surely be resolved. (AE)

4.9 Conclusion

In every terminal of the tax system, a power gap exists as a result of the levels of access, awareness, distortion and inaction. This chapter has examined this power gap from the perspective and in the words of the participants. It began by affirming the importance of a relationship with the actors representing the tax system. It then identified the variance in likely disposition and experience between small and local businesses on the one hand and large and multinational businesses on the other hand. Thereafter, it descriptively analysed the perspectives of the participants regarding the interactions between businesses and the tax system. In the process, it highlighted the impact of the four mechanisms in extending the power gap in the channels of communication. In sum, it provided a platform for the discussion of the role and means by which corruption sustains itself in the relationship between business and the tax system in Nigeria.

CHAPTER 5 CORRUPTION AND THE TWO-WAY RELATIONSHIP EMPIRICAL RESEARCH FINDINGS (II)

5.1 Introduction

This chapter discusses the empirical findings as they relate to corruption and the two-way relationship. It begins by revisiting the meaning of corruption based on the expectations of participants in the research. It then proceeds to discuss corruption in the two-way relationship, focusing on issues raised by participants such as wages, discretion, collusion, and corruption in the broader context of Nigerian society. The penultimate section discusses the role which businesses may play in tackling corruption from the perspective of the participants. This leads to the conclusion which restates the thesis.

5.2 Revisiting the Meaning of Corruption

As discussed in previous chapters, while the theoretical definition of corruption remains important, the real practical difficulty lies in distinguishing between corrupt and non-corrupt acts in any given setting. This difficulty is heightened by the fact that the tag ‘corruption’ can be bestowed upon different actions depending on the time and jurisdiction under consideration. I argue that in every social context there are dimensions that possess roughly independent codes and programmes through which an action can be adjudged corrupt or not corrupt. The number of these dimensions in a given context depends on the extent of functional differentiation that has taken place within it over time.

For the purpose of this thesis, I focus on the legal, economic, political and moral dimensions. These dimensions stipulate ideal limits for an actor’s exercise of power. Corruption therefore is an action which oversteps these limits and brings about a result in which the actor secures a gain which the dimension under consideration does not permit. Such corruption may exist in three strata of a given society (at the level of dimensions, at the level of social expectations and at the level of actions). Certain facts garnered from the empirical research may shed some light on this approach to understanding corruption.

The empirical research primarily seeks to elucidate corruption at the level of actions. The participants were questioned about their expectations of the actions of actors in the two-way relationship. By understanding these expectations and their sources, it is possible to identify the dimensions through which they may adjudge an act corrupt or not corrupt.

5.2.1 Expectations of the Economic Dimension

Based on the responses of participants, the need for efficiency and the achievement of the general economic goals of the tax system seem paramount for businesses. This suggests that acts taken by actors which are inefficient and from which these actors derive gain that contravenes the general economic goals of the tax system can be adjudged corrupt from this economic dimension. This remains the case even where the action in question does not violate the law, culture or sense of morality of individuals in the society. Participants couched their particular concern for efficiency in different terms. Some pointed out the need to maintain foreign investment and to avoid unduly inconveniencing businesses as goals which every tax system should strive to attain. For instance, a participant commented thus:

At the end of the day, you want businesses to thrive; you want increased foreign direct investment, and you want the economy to grow. If taxation will hinder that expectation, I don't think it is in anyone's interest. It is only expected that we are reasonable in our judgements and come to a reasonable agreement or point and try to apply the law in a manner that will not create discomfort or that will not create something that will affect businesses. (DA)

The participant above recognises a negative obligation which should prevent the law from unduly disrupting economic enterprises. In his view, the application of the law (as a communicative action) should be guided by these economic expectations. Another participant identified, as a prevailing expectation, the need for the tax system to positively support businesses thus:

What you expect them to do is to make policies that will support businesses in contributing to the economy. They should think about the taxpayers and the practicability of whatever policy they are bringing out. If I cannot obey, if you are making policies that cannot be obeyed, it is as good as useless. (YE)

The expectation described above relates not to the application of existing laws but to the creation of policies and laws in the first place. Expectations of the economic dimension can also be couched as a need to take into account the commercial realities when dealing with business taxpayers, as a participant did, thus:

We want them to be able to take commercial realities into consideration in decisions around creation of tax policies.... We want tax policies that have some relevance and bearing to its target. For us, it is not enough to just have tax policy changes; we want it to have relations with the realities on ground. (DO)

This concern for investment and the overall commercial realities should have factual implications for the content and structure of the tax system. One participant highlighted some examples of these practical implications in the following words:

The truth is, whether we like it or not, we say as a country we want to encourage investment and tax may not be the number one consideration for an investor but it does factor in. Because in Nigeria for example, one of the things people complain about is multiple taxation – loads and loads of taxation everywhere. In that environment, you don't make yourself very competitive to investors. So it is really for them to put that in mind; have a clear understanding of the policy direction. It should not be the question of there is a random person that is sponsoring the legislation and everybody just goes with it. They need to look at

the realities of the environment, where the government is trying to go or going, and make policies along these lines. And just generally, make policies that do not inconvenience businesses, policies that do not have an opposite effect or result. So if I give the classic case of the VAT thing. As far as the law goes, the intention is not for the government to owe companies 2 billion in taxes But if you have created a policy that has given that result, you should be very interested in addressing it and mitigating the impact on businesses. If you agree that it is very difficult for money to come out of government to refund taxpayers, why don't you create a medium where you can use whatever you owe them as a credit against some other taxes? Because in some countries what you have is you can net-off certain taxes against others. If you do something like that, companies will be happy. Because the intention is not to hold their money or subject them to double taxation. So they need to put businesses in mind, understand clearly what the policy direction is and if by chance they make a piece of legislation that is causing collateral damage, they should quickly intervene to address the other issues. (SA)

Beyond acting with efficiency in mind, a participant observed that the tax authority should also strive to build up the effectiveness of the practices and systems of businesses thus:

What I expect from them is not just to collect tax but to help businesses develop an effective tax system If a business has an effective tax system, it means the only way such businesses will not pay the correct tax is if there is a dubious intention by the business to evade tax. There are times when businesses don't pay the correct tax not because they want to evade tax but just because they don't know how to do the right thing. So if an organisation has an effective tax system, more taxes will be paid to the government. The tax administration's revenue will be boosted as a result of taxpayers having an effective tax system. So it is a win-win situation. (CO)

5.2.2 Expectations of the Legal Dimension

The law, which comprises both soft and hard positive rules, is also a prominent source of expectations for many participants. This is especially the case in relation to the level of taxation to be imposed on a particular business or transaction. A participant, for example, emphasised the law's role in determining the social responsibility of businesses. According to this participant, the social responsibility of businesses or taxpayers in general should not fall short or exceed that stipulated in the law:

There are laws. As a socially responsible citizen, I know we have to pay taxes. But I will not want to pay more than what is required under the tax law. So if they have a better understanding and there is better collaboration from them, businesses will pay the tax it is due to pay: no more, no less. (AM)

This responsibility extends to the tax officials who are expected not to act in a manner that contravenes the provisions of the law. This was pointed out by a participant in the following words:

I don't expect the tax authority to do anything outside the tax laws. They are governed by the tax laws. Everyone liable to tax is governed by the tax laws. They can't do ... – they are not supposed to do – anything outside the tax laws. They have other provisions governing the administrators. I don't expect them to do anything outside the regulatory framework. (YNO)

This respect for the law was linked to the need to avoid the payment of bribes which is one form of corruption expressly identified as a crime. On this, a participant commented as follows:

They are trained to do their work. They are accountants, they are lawyers and they know the laws. When you say tax, tax, tax, you are talking about the law. That is where professionalism comes to play. You

[should] not [ask] whoever, your client, who is the taxpayer, to pay you bribe to compromise the process and not do the right thing. (RO)

5.2.3 Expectations of the Moral Dimension

Apart from efficiency and the law, fairness, objectivity and reasonableness featured as common expectations of the participants. However, I argue that these expectations do not constitute a dimension per se. They are only relevant to the extent that they are recognised and applied by the legal, moral or economic dimensions. What is clear is that this requirement of fairness, objectivity or reasonableness may constitute a prevailing expectation within the legal or economic dimension. Nevertheless, these concerns may also extend beyond these two dimensions to become part of a moral dimension. This is evident where participants recognise an obligation on the tax authority to act in a fair manner which extends beyond their ordinary legal obligation or their obligation to act effectively. As a participant explained:

We have a national tax policy that preaches fairness and all of that. It will be nice to have those things implemented. If you have laws, the best you can do is to pack up your business and leave the country if you don't want to abide by the laws. Otherwise you have to comply with those laws. I don't see businesses saying, 'no these laws are harsh'. But in administering these laws you have to be fair, you have to treat every taxpayer equally. There shouldn't be preferential treatment because you know this person is swinging to the right or the left. It has to be fair ... If you still don't do that thing that is not fair, then you are not complying and you still maybe subject to penalties and if you go to arbitration despite these your good reasons for not being able to comply, you are still going to be blamed. Taxpayers just wish that there is a bit of a balance in all these. (OA)

In the quotation above, the participant recognises the potential for legal rules to contain obligations pertaining to fairness. However, where the legal rules are unfair, failure to comply with them may attract sanction from legal mechanisms. In other words, fairness is not a valid defence for failure to comply with legal obligations, save where the law contains an inherent obligation of fairness. However, the participant goes further to suggest that laws (with or without this inherent obligation of fairness) should be applied in a fair and reasonable manner. This justifies recognising the existence of a dimension different from the legal dimension from which this expectation or demand for fairness is sourced. In other words, the law itself may be subject to an expectation of fairness sourced from the moral dimension which exists independent of the law. Many participants recognise that this fairness requirement demands that businesses should not be taxed multiple times as recognised by this participant in the following words:

The law is supposed to be fair and I am sure it is never at the time we are persuading them. For example, with the Hold Co example, we do not think that it was the intention of the regulators to seek to tax the same income two or three times. However, the way the law has been couched means that if you are going to be compliant with this law, that same income will be subjected to tax two or three times at different levels because there is also the withholding tax on that. So, our expectations are that we would be able to persuade them to be reasonable and try to be fair because part of the canons of taxation is fairness. That is our expectation really. (DA)

In the above quotation, the participant recognises the law as the source of power and expectations. However, his words indicate an expectation that the institutional limits on the exercise of power exceeds the express contents of the law. Put differently, there should be fairness in the exercise of the powers bestowed upon actors by the law. Here, the expectation of fairness is not wholly independent of the law. It is an integral part of giving meaning to the law. This is, however, not a call for the application of emotions or prejudice as explained by a participant thus:

We want the tax administrators to be fair minded in interpreting the tax laws. We don't want emotion or prejudice coming into the interpretation of tax laws. (DO)

The above quotation indicates a demarcation between personal feelings and the institutionalised ideal of fairness. A call for fairness is a plea to an institutionalised ideal. Though this ideal can only take effect when recognised and acted upon by an empowered actor, it seems, at least notionally, distinct from the subjective perceptions of the actor.

5.3 Corruption in the Two-Way Relationship

Based on the above premises, corruption in the two-way relationship can be identified by reference to the positive (soft and hard) laws, the economic considerations (such as efficiency), and fairness/reasonableness relevant to the attainment of the general goals of the tax system. That a corrupt action can be illegal, inefficient and immoral was recognised by a participant in the following words:

It is against the law – compromising your position to get money from people. It is also inefficient. Someone owes hundred, you reduce it to 50 and you get 20. If the person is truly supposed to pay 100, the government has lost 50 and you have enriched your pockets. It is immoral and it is not right. (RO)

While expectations of the economic, legal and moral dimensions featured in the responses of participants, political expectations were noticeable absent. This thesis argues that the absence of political expectations reflects the weakness of political institutions in present-day Nigeria. The varied expectations of participants were often encapsulated in the call for greater professionalism from actors representing the tax system. As one participant noted:

Definitely I will expect that they should be professional.... I think professionalism encompasses a lot. They shouldn't expect you to grease their palms before they do the right thing. (IE)

Corruption, here, is viewed as anathema to professionalism. This expectation of professionalism traverses the various dimensions in Nigerian society. In other words, it embodies the expectations of the legal, economic and moral dimensions of the said society.

Corruption in the two-way relationship is inextricably linked to corruption in Nigerian society in general. For one participant, there is no point in focusing on corruption in just the tax system since it affects all sectors of the Nigerian economy. This participant commented thus:

I am sure you know corruption permeates all sectors of the Nigerian economy. So FIRS or the tax administration cannot be expected to be sanctimonious when the entire [nation] is corrupt. So anyone talking about corruption in Nigeria to me, we are all wasting our time. If judges are corrupt, why will FIRS not be corrupt? Why won't they be? We are all trading in the same market. If there are measures, why have they not been caught? So I do not know, don't narrow down corruption to one sector of the economy. They can take 9.3 million in a private jet to South Africa to go and buy ammunition so which corruption is more than that in an economy that has moved to a cashless society? If I want to withdraw 200,000 from my account today, I can't. But someone can carry 9.3 million dollars on a plane to go and trade. So corruption, I don't like discussing it, because I feel we are not addressing the real issue. (OLA)

The pervasiveness of corruption has been shown to directly affect the attitude of individuals within the society to corruption. Dong, for instance, argued that corruption may have 'contagion effects',³⁴⁷ implying that individuals may 'condition their corruption behaviour on the behaviour of other individuals'³⁴⁸. Owing to this contagion effect, businesses are likely to engage in corruption where such practices are rampant amongst other businesses in their social environment.³⁴⁹ As Kahan explained for crimes in general, this proceeds from a self-fulfilling reality brought about by the consequential increase and decrease of the probability of escaping punishment and stigma attached to the crime respectively.³⁵⁰

Corruption in the wider society also affects the willingness of business to comply with their tax obligations. To the extent that it affects compliance, it indirectly affects corruption in the relationship between business and the tax system. This is because it may deter individuals engaged in prior non-compliance from protesting against or rejecting an invitation to participate in corruption.

One participant described corruption as 'a thing that is in the blood of people living in this country' (OLA). This is indicative that it has been internalised by individuals in society, thereby becoming their likely disposition in certain circumstances. Corruption may have

³⁴⁷ See also, Rajeev Goel and Michael Nelson, 'Are Corrupt Acts Contagious? Evidence from the United States' (2007) 29(6) *Journal of Policy Modelling* 839.

³⁴⁸ Bin Dong, Uwe Dulleck and Benno Torgler, 'Conditional Corruption' (2012) 33 *Journal of Economic Psychology* 609, 610.

³⁴⁹ Bertrand Venard, 'Organizational Isomorphism and Corruption: An Empirical Research in Russia' (2008) 89 *Journal of Business Ethics* 59; Jamie D Collins, Klaus Uhlenbruck and Peter Rodriguez, 'Why Firms Engage in Corruption: A Top Management Perspective' (2008) 87 *Journal of Business Ethics* 89; Shaomin Li and Ming Ouyang, 'A Dynamic Model to Explain the Bribery Behaviour of Firms' (2007) 24(3) *International Journal of Management* 605.

³⁵⁰ Dan M Kahan, 'Social Meaning and the Economic Analysis of Crime' (1998) 27 *Journal of Legal Studies* 394; See also Raaj Sah, 'Corruption Across Countries and Regions: Some Consequences of Local Osmosis' (2007) 31 *Journal of Economic Dynamics and Control* 2573; Jens Anvig and Karl Moene, 'How Corruption May Corrupt' (1990) 13 *Journal of Economic Behaviours & Organisation* 63.

seeped into the moral fabric of society, and consequently, into the relationship between business and the tax system. In light of these warnings, it is imperative to question whether corruption in the two-way relationship is worth addressing independent of corruption in society as a whole.

Corruption in the relationship between businesses and the tax system may take a variety of forms. However, the most common form identified by participants is the demand by or receipt of payments by tax officials as consideration for reducing the tax liability of businesses. Other forms include payment to tax officials to reduce the administrative burdens of compliance or to fast-track the legitimate exercise of power by the actors representing the tax system. It also includes the sale of other services (like tax clearance certificates and tax forms) which should otherwise be free.³⁵¹

The examples of corruption are potentially endless. This is owing to the fact that what constitutes corruption for a given actor depends on his second order observation of the dimensions in society. However, the import of such an observation will vary depending on the extent of the actor's power as determined by his social positioning. One participant, for instance, identified a form of corruption which he called scapegoating. In his words:

There are many forms One of them is what I would call scapegoating or I don't know what term to use. Sometimes certain companies are fingered or identified for reasons that are not objective and they are scrutinised under this basis. That is corruption. Where you are not choosing who to assess on a fair basis but rather on a likely to succeed basis or on a susceptibility basis based on who you can take more advantage of; in which case sometimes you will see the FIRS wake up and start a march on say a South African multinational simply because they can; when for a good number of years some other companies have gone unaudited or un-assessed. (CHU)

Two classes of corruption are identifiable in the two-way relationship depending on the presence or absence of collusion between the actors involved (collusion corruption and extortion corruption). Many participants suggested that most instances of corruption occur where there is some consensus of interest between two or more actors. For instance, taxpayers unwilling or unable to settle their tax obligations may seek the aid of tax officials in this regard for a fee. There was a common perception among many participants that some sort of collusion is crucial for the existence of corruption in many instances. When asked about corruption without collusion, one participant stated as follows:

Most times, it takes two to tango. Most times, if there is an act of corruption, it means the company has also taken part and you don't find them kicking back because they are also culpable. So what you find is them gradually shifting away from that norm to become more compliant maybe by changing their tax consultant. So they will pay the cost of being more compliant. [Of no collusion situations] That rarely happens. What you find is if he makes demands and the company does not meet the demand, he will

³⁵¹ This has been called harassment bribes. See Kaushik Basu, 'Why, for a Class of Bribes, the Act of Giving a Bribe should be Treated as Legal' (Ministry of Finance, Working Paper, 2011) <http://www.kaushikbasu.org/Act_Giving_Bribe_Legal.pdf> accessed 5 July 2015.

most likely assess the company based on the provisions of the tax law. The reason why he is asking for bribe is to waive the position of the tax law to favour the company for a bribe. If the company refuses to pay the bribe, he will most likely stick to the provisions of the tax law and the company will pay whatever, because that is the right thing to pay. (YE)

In the above quotation, the participant recognises the potential for a unity of interests between the tax official and the business to engage in corruption. This unity prevents protests which should follow from the illegitimate exercise of power. However, the unity of interest here is not stable. As the business becomes more compliant, their interests change, and their inclination to resist an illegitimate demand increases. Another participant based the unlikely nature of corruption without collusion on the premise that although a tax official may demand a bribe, they lack the ability to compel taxpayers to comply with this demand. The participant stated:

I have not really been privy to such issues before but what I expect is that no tax authority or tax authority employee can force businesses to do what they do not want to do unless the business owners are also fraudulent. Otherwise, no employee of the tax administration can insist or hassle the business. (CO)

In other words, as pointed out by a third participant, in situations where a demand has been made of a company unwilling to participate in corruption, the company is free to turn down the demand and request that the proper process be followed.

What I know is if you are not going to play ball, what you will do is let the process, the formal legislative process go ahead. What guys would usually do is let the process go ahead, if someone is asking for a bribe or something. (SA)

This indicates that tax officials cannot draw force from the social environment to compel an unwilling business to agree to an illegitimate exercise of power; neither can they rely on their own capacity to achieve the illegitimate goal.

It is important that collusion is not seen as an inextricable part of corruption based on the false premise that there is no corruption where the initial demand is turned down or protested against. A mere demand may constitute corruption regardless of whether it is accepted or protested against. There seemed to be a feeling amongst some participants that such demands are only problematic where the individual who refused or protested against the demand is subjected to an unfavourable or a wrongful exercise of discretion as a result. For instance, one participant in recounting his experience, stated as follows:

I remember having a meeting with one company. The officer was trying to tell me that if I want to talk business that he will help us. He won't be harsh on the company. 'Officer we are not liable, I don't have anything to hide'. Things like that exist. If you don't give, they will not take. Most of the people or companies we represent will not. I have never represented a company that will tell you to give money to the tax authority. Even at that, if you have evidence to prove that someone asked for bribe from you to influence their decision and because you refused to pay they came out with a result that is not favourable to your business, you can challenge it. (MU)

Also, not all parties to ‘collusion-corruption’ are positively interested in the act or its consequences. Some are cajoled into agreement by various actors. This complicates the distinction between collusion-corruption and corruption without collusion. There may be situations where the circumstances for the business are so dire that their desire to participate in corruption can be described as vitiated. There may also be a spectrum between full intention and no intention to participate voluntarily which impacts on the classification of corruption. A business, for instance, may be pushed to voluntarily participate in a corrupt enterprise, not only to ensure its survival but also based on a wrong impression of the nature of its legal liability. This may or may not be combined with either a lack of awareness of or access to (or even belief in) the channels of communication through which the true nature of its liability can be determined.

5.4 Corruption in the Tax Administration Terminal

Most responses from participants about corruption were related to activities in the relationship between businesses and tax officials. This accords with existing research that identifies tax collection as one of the areas much affected by corruption.³⁵² This may be due to the high amount of interaction that takes place at the tax administration terminal relative to other terminals of the tax system. One participant explained his perception that corruption mainly takes place at the tax administration terminal in the following words:

I am not sure it may be frequent in the area of tax laws and tax policies. But when you drill down to the area of tax administration; that is where it will be more rampant. In the sense that probably a tax audit officer comes [to do] a field audit to your company and you know that probably you have not been compliant in your taxes and you know that probably you have understated your liability by a couple of millions and because of corruption and poverty in Nigeria you feel that if I settle him with 500 thousand he will go. (OI)

A link can be drawn between corruption and the arbitrary exercise of power by tax officials. Where tax officials are allowed to tender arbitrary audit reports to businesses, this creates an opportunity for corruption to thrive as explained by one participant thus:

In terms of things encouraging corruption, I will say in the conduct of their audit, they need to do more. They tend to overly estimate additional liabilities. You find that after the conduct of their audits and they come up with a report, most times there are certain things they should have considered. Any layman would know that these things are not applicable which would reduce the liability but because of their revenue drive – their own objective of generating additional revenue – they tend to just overestimate or blow out of proportion what the additional liability should be. So if ordinarily I should be paying additionally 20 million, you can be sure that after the audit they will come up with something like 100 million so you then have to go back and forth, meetings, bring more evidence to show this, more schedules to prove this and at the end of the day after months of back and forth you arrive at what the additional liability will be Not every taxpayer wants to go through this back and forth. Rather than

³⁵² See Fredrik Galtung, ‘Current Strategies for Combating Corruption: A Study of Corruption in the Tax Administration’ (Transparency International, 1995).

go through what the law has provided when you can object to an assessment and object to a liability, they rather just tell them this is what I am willing to pay and this is what I am willing to give you. There are some tax officials that are willing to go that route. Rather than go through months of back and forth and months of objection and reassessment and objection, they rather just settle and move on. I think that is something that encourages corruption. (DA)

Certain points can be deduced from the extract above. Firstly, the participant explained that the wrongfulness of the assessment is something which ‘every layman would know’. This suggests that the assessment constitutes a distortion of the law, which is likely to be deliberate. This is supported by the statement of the participant that this distortion is likely guided by the interests or objectives of the tax official to generate additional revenue. Secondly, he states that the process through which the true liability of the taxpayer should be determined is potentially burdensome (in terms of time and effort required). These burdens constitute a barrier to substantive access to this process. It also indicates unwillingness to access this protest mechanism (inaction). Hence, on the one hand, a power gap is created owing to deliberate distortion of the law. On the other hand, restriction of access or inaction regarding the protest mechanism maintains the gap which corruption might exploit.

Another factor which may encourage corruption in the two-way relationship is the breadth of discretionary powers of tax officials. According to a participant:

[T]here are always lots of loopholes in the tax law which requires the tax authority to use their discretion. Because of using the discretion, they try to enrich themselves. So many provisions are not clear-cut leaving room for selective implementation by the tax authority. These lead to a lot of corrupt resolution of issues. (AF)

This power is extended where the business (the recipient actor) lacks awareness of the applicable law. As one participant explained:

What happens is that the tax official intends to interpret a section of the law and because he has discretion he asks that taxpayers to cooperate with him to enjoy such favours as reduced tax, and refusal will unduly subject the organisation or the business to tax. The game is if you play ball with me, if you pay bribe or anything like that, you will not have to pay that much of taxes. They play on the intelligence and knowledge of the business or entity. If a business or taxpayer knows the law and argues it properly, they find it difficult to approach such business or taxpayer for bribe or anything. (AM)

Here, discretionary power breeds corruption as a result of the deficiency in awareness it creates on at least two levels. On the first level, owing to the discretionary powers, it is difficult to determine whether the tax official has exercised his discretion in accordance with the law or whether a distortion of the law has occurred. If, for instance, the business complies, or even fails to comply, with the demand, protest by third parties or by the business in the event of non-compliance will be challenging without evidence of the demand itself. On the second level, as pointed out by the participant, the discretionary power may be a product of the deficiency in awareness suffered by the business. Where the business is adequately aware, it

may be able to establish a correct manner for the exercise of powers which may suffice to preclude corruption.

A participant identified that the low pay of civil servants makes corruption difficult to resist. He stated:

The tax officers are civil servants. They are not paid that great anyway; so there is an inducement. A lot of companies do not believe in paying their taxes. They have a need to find a way to pay an amount that is way less than what they should be paying ... it is fact that tax officials are not paid that greatly ... that makes it difficult to resist. (SA)

A connection has been made between the emolument and general working conditions of tax officials and corruption as far back as Ancient Egypt. A high salary was paid to Scribes (tax officials), thereby increasing the financial consequences of dismissal for involvement in corruption.³⁵³ However, various empirical studies have produced seemingly inconsistent results on the relationship between corruption and the level of pay of civil servants. For instance, Huang explains that attempts to address corruption (which had grown over time in China from the Ming Dynasty to the Qing Dynasty) by increasing the salaries of public officials were unsuccessful.³⁵⁴ However, Van Rijckeghem and Weder in their empirical research found a correlation between low levels of corruption and high salaries of public officials relative to manufacturing wages.³⁵⁵ Using a case study of the Ghanaian tax system, Chand and Moene³⁵⁶ also argued that improving the working conditions of tax officials can curb corruption where it is done simultaneously with other necessary reforms of the system. These other reforms include reducing the tax rate (in order to diminish the benefits of corruption); simplifying the tax laws so as to reduce the discretionary powers of tax officials; and increasing the scrutiny of tax officials in order to increase the likelihood that punishment will follow any corrupt act.

Low pay manifests as interests of actors in the two-way relationship. In other words, low salaries create an additional incentive for tax officials to engage in corruption. This interest by itself does not create a power gap but it impacts on the power relationship through the operations of the four mechanisms (distortion, awareness, access, or inaction), and in particular distortion of communicative actions. Where distortion, for example, is not possible, having an interest in private gain (more income) is not sufficient to create an avenue for corruption.

³⁵³ Christopher Adam, 'Testing for Regime Shifts in Short-Sample African Macroeconomic data: A Survey of Some Monte Carlo Evidence' (Centre for the Study of African Economies, University of Oxford, Working Paper 93.1, 1993)

³⁵⁴ Ray Huang, *Taxation and Government Finance in Sixteenth Century Ming China* (Cambridge University Press 1974).

³⁵⁵ Caroline Van Rijckeghem and Weder Beatrice, 'Bureaucratic Corruption and the Rate of Temptation: How Much do Wages in the Civil Service affect Corruption?' (2001) 65 *Journal of Development Economics* 307.

³⁵⁶ Sheetal Chand and Karl Moene, 'Controlling Fiscal Corruption' (International Monetary Fund, IMF WP/97/100, 1997) <<http://www.imf.org/external/pubs/ft/wp/wp97100.pdf>> accessed 5 July 2015.

However, in an environment where distortions are inevitable and difficult to detect, addressing interests becomes vital. Nevertheless, addressing interests is no less challenging than tackling distortions in the two-way relationship.

5.5 Corruption and Protest Mechanisms

General channels exist through which businesses may protest or raise awareness about an alleged wrongful exercise of power. These include escalating the issue up the hierarchy, instituting an action or, in the case of crime, reporting the matter to the criminal law enforcement agents. Regarding escalating a dispute up the hierarchy, one participant commented as follows:

If it is something that is an isolated act of the tax official, what you probably find is that the affected businesses will take the issue to his superiors. So you find a lot of businesses where they have serious issues with their tax offices here, they take the issue to Abuja where they have the policy unit or where the more senior people are because generally they find them more reasonable. So if it is an isolated act of an official, or an office, people will usually escalate it. (SA)

Some participants commented that before utilising the channels of protests, many businesses would initially seek to resolve the disputed issue with the actor/organisation with whom the dispute arose. In a case of negligence, for instance, a participant stated as follows:

When negligence is noticed, it is brought to the attention of the official If it can be resolved amicably without having to involve the tribunal or the court, then we will resolve it amicably. Otherwise we will involve the tribunal or court. There is an office in Abuja known as the tax policy desk. The first call will be to write to the policy desk to get their view and interpretation, so that we can inform the tax official the position of the policy desk of his organisation on the issue. If it is in line with our view, then we do this. If it is not in line with our view, then it means there is a gap in the understanding of the tax provision. The next step is to seek the view of the Tax Appeal Tribunal. Based on Nigerian tax law, you go to the Tax Appeal Tribunal first, appeals lie to the High Court. (AM)

In a case of incompetence, another participant described his likely steps in the following manner:

In such instances [of incompetence], I will imagine that there would be complaints. We have attended tax audits where, if you are not satisfied with the position, i.e. if you think the tax official handling the audit is not competent and his practices are not aligned with the position of the law, we complain You make representations and hope that they could give the file to someone else to handle This happens a lot. Your interpretation of a particular section may not be the same as mine. You will always make your position known and if at the end of the day you do not agree that is when you will seek legal help ... by going to the Tax Appeal Tribunal (DA)

Businesses may also instigate protest through their representative body or organisation. This is more likely to occur where the action protested against has a considerable negative impact on a group of businesses. A participant commented regarding negligent actions by tax policy- and law-makers as follows:

Well, if it is a tax [law] maker, there are times we have to live with some negligence on the part of tax law makers, and what happens is everybody interprets it the way they like. But if the negligence is going

to have a major impact on the business, what I see businesses do is go to the umbrella body and write to the tax lawmakers to make amendments. (CO)

However, businesses may not utilise channels of protest even where an actor representing the tax system has acted to their detriment.

Corruption is often a crime or at the least a breach of the terms of an actor's empowerment. Hence, procedures do exist to tackle corruption both within and outside the tax system, ranging from dismissal from service to imprisonment. Corruption of this nature in the two-way relationship does not survive because there are no measures to tackle it. Rather, corruption thrives because the measures that exist are suffocated or otherwise made redundant by an environment where deficiency in awareness, restriction of access, distortion of communication and inaction reign supreme.

While most participants expressed a lack of confidence in the effectiveness of the measures put in place to tackle corruption, one participant identified some likely beneficial effects of anti-corruption measures. In his words:

It ensures that both parties are mindful and more thoughtful about their interactions. It ensures that to a large extent objective discussions are had by the parties involved. It also focuses on the heart of tax practice in Nigeria in ensuring that tax technical issues becomes the key focus rather than the gratification that will come out of it. So those measures make a lot of difference, and it also helps in sanitising the practice of tax in Nigeria. Because then both old timers and the new generation are mindful of what the implications are. And they will try to promote the culture of non-corruption. (DO)

Other participants mentioned some other positive effects of these measures. For instance, it has heightened the level of awareness of taxpayers about their rights and responsibilities as one participant explained thus:

I think it created more awareness for the taxpayers. They are more aware of their rights. They still have a decision as to whether they want to follow due process in getting things done or sorting out their tax affairs or whether they want to continue in their old ways. There is more awareness that you can actually get things done without paying your way. (DA)

As this participant pointed out subsequently, increased awareness has provided taxpayers with greater flexibility to determine whether they wish to participate in corruption or comply with the law. According to this participant:

In certain instances, I think it has made the relationship between some taxpayers and tax officials.... I mean for the taxpayers that are willing to do things the right way, it is no longer business as usual for the corrupt official, so they tend to try to make things a bit more difficult; so a tax clearance certificate that should normally be issued in 3 days of application or maybe a week from the date of application may take up to a year.

This presence of protest mechanisms should ordinarily reduce the occurrence of extortion corruption. Rather, as expressed in the quotations above, tax officials bent on extorting corrupt gains may yet accomplish their motives by exploiting the actual or perceived inefficiencies in the system.

Based on the balance of responses from participants, there is the perception that the measures to tackle corruption in the tax system are rarely activated by individuals directly or indirectly affected by corruption due to several factors including the need to maintain a relationship, the fear of a backlash, the lack of awareness of the procedures, the non-compliant nature of businesses, and the lack of belief in the system as a whole. One participant commented that despite the seeming prevalence of corruption, he has not come across a case of corruption in the law reports he publishes. This to him suggests that not enough is being done to tackle the phenomenon. He stated that:

We have so many, they are there. I don't have any case. I do tax law reports and I do tax generally. It's hard to come across any case where someone has been convicted or even been tried on account of this. So it is a big problem. I don't think there are any measures. They are just laws in the textbook. They are not effective. (MU)

The measures to tackle corruption may not be effectively implemented due to the lack of political will or interest in enforcing the law. One participant, for instance, explained this in the following words:

I can assure you that there are measures. In fact the laws are there but it is just to wake up the laws. They are sleeping laws. The legislation is there. There is nothing in Nigeria ... our laws are already there to address those issues but the challenge is someone needs to have political will to say, 'you know what, we will implement this' I feel our laws are sufficient. What we have today can actually check the issue of corruption. I am not talking about tax administration efficiency, because our laws are still very old. But what we have currently is enough to check corruption. (OI)

Ineffective implementation of the available laws may also be due to the existence of countervailing interests on the part of the enforcers as explained by another participant thus:

The measures I can say is effective if they implement it the way it is. But when you have put a measure in place but you are also circumventing the measure yourself, it is not likely to produce the desired result. But if they fully implement it, I am sure it will curb corruption to a large extent. (AF)

Yet again, the above quotation indicates that interests of actors influence the power relationship through distortion of communicative actions. The circumvention of measures put in place to tackle corruption prevents these measures from limiting the power gap in the two-way relationship between businesses and the tax system.

One factor affecting the means to tackle corruption is the need for evidence. Before proper protest or force can be applied to reduce corruption, it is crucial that any such allegation can be established based on the rules of evidence. As one participant questioned:

How do you prove it? You know corruption is a criminal issue. How will you be able to prove it? (DK)

Another participant pointed out a potential consequence of making an allegation without adequate proof thus:

For corruption, that is the truth. Nobody takes action. The onus of proof is on you, and where you are unable to prove, you may be the scapegoat. (AF)

Even businesses that protest against corrupt practices and are able to establish their case against the corrupt official are not free from ‘scapegoating’ as one participant explained thus:

It reduces it because when you complain to their representative that this is the problem you are having with the tax official, they will surely face sanction. And once one official gets sanctioned, other officials who come to the business subsequently will not ask for encouragement. They will come with the intention of being difficult and frustrating the business knowing full well that they will not receive any extra benefit from that business. Taxpayers find it discouraging to be complaining with the hope of sanctioning the tax officials. They find it difficult. Because they feel if you do that, you get noticed and you may likely have problems. No company wants to have problems with government officials. (AF)

Some of the processes involved in protesting against corrupt activities are too long. One participant commented on this point thus:

How effective are they? Maybe this is probably a question I have not answered. They are effective but the process may be long. If you go through the court system, the process of getting judgement could be very long. And that can affect your business. ... People will rather work on the relationship with the tax official. (AM)

Research by Cule and Fulton³⁵⁷ show that the increase in measures to tackle corruption such as penalties and audits may have an adverse effect on tax evasion and corruption in environments where corruption is pervasive. The perceived pervasiveness of corruption makes protest against the act difficult in more ways than one. For instance, businesses may be deterred from protesting by escalating issues to superior officials due to the worry that the superior officials are not only aware of the occurrence of corrupt practices but are also expressly complicit. As a participant explained:

The kind of environment we have here most government agencies are known to be corrupt So it is more or less where you can talk to someone who is above the person you are relating with. If that person gives instruction to the person below him to do these things, you can't beat it. You either dance to their tune or find an alternative way to go about it. (RO)

Also, experienced corrupt officials are careful and demand bribes in situations where they are likely to be successful. As a participant stated:

It is one of those things; the person that is asking for a bribe has probably ‘sized you up’. At the point he is asking he thinks you are willing to play ball. Alternatively, the person that is asking you for a bribe is someone who is relatively high up. So I guess guys just understand the Nigerian system. If you are not going to give a bribe, you just end it there and say you are going to do the right thing. I am not sure how frequently people actually report people. I don't think it is that frequent. (SA)

Individuals willing to circumvent the law are not difficult to find in an environment where many taxpayers are not tax conscious. Also, ‘finding a partner with whom to engage in a corrupt transaction and escaping detection or punishment becomes easier as the proportion of individuals who are corrupt increases’.³⁵⁸ A participant explained this point thus:

³⁵⁷ Monica Cule and Murray Fulton, ‘Business Culture and Tax Evasion: Why Corruption and the Unofficial Economy can Persist’ (2009) 72 *Journal of Economic Behaviour & Organisation* 811.

³⁵⁸ Abigail Barr and Danila Serra, ‘Culture and Corruption: An Experimental Analysis’ (2010) 94 *Journal of Public Economics* 862.

A lot of Nigerians are not tax conscious. We are not tax compliance conscious. And because we are not tax compliance conscious the next thing is to look for a short cut so that you are not caught in the long arm of the law. The law empowers the tax official to distrain your company if your company is not compliant and you have not settled your tax liability. But I mean, you can settle it the Nigerian settlement way. (OI)

A major deterrent to a protest against corruption is non-compliance. As one participant explained:

The measures advise that nothing should be given to the tax officials and if they make demands they should be reported to whoever directed them to audit. The only problem is that in most cases, it is unlikely that the person reporting has complied fully. So if he finds someone who with a little encouragement will ignore his non-compliance or partial compliance, he is more likely to accept and negotiate with the tax official, than report. (OI)

This does not in any way suggest that only non-compliant companies are exposed to corruption. Even compliant companies may feel pressured into corrupt practices as pointed out by the same participant, thus:

In the case of companies that comply, as I earlier said the tax officials are unhappy with the fact that there are no loopholes to exploit and may delay your clearance. In such situations you find even compliant companies giving some “encouragement” to prevent such delays and frustration. They don't just want to disturb themselves. They want to move on. The more they complain the more problems you face subsequently. Once a business has an issue with the officials, it gets noticed and the officials try to checkmate it. No taxpayer wants to listen to that. I am not saying that they cannot complain. I am looking at the factors that discourage them from complaining. (AE)

Some corrupt officials may take advantage of the deficient knowledge of clients interacting directly with the tax authority without the assistance of seasoned tax professionals. As one participant pointed out:

Most times when you go with tax consultants, seasoned tax consultants, they don't bring it up, but you end up hearing from the client that this is what the tax authorities have said. And then you are *like seriously*; but when you go there they don't say that. It now depends on the client to either go the right way or go back and settle the other way; but it is the client's call ... I know there was a situation like that where we had gone in and we did not know that before we were asked to come on board the tax authority had negotiated, had told the client that they needed to pay some money so that the whole thing could die or to write off the liability. When we now went in and the guy was so mad seeing a new tax consultant and we didn't know, it was later on the client told us. Because I think there is a committee you can report to or give suggestion about the services but I am not sure that if recommendations are actually – if there is anybody that looks into it. There are suggestion boxes, where you can drop things. You can actually go to Abuja where you have the headquarters to lay your complaints. (RO)

Even tax consultants may establish corrupt relationships with the tax authority to enable them to meet internal performance targets. As the same participant also explained:

I am sure most accountant tax managers also have their own performance goals. Most times, to minimise the tax you are paying and to minimise costs. You want to, maybe, if instead of paying 100 I pay 20 I can save my company 80. (RO)

In many cases, the individuals aware of the corruption are the culprits and hence not likely to protest against its occurrence. Other businesses not directly involved in the corrupt act will not protest as they are not aware. Even where they are aware, they may not protest as it may not be in their interest to do so. This was described by a participant in the following words:

If the company obliges; decides to be corrupt; the two parties are ok with the arrangement, most likely it is going to sail through. Other businesses won't be aware. They are rarely aware. They won't protest because it is not their business. They are not paying the taxes. It does not affect them. (YE)

One participant explained that measures to tackle corruption cannot be effective owing to the large percentage of businesses in the informal sector that are not ordinarily affected by changes in the tax system. In the opinion of this participant as produced below, for measures against corruption to be successful, there is the need to ensure that more businesses are brought into the tax net by, for example, the adjustment of the VAT tax rate.³⁵⁹ This seemingly contradicts research which shows that countries with a higher proportion of direct taxes to indirect taxes are more likely to be less corrupt than countries with a higher proportion of indirect taxes than direct taxes. In the words of a participant:

I don't think it has any effect because a lot of guys are not educated on the tax system in Nigeria. For us, tax is still a pie in the sky affair. For big companies, I will say it would affect For a country where 70 percent of the sector is in the informal sector. The only thing that will affect the informal sector I still repeat is when probably there is an adjustment of the indirect tax rate, the VAT. That is when the informal sector will be affected. (OI)

The difficulty in tackling corruption is heightened where there are inefficiencies in the system. Tax officials determined to milk their office may resort to these inefficiencies to derive corrupt gains. On how inefficiency may be exploited for corrupt purposes, one participant commented as follows:

If I apply for the certificate – all things being equal – if there are no issues, I should be able to get it by next week or maybe in two weeks at the latest. They just unnecessarily tend to take longer. Now maybe the objective is that taxpayers may then be constrained or encouraged to give them something to facilitate or fast track that or maybe they just want to unnecessarily make things longer. I don't know. But I think it can be seen as straining the relationship. It can also be seen again as a means used to try to encourage corruption. It is two-fold. (DA)

Some companies feel compelled to engage in corruption as a result of their previous failings. An example of such failings is negligence or inefficiency in documentation by businesses. In situations where they are unable to provide documentary evidence of their activities, businesses are more likely to engage in corruption as explained by one participant thus:

One of the challenges is that actually some companies, they know what they are doing but they don't have documents to back it. When there are no documents, you can't support your case and when you can't support your case, you more or less fall prey. So you can't back it up. So if you can't prove to be beyond reasonable doubt that you are actually right, then you may fall. It is not as if you are guilty but you are more or less compelled to pay that amount because of your own negligence – because you don't have proper documentation. In that instance, when you cannot support your position, when they ask you and you don't have the normal checks to support your position. (DA)

³⁵⁹ Yongzheng Liu and Haibo Feng, 'Tax Structure and Corruption: Cross Country Evidence' (2014) 162 Public Choice 57.

5.6 The Role of Businesses in Tackling Corruption

Businesses, a frequent party to ‘collusion-corruption’, have a role to play not only in raising awareness of corruption but also in dealing with the phenomenon within their ranks.³⁶⁰ Here again, large and multinational companies take the lead. They are more likely than small and domestic companies to have internal mechanisms for checking corruption. These internal mechanisms form part of the rules in the legal dimension that constrain actors from exercising their powers in a corrupt manner. Whether these internal measures will be effective will depend on the levels of awareness, access, distortion and inaction in the relationship with officials of the business. These measures may differ from company to company. One participant describing the internal measures within his company stated as follows:

In my organisation, yes; internally, you are not meant to give if it is demanded. Even if it is demanded and I don't give, I am required to even record it – note it – in my organisation. So in effect I have an engagement or an advocacy with any of the external tax policy stakeholders, and there is a demand for gratification from me, I would not give but at the end of it, I am required to come back to the office and register the incident. So that provides a check. The tax authorities' leadership also requests that if there is any corrupt practice noted, they should be reported to their chairmen. (DO)

One participant described an experience of how internal measures were utilised to punish an erring staff member thus:

I know one of my colleagues had an issue where a company outside Nigeria has a subsidiary here and the tax manager or so to speak had dealing with the tax authority and some money was paid so that the liability could be reduced. At the end of the day, there was a global corporate audit where they got to know ... the guy was fired and the company went on to pay the difference. You have companies like that. Some companies have controls to protect them from such occurrence. (RO)

In explaining why the internal measures put in place by companies may work, the same participant stated as follows:

You have to tell me why you have to pay this and the reasons for paying this. So if you explain to me I will release the money and I have to get a receipt, a documentation that says you have paid a hundred and a clearance from the revenue saying everything is fine. So to some extent it works.

In many cases, the actions of multinational companies are regulated by domestic anti-corruption measures of their home state with extra-territorial effects. From the responses of participants, this seemed to have an impact on their attitude towards corruption. As one participant explained:

But there are many others that frown strictly at bribery. An example will be companies that are affiliated to the US SEC companies and are related to the American companies. They never give bribes. Even if it costs them more to defend a position they think is right, they would rather do that. So if the liability being contested is say 10 million and it is going to cost them an additional 10 million to pay tax advisers and lawyers to make sure they are on the right side, they would rather do that than bribe someone to reduce the liability. (DA)

³⁶⁰ See Principle 10 of the United Nations Global Compact 2004.

Over time, such multinational businesses establish a reputation for not offering bribes to tax officials. Such a reputation is sustained by their willingness/ability to challenge arbitrariness and abuse, as well as their capacity to withstand frustration and delay. This reputation constitutes in a sense a social expectation between the businesses who have it and the actors representing the tax system. Many participants were quick to point out that their establishment had this positive reputation. One participant, for instance, commented thus:

Corruption is not an issue for us, we have made efforts to make the case clear in terms of what our expectations are, in terms of what we can do, in terms of what standards we are held by. And that is quite clear to the people we interact with. That does not mean this is the same for other organisations. (DO)

Finally, some participants noted that, for corruption to be effectively tackled, both sides of the relationship (and in particular businesses) must do their part. As one participant explained:

For the policies to be really effective, it has to be from both sides. When you have a business that has a no gift policy, and you have the actor or the tax regulator on the other hand that is expecting some form of gratification maybe some year-end gift and the business is not forthcoming, there is no similarities in policies or in expectations and that could create a strain on the relationship. I think the bottom line is for businesses to have a rigid policy about offering gifts or any form of gratification or form of assistance to the tax authority. Businesses who do this no gift policy are known for that. I used to work in a consulting firm where the tax authority already knows you will not give them anything. The main thing they ask us for at the end of the year is calendars and diaries because they know that is the only sort of thing they can get from us. Sometimes, the tax authority gets used to the fact that you will not give them any form of gratification. Businesses are majorly the ones who can drive the no-corruption in the tax system. If all businesses do that, the tax authority on the other hand will understand the stand of the businesses and they will have the choice but to align with that position. (CO)

This indicates the multidirectional nature of the exercise of power as well as the multidirectional nature of the measures required to tackle corruption. On the one part, the tax officials, for instance, must be constrained by their institutional environment in their interaction with the businesses. Likewise, businesses and their representatives must be constrained effectively by their institutional environment in their interaction with tax officials and other actors representing the tax system. This would provide a more effective general environment to prevent the sustenance of corruption in the two-way relationship.

5.7 Conclusion

This chapter discussed the empirical findings on corruption and the two-way relationship. It began by revisiting the meaning of corruption. It argued that one can understand corruption through the expectations of the individuals within a given society. Based on the expectations of the participants in this research, it identified three prevailing dimensions within which corruption may be defined (legal, economic and moral). The lack of reference to the political

dimension by the participants is indicative of the limited role played by political considerations in a society where political institutions are weak.

This chapter also considered the various issues of access, awareness, distortion and inaction that may create a power gap and avenue for corruption in the two-way relationship. It discussed the role played by discretion, wages arbitrariness, collusion and the business community in encouraging or discouraging corruption. In each case, it linked these issues to the power gap as the avenue through which corruption sustains itself in the two-way relationship.

CHAPTER 6 THE LAW, CORRUPTION AND THE TWO-WAY RELATIONSHIP

6.1 Introduction

This penultimate chapter contains a discussion of the means through which corruption may be addressed in the two-way relationship. It focuses on the use and limits of the law in achieving this goal. It recognises that the law may play a direct or indirect role in addressing corruption in the two-way relationship. In section 2, I argue that the law's definition of and punishments for corruption in the two-way relationship (and in society more broadly) should be constructed in a manner that reduces the horizontal gap between the dimensions to the barest minimum. The focus on the barest minimum is due to the likely impossibility of eliminating this horizontal gap in its entirety while maintaining the boundaries of the different dimensions in a social context. In section 3, I argue that law must tackle the issues of access, awareness, distortion and inaction so as to reduce the power gap that corruption exploits in sustaining itself in the two-way relationship. In doing this, I point out the potential for the law to both increase and reduce the power gap through its influence on these four mechanisms. This leads to the conclusion in which I restate the principal arguments of this thesis.

6.2 The Direct Impact of the Law on Corruption

The law directly impacts on corruption in the two-way relationship by identifying acts which are corrupt as well as imposing penalties on actors found guilty of those acts. These punishments may range from imprisonment to the loss of a position of power. The law's description and penalisation of these acts also constitute inputs in other dimensions through which these acts can be addressed. For instance, fines are valid inputs within the economic dimension. Also, describing an act as a crime impacts on the description of the act within the moral dimension. An actor may lose his position of power within the political dimension as a result of the application of the law to his situation. However, as the main institution for tackling corruption, the law's definition of any act as corrupt or otherwise illegal is crucial to whether the act can sustain itself in the two-way relationship.

Where an act is expressly adjudged corrupt under the law, the continuous existence of the act depends on its ability to hide from the reach of the law. The law's reach will differ depending on the strength of the institutions through which the law is enforced. In countries with weak legal institutions, individuals are more likely to observe corruption (as defined by the law) in their day-to-day activities. However, the natural trend towards development means

that corruption cannot always rely on an enduring state of weak institutions for its sustenance. As economies develop and institutions become stronger, corruption must find other ways to survive. One way is to limit itself to certain areas which the law (even with strong institutional mechanisms) traditionally finds difficult to reach. Corruption may, in this way, retreat to areas such as the discretionary powers of actors. An exercise of such discretion based on ethnic bias, for instance, may be difficult to establish in a given case owing to a lack of awareness that the action breached the expectation of the legal dimension. This makes it difficult for strong institutions to tackle this form of corruption. A second way is to exist in forms that the law finds difficult to address. One such form is the difficult distinction between gifts and bribes. This is especially the case where the gift is provided in a non-monetary form, for instance, sexual advances. In both of these ways, corruption must remain in check and must not exceed certain boundaries. Where such boundaries are exceeded, the ordinarily strong institutions will act to tackle corruption by imposing penalties on the actors involved.

A more formidable way through which corruption may secure sustenance in environments with strong institutions is by attaining the support of the law. Strong institutions may struggle in dealing with actions that are seemingly corrupt (owing to their nature and consequences) but are adjudged not corrupt by the law. Due to their potential re-characterisation as legal and not corrupt, it becomes pertinent to view actions through the lenses of other dimensions other than the law in order to decipher their nature. In doing so, a basic examination of the acts and their consequences in light of the actions and consequences of other acts that are clearly corrupt under the law is telling. The hackneyed distinction between tax avoidance and evasion, for example, may be subjected to this form of analysis. In drawing this distinction, tax avoidance is often defined as those actions of a taxpayer that reduce his tax liability within (at least the letter of) the law. Tax evasion on the other hand refers to illegal means of reducing one's tax liability.

The link between corruption and tax evasion has long been established and analysed by many academics in the field. For instance, research by Johnson and others³⁶¹ found a significant correlation between bureaucratic corruption and the underreporting of sales by firms in five Eastern European countries using firm-level survey data. Also, Tanzi and Davoodi³⁶² argue

³⁶¹ Simon Johnson and others, 'Why do Firms Hide? Bribes and Unofficial Activity after Communism' (2000) 76 *Journal of Public Economics* 495.

³⁶² Vito Tanzi and Hamid Davoodi, 'Corruption, Growth, and Public Finances' in KJ Arvind (ed), *Political Economy of Corruption* (Routledge 2001) 89.

that tax evasion is likely to be high in economies where corruption is also high. Chun³⁶³ finds that income tax evasion may increase as a result of a reduction in penalties brought about by corruption, whilst Nurtegin³⁶⁴ identifies eradicating corruption as a principal method for reducing tax evasion.

Such analysis exposes the potential congruence between evasion and corruption, especially in respect to collusion-corruption. The common example of such congruence is the receipt of bribes by tax officials to turn a blind eye to deliberate non-compliance by taxpayers. However, as already discussed, corruption need not only exist in relation to evasion where there is some collusion. Corruption may be the sole result of the exercise of power by the tax official over a business in the form of extortion in which case the business – an unwilling ally – cannot reasonably be said to have colluded. Arguably, the tag ‘corrupt’ should be placed on the tax official and not on the business.

Attempts to link corruption to tax avoidance have been rarer.³⁶⁵ This is primarily due to the fact that corruption is widely expected to be illegal while tax avoidance (or any act adjudged to be so) is legal. This legal/illegal distinction has sufficed in many circles to protect tax avoidance from association with corruption. However, observing tax avoidance and corruption based on the expectations of other dimensions may yield different results. This is not only because certain features of tax avoidance may be similar to those of tax evasion (involving both collusion and extortion corruption) but also because the consequences on the tax base, tax effort, fairness, efficiency, certainty and other possible indices through which one can measure the success of the tax system and the state are sometimes also alike.

My thesis centres on the power dynamic between actors in the two-way relationship and situates corruption within this dynamic. It is therefore important to examine the potential differences and similarities in the power dynamics (both within and outside the law). This can be achieved by analysing factual yet fictitious instances of evasion and avoidance. Five scenarios are listed and discussed below to illustrate this point.

³⁶³ Cyrus Chun, ‘A Model of Income Tax Evasion with Venal Tax Officials: The Case of Taiwan’ (1990) 45(3) *Public Finance/Finances Publiques* 392.

³⁶⁴ Kanybek Nur-tegin, ‘Determinants of Business Tax Compliance’ (2008) 8 *The BE Journal of Economic Analysis & Policy* 1; see also, Jean Hindricks and others, ‘Corruption, Extortion and Evasion’ (1999) 74(3) *Journal of Public Economics* 395.

³⁶⁵ See, for example, Gillian Brock and Hamish Russel, ‘Abusive Tax Avoidance and Institutional Corruption: The Responsibilities of Tax Professionals’ (Edmond J Salta, Working Paper No 56, 2015).

Scenario 1

A business' tax liability should be £100. The business is unwilling to pay £100 and seeks a tax official willing to accept a bribe to reduce this tax liability. This tax official is found and the deal is struck.

Scenario 2

A business' tax liability should be £100. The business is unwilling to pay £100 and seeks a tax law-maker powerful enough to influence the law to reduce the tax liability. The business offers to support the tax law-maker by funding their political campaign within the law.

Scenario 3

A business' true tax liability is £100. However, the business is unaware of this. A corrupt tax auditor arbitrarily serves the business an assessment stating that its tax liability is £200. The business is warned that if it does not pay £200, its premises will be closed. The business is only willing and able to pay £100 and has no reasonable means of establishing its true tax liability. Based on a later suggestion by the tax official, the business pays £100 as tax and £10 as bribe to the tax official.

Scenario 4

A business' true tax liability is £100. The business is unwilling to pay this sum. The business meets an influential tax policy-maker and informs them that it is only willing to pay £50. The business threatens to leave the jurisdiction if £50 is not made its tax liability. The tax policy-maker succumbs and issues 'side letters' to the business. These side letters are honoured by the tax authority and the business' tax liability is reduced to £50.

Scenario 5

The business' liability in State A is £100. The business is unwilling to pay this sum. The business approaches State B and promises to artificially move its profits to State B if State B accepts £50. State B accepts £50.

In each scenario described above, power has been exercised in respect of a business' tax liability resulting in the business paying less tax than it should have paid (with the exception of scenario 3 in which the business paid the correct tax but incurred additional liability in the form of the bribe paid to the tax official). Under the laws in many jurisdictions, a crime would

have been committed in scenarios 1 and 3 but not in scenarios 2, 4 and 5. The question that arises is whether there are substantial differences between these scenarios to justify the different treatment under the law.

Scenario 1 involves collusion-corruption. Both the business and the tax official will be adjudged to have acted corruptly by most dimensions of the society. Both individuals have secured illicit gain as a result of their exercise of power in a manner that falls short of the expectations of the legal, economic and moral dimensions of society.

In scenario 2, both the business and the tax law-maker have not breached the law. No crime has been committed. Yet, to the extent that the special law passed in favour of the business is economically inefficient in the circumstances, it is arguable that the tax law-maker has exercised his power in a manner that breaches the expectations of the economic dimension of the society. The said official has also secured a gain which (though legal) constitutes economic waste. Consequently, it is arguable that the tax official has acted corruptly from an economic perspective.

He may also have acted corruptly from a moral perspective to the extent that the laws enacted are unfair on the taxpayers and electorate in general. The business can also be said to be corrupt from an economic perspective. By influencing the change of the law for its private benefit, it has secured illicit economic rents and has abused its power to the extent that the law created is inefficient. This is therefore potentially a case of collusion-corruption from an economic perspective.

Scenario 3 is an instance of coercion/extortion-corruption. The business is arguably an unwilling ally to corruption. The state does not lose directly as a result in terms of revenue but may lose indirectly as a result of the payment to the tax official. To the extent that such payments encourage the tax official to continue extorting money from businesses, this may discourage future compliance and damage the reputation and efficiency of the tax system. The business also stands to lose as a result of the additional tax burden imposed on it.

Scenario 4 is a comparable situation of extortion but for which no party can be said to be corrupt under the law in most jurisdictions. Power in this case is exercised by the business over the state. Although such exercise of power may not violate positive laws, it may be improper – economically or morally speaking – to the extent that it leads to the creation of an inefficient or immoral law. The business also derives gain from the new law which can be classed as illicit flowing from the inefficiency or immorality of the law. In this case, extortion-corruption from an economic or moral perspective can be said to have occurred.

Scenario 5 is similar to scenario 2 in the sense that collusion-corruption from an economic perspective can be said to have occurred. The main difference is that while the state official in scenario 2 acted for his personal interest, the official in scenario 5 has acted for the interest of his state. To the extent that the action of the tax official in scenario 5 leads to the inefficient allocation of capital and taxes across states (depriving the state which ordinarily should impose tax on that activity from taxes), corruption can be said to have taken place. This is despite the fact that state interests rather than private interests may have been served as a result of the act.

In understanding the sustenance of corruption in the two-way relationship, it is therefore important to examine the potential for actors to secure protection from strong institutions by modifying the form but not the substance of their actions. It is also important to consider the extent to which the law can protect seemingly corrupt actions from being addressed by mechanisms existing in other dimensions.

In light of the above, it is argued in this thesis that the definition of corruption under the law should be such that it takes into account the expectations of other dimensions as much as reasonably possible. Put differently, corruption must be defined in the tax laws in a manner that reduces the horizontal gap between the dimensions in the society. This approach to corruption in the two-way relationship poses certain challenges. The first challenge is the presence of numerous other dimensions in society depending on the level of functional differentiation that has occurred. A solution to this challenge involves limiting the applicable dimensions to those foremost in the minds of actors within the field. In the case of the tax system in Nigeria and around the world, this would arguably be the economic and the moral dimensions. Concern for efficiency and fairness should be integrated into the definition of corruption under the law. This would ensure that the existing machinery of the law can be utilised to support and address corruption both within the law and under these other dimensions. Even more importantly, it will ensure that the law does not constitute a barrier against the attempts by other dimensions to address what they consider to be corrupt. Beyond the definition of corruption, law should also take into account the force mechanisms inherent in other dimensions when devising its own penalties and procedures against corruption.

However, there may be certain unresolvable inconsistencies between the legal, moral and economic dimensions which make it difficult to eliminate the horizontal gap while these dimensions still reserve the right to determine its content, structure and trajectory through its internal codes and programmes. Therefore, the goal of the law in addressing corruption through its definition and force mechanisms cannot be absolute. A more realistic goal would be to

reduce the horizontal gap to its barest minimum. However, this thesis does not attempt to suggest what this barest minimum is or how it should be achieved.

6.3 The Indirect Impact of Law on Corruption in the Two-way Relationship

The law's contribution to corruption in the two-way relationship is not limited to defining and imposing penalties on corrupt acts. The law may also help expose corrupt acts or otherwise provide a shield under which such acts may hide from both strong and weak institutions.

As argued in previous chapters, deficiency in awareness, restriction of access, distortion of communications and inaction not only plague the communication link between business and the tax system but also influence the power gap through which corruption guarantees its sustenance in the two-way relationship. Hence, law may play an indirect role in the sustenance of corruption in this relationship through its impact on these four mechanisms.

6.3.1 Awareness

The law in describing an act as corrupt or not corrupt influences the values which should be conferred on these Actions. The law also affects the knowledge of the existence, procedures and instruments of actors in the two-relationship. The law achieves this through its rules on freedom of information, privacy and confidentiality, whistleblowing and secrecy, to name a few.

Freedom of information is entrenched in the laws of many jurisdictions. Such laws permit interested individuals to petition the state for the release of public and other official documents relating to the actions or inactions of actors in the two-way relationship. However, the right to information contained in such laws is usually not unlimited. This right may be overridden on grounds of national security or general public interest. Where the public authority wishes to deny this request, the onus usually falls on them to justify this decision.

Laws on freedom of information are not functional until they are activated by interested actors. Hence, in societies where inaction is common, such laws may remain merely decorative. Also, the potential for denial of requests on grounds of national security and public interest creates loopholes within which corrupt activities may be hidden. Even where, with the aid of these laws, information is made available for exposing corruption, such information does not guarantee adequate awareness. The process of transmitting information may be plagued by distortions as a result of which an actor's awareness of the activities may remain deficient. The relevant actors may not also take the necessary steps to gain awareness or may be prevented

from doing so by certain barriers such as language and education. Therefore, while freedom of information laws may aid awareness, they do not guarantee it.

A common ally to the law that guarantees freedom of information, which is often characteristic of democratic settings, is the law that guarantees the freedom of the press.³⁶⁶ Corruption has been held to be lower in countries with higher press freedom.³⁶⁷ The press is often more active and willing to imbibe and act on information available to them. Hence, a free press increases the effectiveness of laws on freedom of information.

With or without an entrenched law on freedom of information, the investigative activities undertaken by the press may aid the revelation of corrupt practices and instigate the protest or force mechanisms against corrupt officials. For example, investigations by the Washington Post in the infamous Watergate Scandal led to the resignation of President Richard Nixon in 1974. Also, the investigations by the Philippine Centre for Investigative Journalism (PCIJ) led to the impeachment and trial of erstwhile President Joseph Estrada for corruption in 2000. Following an extensive report by the PCIJ into the lifestyles of officials of the Philippines Bureau of Internal Revenue, tax collectors were investigated, suspended, retired or transferred.³⁶⁸

However, while the press may be free, they may be controlled by private interests and tainted by political and economic bias. This may transform the press to a source of distortion rather than awareness. Houston and others, for example, argue that there is a positive correlation between corruption in bank lending and media concentration.³⁶⁹ Also Besley and Prat³⁷⁰ highlight the dangers of media capture in democratic governments. Rather than aiding the fight against corruption, compromised media may protect corruption by concealing it.³⁷¹ This challenge is captured in the intermittent debates about the extent to which press freedom should remain unbridled.³⁷²

³⁶⁶ For the relationships between free press and corruption, see Aymo Brunetti and Beatrice Weder, 'A Free Press is Bad News for Corruption' (2003) *Journal of Public Economics* 1801; Tim Besley and Andrea Prat, 'Handcuffs for the Grabbing Hand? Media Capture and Government Accountability' (2006) 96(3) *American Economic Review* 720.

³⁶⁷ Johann Lambsdorff, *The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy* (Cambridge University Press 2007) 45.

³⁶⁸ See Rod Macdonnell and Milica Pestic, 'The Role of the Media in Curbing Corruption' in Rick Stapenhurst and others (eds), *The Role of Parliament in Curbing Corruption* (World Bank 2006) 112.

³⁶⁹ Joel Houston and others, 'Media Ownership, Concentration and Corruption in Bank Lending' (2011) 100 *Journal of Financial Economics* 326.

³⁷⁰ Besley and Prat (n 367).

³⁷¹ Richard Nielsen, 'Corruption Networks and Implications for Ethical Corruption Reform' (2003) 42(2) *Journal of Business Ethics* 125, 136.

³⁷² Following the Leveson Inquiry in the UK, for example, some have searched for a balance between regulation and press freedom. See George Brock, 'The Leveson Inquiry: There is a Bargain to be Struck over Media Freedom and Regulation' (2012) 13(4) *Journalism* 519.

Standing in opposition to laws safeguarding freedom of information and the press are those protecting the privacy and confidentiality of individuals. The presence of both forms of laws – one seemingly aiding awareness and the other seemingly hindering it – is typical of the legal dimension in which rights criss-cross and determine the limits of each other. Privacy and confidentiality is particularly important when the issue is the taxation of businesses. Most jurisdictions protect the confidentiality of the tax affairs of businesses as part of the scheme to encourage openness and transparency between businesses and the tax authority. However, in encouraging openness between these two actors, privacy and confidentiality creates a smokescreen which makes scrutiny of their relationship (especially in suspected cases of collusion corruption) challenging. The UK Public Accounts Committee, for example, complained that their effort to scrutinise HMRC’s ‘tax deals’ with certain large companies was hindered by the HMRC using laws on confidentiality.³⁷³ Tax administrators in possession of confidential information about businesses and their dealings with the tax authority are usually bound by laws and other administrative rules that govern the terms of their employment to refrain from divulging such information. However, this obligation is usually tempered by rules permitting whistleblowing. In many cases, however, there may be a fine and dangerous line (for the tax official) between illegally divulging confidential information and whistleblowing. One example of this fine line is the case of Osita Mba, the HMRC whistleblower who was allegedly maltreated by the HMRC.³⁷⁴ Also relevant is the treatment of the ex-PWC employees who leaked the Luxembourg tax authority rulings.³⁷⁵

This situation is compounded by secrecy laws that apply to government officials holding sensitive positions within the tax system. These secrecy laws further forbid these officials from divulging official secrets.³⁷⁶ Secrecy laws may also be part of the state official policy for encouraging investment. For instance, bank secrecy laws protect the identity of taxpayers owning wealth stashed in offshore accounts, thus aiding international tax evasion

³⁷³ See Public Accounts Committee, *HM Revenue and Customs 2010-11 Accounts: Tax Disputes, Sixty-First Report of the Session 2010-12* (HC 2010-12, 1531) EV 82 (Tax Disputes); Osita Mba, ‘Transparency and Accountability of the Tax Administration in the UK: The Nature and Scope of Taxpayer Confidentiality’ (2012) 2 BTR 187.

³⁷⁴ See Rajeev Syal, ‘How HMRC Treated its Goldman Sachs Tax Deal Whistle-blower as a Criminal’ *The Guardian* (London, 29 April 2013).

³⁷⁵ Reuters, ‘Luxembourg Court Charges French Journalist over LuxLeaks Role’ *The Guardian* (London, 23 April 2015).

³⁷⁶ See, for example, FIRSEA, s 50.

and avoidance. In recent times, there have been various unilateral, bilateral and multilateral attempts to counter such bank secrecy laws with the goal of enabling transparency.³⁷⁷

Law may also aid awareness by creating and strengthening obligations on the part of businesses and the actors representing the tax system to develop their knowledge of the laws (relating to taxation and corruption) and the industry within which they operate. Laws may specify minimum qualifications, as well as mandate an appreciable level of training and continuous professional development, for key actors in the two-way relationship.

6.3.2 Access

Laws may aid or hinder access to the protest and force mechanisms through which corruption in the two-way relationship may be addressed. By creating avenues for protest, such as courts, ombudsmen and committees, the law provides individuals willing to challenge corruption access with a means to do so. The media is one platform through which protest against corruption can be carried out. Therefore, by ensuring a free media, the law also grants access to a protest mechanism.

The courts are a major mechanism through which protest is achieved within the legal dimension. Therefore, access to the courts is crucial. However, certain rules may exist which hinder access to the courts. The main examples of these laws include the laws on standing (*locus standi*), statute of limitation and immunity clauses.

In civil matters, the rules on *locus standi* were formulated to protect the courts from being inundated with claims from busybodies who had no interest in the suit. In its earlier forms, rules on *locus standi* granted access to individuals whose private rights had been infringed. However, over time, the rules on *locus standi* have become increasingly watered down to grant greater access to individuals with direct and indirect interest in the subject matter of the suit. In its present form in Nigeria, the rules on *locus standi* grant access to individuals with sufficient interest in the subject matter of the suit.³⁷⁸ The current sentiment of the Nigerian courts to the issue of standing is captured in the words of Fatayi Williams CJN in *Adesanya v President of Nigeria and anor*³⁷⁹ thus:

³⁷⁷ See, Laura Szarmach, 'Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case' (2010) 43 Cornell International Law Journal 409; Niels Johannesen and Gabriel Zucman, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown' (2014) 6(1) American Economic Journal: Economic Policy 65.

³⁷⁸ See Godwin Okeke, 'Re-Examining the Role of Locus Standi in the Nigerian Legal Jurisprudence' (2013) 6(3) Journal of Politics and Law 209.

³⁷⁹ *Adesanya v President of Nigeria and anor* (1981) 1 All NLRI. Ironically, the court found that the litigant lacked sufficient interest in this case.

I take cognisance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumour-mongering is the pastime of the market places and construction sites. To deny any member of such a society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of the Constitution, or that any law passed by any of the Legislative Houses, whether Federal or State, is unconstitutional, access to a Court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organised disenchantment with the judicial process.

Based on this sentiment, the courts are likely to find that a willing litigant has sufficient interest in the suit. Standing becomes problematic in the two-way relationship where a taxpayer seeks to challenge a communicative action relating to another taxpayer's affairs. This may be a law, policy or action of the tax authority relating to another taxpayer. The UK courts were formerly unwilling to grant *locus standi* in such cases,³⁸⁰ save in situations where both taxpayers are close competitors.³⁸¹ Recent developments in the law suggest that a litigant in such cases would have *locus standi*.³⁸² It is, however, yet to be seen whether the grant of *locus standi* in such cases merely constitutes formal, rather than substantive, access. In other words, whether the courts will set aside an exercise of power in favour of a taxpayer on the application of another.³⁸³ The tax authority may also wish to challenge the constitutionality of private arrangements entered into by taxpayers concerning their tax liability. The Nigerian court held that the tax authority had sufficient interest to institute such proceedings.

In criminal matters, an action is usually instituted not by the victim but by the state, save in exceptional circumstances. Hence, where the state fails to take criminal action against the transgressors, then the victims and other third parties possess very limited rights to force the institution of such proceedings in most jurisdictions. The Nigerian Supreme Court in *Ogbuagu v Ogbuagu*,³⁸⁴ for example, decided that, while the court may entertain cases on the breach of the Code of Conduct by public officers, this Code does not entitle private individuals to institute actions on its account.

Another common legal restriction of access to courts is the statute of limitations. Such statutes impose time limits on the rights of actors to institute civil claims. After the expiration of time, such actions are statute-barred. Most jurisdictions have both general and special time limitations on the institution of actions. General limitations apply to all suits of a given subject matter. Special limitations apply depending on the parties or courts involved.

³⁸⁰ *R v Inland Revenue Commissioners ex p National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617.

³⁸¹ *R v Attorney General ex p ICI Plc* [1987] 1 CMLR 72.

³⁸² *R (on the application of UK Uncut Legal Action Ltd) v Revenue and Customs Commissioners* [2013] EWHC 1283.

³⁸³ See, Dominic de Cogan, 'UK Uncut Legal Action v HMRC: Legal Inaction and a Return to Fleet Street' (2003) 4 BTR 552.

³⁸⁴ *Ogbuagu v Ogbuagu* (1981) 2 NCLR 680.

Within the Nigerian tax system, for instance, a taxpayer seeking to challenge a notice of assessment must institute an action within 30 days of his receipt of the said notice. Where such action is not so instituted within that time period, the notice is deemed to be final and conclusive and therefore can no longer be challenged in court. This bar can create a power gap as it may prevent a taxpayer from challenging an illegitimate exercise of power.

No suit can be brought against public officers (which includes most actors representing the tax system) after three months of an act taken by the said officer in the course of his duty.³⁸⁵ This rule does not apply where the act complained about is ‘outside the colour’ of the office or duty of the public officer³⁸⁶ or where the damage caused by the act is continuous.³⁸⁷ These exceptions prevent actors from using this provision as a shield to commit crimes (e.g. engage in corruption) or frustrate taxpayers.

In Nigeria, taxpayers cannot be assessed for tax on income accruing to them after a period of 6 years. There is an exception to this rule where crime or fraud is committed. This exception empowers the tax authority to challenge the tax liability of a taxpayer secured by corruption (or other forms of crime) at any time and to charge penalties and interests on any unpaid tax. On the one hand, this may deter knowledgeable taxpayers from engaging in corruption but on the other it may encourage the extortion and hostage-taking of taxpayers that had earlier engaged in corrupt activities. These hostages may lose their substantive access to a protest mechanism when faced with extortionate or repressive activities.

Finally, Section 308 of the CFRN grants immunity from prosecution to certain important public officers within the tax policy terminal of the tax system while they remain in office. This immunity extends to actions instituted for breach of the Code of Conduct. The effect of this immunity is to restrict or at least delay access to a force mechanism through which the interests of these actors may be aligned with the ideal. However, it does not preclude challenges to the actions taken by these actors. Where these actions breach the ideal, they may yet be challenged by a recipient actor or third party. This immunity is another example of a legal instrument with the potential of maintaining a power gap between the actors in the two-way relationship.

³⁸⁵ See Public Officer Protection Act, s 2; FIRSEA, s 55 (for tax officials).

³⁸⁶ See *Attorney-General of Rivers State v Attorney-General of Bayelsa State & Anor* (2013) 3 NWLR (Pt 1340) 123, 148 and 149.

³⁸⁷ *ibid.*

6.3.3 Distortion of Communication

In applying force on corrupt actors, the courts as the primary force mechanism will be called upon to determine both the facts and the applicable law. In performing this task, there is considerable potential for distortion arising from the methods through which such discovery of facts is made. In adversarial legal systems, the fact-finding process is a battle between the parties, each portraying the facts in a light that suits its averments. As a result, distortion of facts is common. This is worsened by the fact that the courts are prevented from descending into the arena of conflict as they must remain impartial umpires. Hence, the facts established by the courts may not be the true facts. Often, they are the product of a superiority contest between rival counsels as mediated by laws regulating what and how facts are to be established.

Although the laws of evidence were created and refined over the years to ensure that the facts established are true, these laws often constitute a barrier to such true facts. For instance, the law may provide that documentary evidence of a fact is inadmissible merely because the document in question does not satisfy certain formal requirements which may or may not affect the validity of the contents of the documents.

Also, the legal rules or canon through which the courts interpret statutes also permit distortions contrary to their original goals. Conventionally, the role of the court is to interpret the laws. The courts are bound by the law and must give effect to it. This conventional role is captured in the primary rule of interpretation – the literal rule. This rule requires the court to give effects to words in statutes based on their ordinary grammatical meaning. The application of literal rule has received even greater acceptance within taxation. This is because, since tax law involves the appropriation of the property of citizens, it is imperative that such appropriation should not be permitted save where the law clearly and expressly says so. However, the complexity of tax statutes, inability of the law to cater for the penumbra, and the creative ways in which taxpayers comply with the law have pushed the courts to apply other canons of interpretation. These include the golden rule which permits a deviation from the literal rule where the application of the literal rule will lead to absurdity; the mischief rule which implores the courts to interpret the statute in light of the mischief or problem which the said statute was created to address; and purposive interpretation which requires the courts to interpret the statute in light of its purpose.

It is common, especially in the field of taxation, for the interpretation of the law to differ depending on the canon of interpretation employed. This creates considerable room for distortion of the law when applying it to the facts. This situation is further exacerbated where the potential for judicial activism is taken into account. As a result of the potential distortion

of the facts and the law, the courts may arrive at a decision which differs from the true situation of things in light of the real intent of the law.

Therefore awareness of the potential for distortion by the arbiters responsible for dispute resolution is crucial. However, tackling distortion of this sort is challenging. It is argued that while arbiters should be more rigid in their interpretation of laws and facts, they should apply a certain degree of flexibility when dealing with procedures used to determine facts and law. Rigid procedures and technicalities such as requisite formality of documentation should not be permitted to constitute barriers to the factual resolution of disputes. These arbiters must also give regard to resources available to the parties in the suit. Small and local businesses are more likely to lack the requisite processes to defend their claims in court. Hence, arbiters should be mindful of this fact and be prepared to waive formality requirements depending on the particular circumstances. These specific changes are possible within the special fact-finding tribunals that form the first step of the external dispute resolution terminal of the tax system. Hence, the strengthening of this terminal (by the resolution of uncertainty concerning its jurisdiction and the improvement of its perceived and actual independence) is a crucial aspect of the process required to maintain a protest mechanism with limited distortions.

6.3.4 Inaction

The law seemingly has a limited role in ensuring action by actors. This is based on the premise that the law is usually concerned with wrong actions rather than wrong omissions. However, the law addresses omission by creating obligations to act. The creation of such obligations at various points in the two-way relationship between businesses and the tax system may help reduce the power gap. This is especially the case in relation to undue delays. The law in many instances creates clear timelines within which businesses must take action (such as filing returns and filing objections to assessments). Although similar obligations already exist in relation to the actors representing the tax system, it is arguable that these should be extended to cover the various instances where undue delay negatively affects the relationship between business and the tax system. These instances include the delay in reviewing tax laws, responding to requests for clarification of the law, providing tax documentation and resolving tax disputes. This duty to act should be accompanied with rights of businesses to protest and apply force on actors representing the tax system that breach it. However, extending this obligation is not without its challenges. Firstly, there will be situations where the undue delay is due to bureaucracy or other surrounding circumstances which are beyond the control of the actors involved. Hence, any law imposing a time limit may either create unfairness and

inefficiency if enforced or be ignored by the enforcers on the grounds of fairness and efficiency. Secondly, conferring rights on businesses assumes that businesses will be willing and able to protest in line with those rights. In situations where businesses tend not to protest owing to practical considerations, such rights to protest would have limited impact. This issue can be resolved by creating a corresponding duty on the part of an actor (possibly a third party) to protest in the event of a delay. This may succeed depending on the willingness and ability of the said actor to instigate this protest.

The law may encourage protests against illegitimate exercise of power by protecting whistleblowers or limiting the application of secrecy laws. Also, the imposition of asymmetric as opposed to symmetric liability for bribe givers and takers may encourage reporting of and deter the illegitimate demand of bribes in the case of harassment bribes. Harassment bribes are bribes paid by individuals for services which they are ordinarily entitled to. It is distinguishable from collusive bribery where both the bribe giver and the bribe taker exchange favours, with the bribe giver receiving that which he is not ordinarily entitled to it. With collusive bribery, there is a unity of interest between the parties based on the favours mutually enjoyed. Third parties are often required to protest or challenge such enterprises as the parties are unlikely to protest even in cases where the punishment for bribery is asymmetrical.³⁸⁸ In contrast, Abbink and others³⁸⁹ conducted an experiment that reveals the potential of asymmetric liability to increase reporting of bribes and reduce demand for bribes in cases of harassment bribes. It also shows that these benefits of asymmetric liability may be reduced where the economic incentives for the bribe giver are not sufficient or retaliation by the bribe taker is possible.

To some extent, inaction may be indirectly tackled by the law where the law addresses the levels of awareness, distortion and access in the two-way relationship. It is argued that these other mechanisms are the underlying causes for inaction in many instances.

6.4 Conclusion

Tackling corruption is not a task of the law alone. Other dimensions in society possess their own mechanisms through which they tackle corruption. Nevertheless, the law has a central, yet limited, role to play in tackling corruption in the two-way relationship. In doing this, the law must ensure that it does not constitute an obstacle to legitimate means of tackling corruption

³⁸⁸ See Christoph Engel, Sebastian Goerg and Gaoneng Yu, 'Symmetric vs. Asymmetric Punishment Regimes for Bribery' (MPI Collective Goods Preprint, No 2012/1, 2013) <<http://ssrn.com/abstract=1983969>> accessed 5 July 2015.

³⁸⁹ Klaus Abbink and others, 'Letting the Briber Go Free: An Experiment on Mitigating Harassment Bribes' (2014) 111 *Journal of Public Economics* 17.

by other dimensions in society. In this chapter, I have suggested two main ways in which the law can achieve this task. Firstly, the legal definition of and punishment for corruption should be constantly revised to ensure that any horizontal gap amongst the dimensions is reduced to the barest minimum. This may be achieved by including codes and programmes into the law, thereby creating a structural coupling between the law and these other dimensions that ensure similar yet independent progression amongst the dimensions in society concerning corruption. Secondly, law must tackle the power gap through its impact on the levels of awareness, access, distortion and inaction in the two-way relationship. While the law may be unable to solve all the challenges posed by these four mechanisms, a review of the law with these factors in mind will limit the power gap and with this constrain the avenue through which corruption sustains itself in the two-way relationship.

CHAPTER 7 SHIFTING THE FOCUS TO THE POWER GAP AND ITS MECHANISMS: CONCLUDING CHAPTER

7.1 Introduction

This concluding chapter seeks to achieve two main goals. Firstly, it will attempt to justify a call for the shift in focus from certain prominent themes in the existing literature (transparency, accountability, monopoly and discretion) to the power gap and its four mechanisms. Secondly, it calls for further research on applying the concept of the power gap, not only to other societal relationships and jurisdictions but also to the international arena with states, multinational companies and international organisations as the principal actors.

7.2 Shifting the Focus?

In societies where corruption is prevalent, there is a recognised tendency for actors to view its infiltration of and persistence in institutions as a *fait accompli*. It is the duty of academics to think productively about ways to reduce corruption in these institutions. Such productive thinking may lead to the identification of certain themes or concepts which indicate actions that policy-makers may take to tackle corruption. Four prominent themes (transparency, accountability, monopoly and discretion) can be identified in the existing literature. Accountability, monopoly and discretion, for example, feature in Klitgaard's formula on corruption (that is, corruption equals monopoly plus discretion minus accountability).³⁹⁰ This section briefly examines these themes in a bid to justify the call for a shift in focus to the power gap and its four mechanisms.

7.2.1 Monopoly

Monopoly features regularly in economic literature on corruption. Some academics have argued that the lack of competition or the over-concentration of powers in certain actors enables corruption to thrive in public institutions. As a result, they have identified the decentralisation of powers as a government policy that may reduce corruption. However, both empirical and theoretical research have produced conflicting results on the relationship between monopoly or concentration of powers (decentralisation) on the one hand, and corruption on the other hand.

³⁹⁰ Robert E Klitgaard, *Controlling Corruption* (University of California Press 1988).

With regard to decentralisation, for example, while Breton³⁹¹ and Weingast³⁹² argue that decentralisation will reduce corruption, Banfield³⁹³ and Manor³⁹⁴ argue that decentralisation will increase corruption. The results of empirical studies by Treisman³⁹⁵ and Goldsmith³⁹⁶ also show that decentralisation increases corruption, while similar empirical studies by Estache and Sinha,³⁹⁷ and Gurgur and Shah³⁹⁸ show the reverse.

The creation of more public service outlets may improve efficiency and reduce corruption. This is as a result of increased competition between outlets. Gray Molina and others,³⁹⁹ for example, find a reduction in informal payments where there is competition in the provision of government services. In contrast, however, the creation of more public service outlets may provide more options to actors seeking willing allies to participate in corrupt practices, especially in a social environment where corruption is rife.

Arguably, focusing on monopoly or the lack of competition does not adequately address the core mechanisms exploited by corruption in the two-way relationship. In cases where lack of competition or monopoly breeds corruption, the core issue is the presence of a power gap brought about by restriction of access, deficiency in awareness, inaction and distortion of communications. Hence, emphasis should be placed on addressing the power gap by influencing the levels of these four mechanisms.

7.2.2 Discretion

Discretionary powers have been recognised as a stronghold for corruption in public institutions.⁴⁰⁰ It is a common argument that the breadth of an actor's discretionary powers is

³⁹¹ Albert Breton, *Competitive Governments: An Economic Theory of Politics and Public Finance* (Cambridge University Press 1996).

³⁹² Barry Weingast, 'The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development' (1995) *Journal of Law, Economics and Organisation* 1.

³⁹³ Edward Banfield, 'Corruption as a Feature of Government Organisation' in Monday Ekpo (ed), *Bureaucratic Corruption in Sub-Saharan Africa: Towards a Search for Causes and Consequences* (University Press of America 1979) 98.

³⁹⁴ James Manor, *The Political Economy of Democracy Decentralisation* (World Bank 1999) 101.

³⁹⁵ Treisman (n 30).

³⁹⁶ Arthur Goldsmith, 'Slapping the Grasping Hand: Correlates of Political Corruption in Emerging Markets' (1999) *American Journal of Economics and Sociology* 866.

³⁹⁷ Antonio Estache and Sarbajit Sinha, 'Does Decentralisation Increase Public Infrastructure Expenditure?' in Antonio Estache (ed), *Decentralising Infrastructure: Advantages and Limitations* (World Bank 1995).

³⁹⁸ Tugrul Gurgur and Anwar Shah, 'Localisation and Corruption: Panacea or Pandora's Box?' (OECD/World Bank 2000).

³⁹⁹ George Gray-Molina and others, 'Does Voice Matter? Participation and Controlling Corruption in Bolivian Hospital' in Rafael Di Tella and William Savedoff (eds), *Diagnosis Corruption: Fraud in Latin America's Public Hospitals* (Inter-American Development Bank 2001).

⁴⁰⁰ Gisela Von Muhlenbrock, 'Discretion and Corruption: The Chilean Judiciary' (1997) 25 *Crime, Law and Social Change* 335.

a rough indication of his capacity to engage in corruption. Some researchers argue that there is a positive correlation between discretionary powers and corruption.⁴⁰¹ Hence, by reducing or even eliminating discretionary powers, corruption may be minimised.⁴⁰²

However, discretionary power is not merely a product of laws or administrative rules. Rather, like any other phenomenon in the two-way relationship, it is a product of a network of human and non-human actors. An actor may possess discretionary powers even in situations where such powers are not expressly conferred on the actor by laws or administrative rules. Thus, merely altering the content of these rules may have limited or no effect on the breadth of an actor's discretionary power.

It is also noteworthy that corruption does not require discretionary powers to thrive. Corruption may result from the exercise of non-discretionary powers in a manner that contravenes ideal expectations. Also curbing discretionary powers is not always efficient, especially as certain roles require flexibility. Rather than focusing on eliminating or reducing discretionary powers, it is therefore imperative to identify and address the main underlying challenges posed by discretionary powers.

I argue in this thesis that the challenge is not discretion per se but the power gap as widened by the levels of the four mechanisms. For instance, the problem with discretionary powers may be the increased likelihood that the 'ideal' will be distorted in a manner that is not easily noticeable. This is because where there is discretionary power, it may be difficult to detect whether the actor has exercised his powers in line with the ideal. Where non-discretionary powers are exercised, a distortion of the ideal can easily be identified by comparing the ideal and the outcome of the exercise. In cases where discretionary powers are exercised, recourse may have to be made to the motives behind the exercise. Such motives are difficult to determine in many cases. This illustrates that the underlying challenge with discretionary power may be issues of awareness and distortion. Hence, focusing on the issues of awareness and distortion would lead to more targeted and productive ways to tackle the real

⁴⁰¹ Alberto Ades and Rafael Di Tella, 'The New Economies of Corruption: A Survey and Some New Results' (1997) 45 *Political Studies* 496; Rajeev Goel and Michael Nelson, 'Corruption and Government Size: A Disaggregated Analysis' (1998) 97 *Public Choice* 107; Daniel Kaufmann and Paul Siegelbaum, 'Privatisation and Corruption in Transition Economies' (1997) 50 *Journal of International Affairs* 519; Simon Johnson, Daniel Kaufmann and Pablo Zoido-Lobaton, 'Regulatory Discretion and the Unofficial Economy' (1998) 88 *American Economic Review* 387; Kurt Weyland, 'The Politics of Corruption in Latin America' (1998) 9 *Journal of Democracy* 108.

⁴⁰² Denis Galligan, *Discretionary Powers: A Study of Official Discretion* (Clarendon Press 1986) 167.

challenges posed by discretionary powers. A shift in focus is therefore likely to be more beneficial than a broad and arbitrary attempt to reduce or eradicate discretionary powers.

7.2.3 Transparency

Transparency, and its sister concept accountability, have featured prominently in the literature on corruption.⁴⁰³ Two main facets of transparency are openness and clarity. While openness refers to the accessibility of institutional actors and actions, clarity refers to the ease with which these actors and actions can be understood.

Transparency, like monopoly and discretionary power, points policy-makers in the right direction in terms of actions needed to tackle corruption. Improving transparency reduces the information asymmetries that may prevent recipient actors and other third parties from protesting against an illegitimate exercise of power.⁴⁰⁴ However, it does not sufficiently identify the underlying challenges that corruption exploits. This is mainly due to its tendency to lead to a focus on just one side of the relationship. The call for greater transparency, for example, demands greater openness and clarity from state actors and institutions (such as the terminals of the tax system). However, it often ignores the considerable role played by the actors interacting with these institutions in securing such clarity and openness. Making institutions open or clear does not guarantee openness or clarity since the actors on the other side of the relationship may fail or be unable to take advantage of it.⁴⁰⁵ Put differently, merely focusing on openness or clarity without ensuring that it leads to increased access or awareness may fail to inspire the changes required to tackle corruption. Bauhr and Grimes have also argued that actors may fail to hold public office holders to account despite transparent practices revealing the wrongs of these officers. In their words, the attitude of these actors may be one of ‘resignation’ rather than ‘indignation’ in the face of corruption exposed by transparency. This is more likely to be the case in societies where corruption is rife.⁴⁰⁶

⁴⁰³ Daniel Kaufmann, Gil Mehrez and Tugrul Gurgur, ‘Voice or Public Sector Management? An Empirical Investigation of Determinants of Public Sector Performance Based on a Survey of Public Officials’ SSRN Electronic Journal <<http://ssrn.com/abstract=316865>> accessed 5 July 2015; Joel Kurtzman and others, ‘The Global Costs of Opacity: Measuring Business and Investment Risk Worldwide’ (2004) 46(1) MIT Sloan Management Review 38.

⁴⁰⁴ See Jonathan Fox, ‘The Uncertain Relationship between Transparency and Accountability’ (2007) 17 *Development in Practice* 663.

⁴⁰⁵ Catharina Lindstedt and Daniel Naurin, ‘Transparency is not Enough: Making Transparency Effective in Reducing Corruption’ (2010) 31 *International Political Science Review* 301.

⁴⁰⁶ Bauhr and Grimes (n 39).

Therefore, a shift in focus from transparency to awareness and access better ensures that the underlying challenges exploited by corruption are addressed. The call for this shift is not intended to belittle the important role played by transparency. It merely requires that transparency be categorised as one of the issues to be considered in achieving greater access and awareness rather than as the focal point in the battle against corruption.

7.2.4 Accountability

Accountability, a prominent theme in the literature on corruption,⁴⁰⁷ is also capable of different meanings. One may identify two angles of accountability. The first angle covers an actor's personal accountability for actions that affect others. The second angle covers the ability of other actors to hold an actor accountable for the latter's actions.

Accountability is an umbrella concept that covers the various concerns captured in the power gap and the four mechanisms. When interpreted broadly, it roughly equates to a state of no corruption. This broad interpretation or the lack of specificity renders the call for greater accountability in practice unhelpful. There is a need to deconstruct this call for greater accountability in order to uncover the actual mechanisms responsible for the lack of accountability in a given relationship or society. The power gap and four mechanisms concept is a product of such deconstruction. By identifying the different limits placed on actions by the ideal expectation of the dimensions in society, the power gap concept highlights the differing standards against which one may be held accountable. Also, the issues of distortion, access, awareness and inaction provide a clearer picture of the elusiveness or challenges of accountability in social contexts. Thus, it provides better guidance to policy-makers on the steps required to achieve accountability or curb corruption.

The above premises further validate the call for a shift in focus from accountability to the power gap and the four mechanisms.

7.3 Further Research

Admittedly, this call for a shift in focus can only be fully justified after testing the concept of the power gap and the four mechanisms in other research beyond the scope and limitations of

⁴⁰⁷ Simeon Djankov and others, 'Who Owns the Media?' (2003) 46 *The Journal of Law and Economics* 341; Rose-Ackerman (n 30); Juan Linz and Alfred Stephan, 'Towards Consolidated Democracies' (1996) 7 *Journal of Democracy* 14; Tefvik Nas and others, 'A Policy Oriented Theory of Corruption' (1986) 80 *American Political Science Review* 107; John Bailey and Arturo Valenzuela, 'The Shape of the Future' (1997) 8 *Journal of Democracy* 43; Torsten Persson and others, 'Separation of Powers and Political Accountability' (1997) 112 *Quarterly Journal of Economics* 1163; Jean-Jacques Laffront and Mathieu Meleu, 'Separation of Powers and Development' (2001) 64 *Journal of Development Economics* 129.

the current research. Firstly, it would be beneficial to study empirically the two-way relationship in social contexts, other than Nigeria. In this regard, a comparative analysis of this relationship in developed and developing countries would be a positive step towards fully understanding the susceptibility of the relationship to the four mechanisms. Secondly, even beyond taxation, there are other relationships in society customarily plagued by corruption (for example, procurement processes). An empirical study of these other relationships could be conducted with the power gap and the four mechanisms as a guide. Thirdly, a quantitative analysis of the levels of access, awareness, distortion and inaction as against the prevalence of corruption would also shed more light on the usefulness of the power gap concept.

Fourthly, the concept of the power gap and the four mechanisms applies not only to corruption but also to sundry other acts that fall short of the ideal expectations of the dimension of any given society. Hence, further research applying this concept to other forms of malfeasance may aid its development and improve its application to corruption in the two-way relationship between businesses and the tax system.

Most interestingly, the power gap concept may be applied to the international tax arena with states, international organisations (such as the OECD, EU and UN), and multinational companies as the principal actors in the relationship. In this arena, the rule-setters are often the international organisations. These organisations are responsible for the policies and rules contained in the bilateral and multilateral treaties that shape the framework of the international tax system.⁴⁰⁸ The tax administrators are the various states charged with the responsibility of giving effect to these international tax rules. The arbiters are the growing international tax dispute resolution centres and the domestic dispute resolution mechanisms, to the extent that they entertain international tax disputes. Many of these disputes relate to transfer pricing (i.e. the price at which transfers of goods and services are made between related entities).⁴⁰⁹

The application of the concept of the power gap and the four mechanisms to the international arena is pertinent. This is in light of the burgeoning interest of tax policy-makers in the challenges created by harmful international tax competition, base erosion and profit shifting. Harmful tax competition refers to practices by states which encourage non-compliance, unduly distorts the allocation of capital and labour, or disrupts the agreed means for allocating taxing rights. It includes imposing no taxes on economic activity, preferential

⁴⁰⁸ Reuven S Avi-Yonah, *International Tax as International Law* (Cambridge University Press 2007).

⁴⁰⁹ See Eduardo Baistrocchi and Ian Roxan (eds), *Resolving Transfer Pricing Disputes* (Cambridge University Press 2012).

regimes and secrecy laws. The fight against such practices was led by the OECD but has recently been overtaken by the movement to tackle base erosion and profit shifting. Teather makes a compelling argument as to why these practices should not be termed harmful.⁴¹⁰ Base erosion and profit shifting (BEPS) refers to the current movement led by the OECD/G20 targeted at practices of multinational companies that unduly exploit the gaps in international tax rules to reduce their tax liability.⁴¹¹

There is a growing number of cases in which multinational companies collude with state actors to flout the ‘ideal expectations’ of the international tax regime contained in the international tax rules, the individual and collective conceptions of fairness and the overarching economic goals of promoting growth and efficiency.

For instance, in 2014 there was a discovery led by journalists of seemingly aggressive tax planning strategies by over 300 multinational companies with the aid of tax rulings by the Luxembourg tax authority (Luxembourg Tax Leaks).⁴¹² The practices of these companies have been described as immoral. In the words of Margaret Hodge, head of the UK Public Accounts Committee, these companies are not being accused of engaging in illegality. Rather they are being accused of being immoral.⁴¹³ However, some of these practices have crossed the fine line between morality and illegality. For instance, the deal between Amazon and Luxembourg has been labelled illegal state aid by the European Commission. The European Commission has also accused Ireland and the Netherlands of breaching the rules on state aid through covert tax deals.

Regarding the cases exposed by the Luxembourg Tax Leaks, it is vital to ask questions about how the state of affairs, currently condemned internationally, persisted for almost a decade unperturbed. Applying the power gap concept, it is arguable that the state and multinational companies involved were able to further their private interests while breaching the ideal (as contained in the EU law on State Aid – legal dimension – or conceptions of fairness – moral dimension) owing to the a) lack of awareness on the part of third parties willing to challenge the action; b) lack of access to a force mechanism through which the action can be challenged on the part of those who were aware; c) distortion of Communication; and d)

⁴¹⁰ Richard Teather, ‘Harmful Tax Competition?’ (2002) 22(4) *Economic Affairs* 58.

⁴¹¹ See Dhammika Dharmapala, ‘What Do We Know about Base Erosion and Profit Shifting’ (2014) 35(4) *Fiscal Studies* 421; OECD, *Addressing Base Erosion and Profit Shifting* (OECD 2013).

⁴¹² See Vanessa Houlder, ‘Leaks Reveals the Scale of Tax Deals with Luxembourg’ *Financial Times* (London, 6 November 2014).

⁴¹³ Helia Ebrahimi, ‘Starbucks, Amazon and Google Accused of Being Immoral’ *The Telegraph* (12 November 2012).

inaction on the part of those who were aware and had access to a force mechanism that operates without considerable distortion.

The ideal is as contained in the EU law on State Aid (legal dimension) or conceptions of fairness (moral dimension). The European Commission, for example, was arguably unaware of the deals before the leaks. One may question the rationale behind so much secrecy in the resolution of tax disputes. Apart from creating room for a power gap, this may have a negative effect on the growth of international law of taxation. To the extent that the activities were merely immoral and not illegal, its persistence can be attributed to the absence of an adequate force mechanism. Some civil society organisations are willing to challenge these practices but lack access to a functional force mechanism. In one case involving Dyson Ltd,⁴¹⁴ the arm's-length standard was applied in a manner that enabled the company to incur deductible interest expenses for a loan that was interest free. This led to a reduction in the taxable profits of the company and can arguably be described as a distortion of the arm's-length standard (distortion of Communication). Arguably, the Luxembourg government and tax authority actively colluded in the process. There is a good chance that they were aware but they chose not to act as this suited their interests (inaction).

7.4 Conclusion

As states struggle to generate sufficient revenue from the tax system whilst attracting, encouraging and sustaining investments, societal factors such as corruption are likely challenges. Despite its widespread condemnation, corruption manages to infiltrate and impact on the results of this struggle of states. This research therefore set out to understand how corruption manages to persist in a relationship closely associated with this struggle (that is, the two-way relationship between business and the tax system). It recognises the need to avoid a state of helplessness by identifying concepts or themes that may guide policy-makers in their bid to minimise corruption. It argues that corruption sustains itself in this two-way relationship by exploiting a power gap, influenced by the levels of access, awareness, distortion and inaction. In its concluding chapter, it calls for a shift in emphasis from traditional concepts such as transparency, accountability, discretion and monopoly to the power gap and its four

⁴¹⁴ See Simon Bowers, 'Luxembourg Tax Files: How Tiny State Rubber-Stamped Tax Avoidance on an Industrial Scale' *The Guardian* (London, 5 November 2014) <<https://www.theguardian.com/business/2014/nov/05/-sp-luxembourg-tax-files-tax-avoidance-industrial-scale>> accessed 7 June 2017.

mechanisms. However, it recognises that this shift can only be fully justified after conducting further research on the usefulness of the power gap concept.

In all, it augurs hope that the concept of the power gap and its four mechanisms will aid the design of a tax system that strikes an adequate balance between the potentially conflicting needs for investments and revenue generation in countries where corruption is endemic. It is worth reiterating that this is essential in these years of austerity and heightened international tax competition as the need to encourage, attract and sustain investments remains foremost in the minds of governments of both developed and developing countries.

Appendices

A. INTERVIEW GUIDE FOR SEMI-STRUCTURED INTERVIEW OF TAX PROFESSIONALS

Questions 1 to 3 seek to derive information on the levels of interaction between businesses and the actors representing the tax system.

Question 4 targets information on general factors affecting the interaction.

Questions 5 to 12 seek information on the expectations of businesses regarding the actions of actors representing the tax system. These will also help provide information on how businesses respond to the actions of these actors.

Question 13 seeks information on what actions businesses identify as corrupt. Questions 14 to 17 are direct questions on corruption and the relationship between businesses and the tax system.

- 1) Do tax officials interact with:
 - a. Tax policy-makers?
 - b. Tax law-makers?
 - c. Tax arbiters?
 - d. Businesses?
- 2) How do tax officials interact with
 - a. Tax policy-makers?
 - b. Tax law-makers?
 - c. Tax arbiters?
 - d. Businesses?
- 3) How often do tax officials interact with:
 - a. Tax policy-makers?
 - b. Tax law-makers?
 - c. Tax arbiters?
 - d. Businesses?
- 4) What factors affect (positively or negatively) tax officials' interaction with:
 - a. Tax policy-makers?
 - b. Tax law-makers?

- c. Tax arbiters?
 - d. Businesses?
- 5) From your experience, what do tax officials generally expect in their relationship with (in terms of the actions of):
- a. Tax policy-makers?
 - b. Tax law-makers?
 - c. Tax arbiters?
 - d. Businesses?
- 6) Why are these actions expected?
- 7) From your experience, what unexpected actions occur (in terms of the actions of) in the interactions/relationship between tax officials and:
- a. Tax policy-makers?
 - b. Tax law-makers?
 - c. Tax arbiters?
 - d. Businesses?
- 8) Why do you classify these actions as expected or unexpected?
- 9) How do businesses respond when an action is to their benefit?
- 10) How do businesses respond when an action is detrimental to them?
- 11) Why do businesses respond in these manners to the actions by:
- a. Tax policy-makers?
 - b. Tax law-makers?
 - c. Tax arbiters?
 - d. Tax officials?
- 12) What are the likely responses by businesses when the action is a case of:
- a. Negligence?
 - b. Incompetence?
 - c. Misinterpretation of the law?
 - d. Inefficiency?
 - e. Abuse of power?
 - f. Corruption?
- 13) What forms of corruption could occur in the relationship between businesses and:
- a. Tax policy-makers?
 - b. Tax law-makers?
 - c. Tax officials

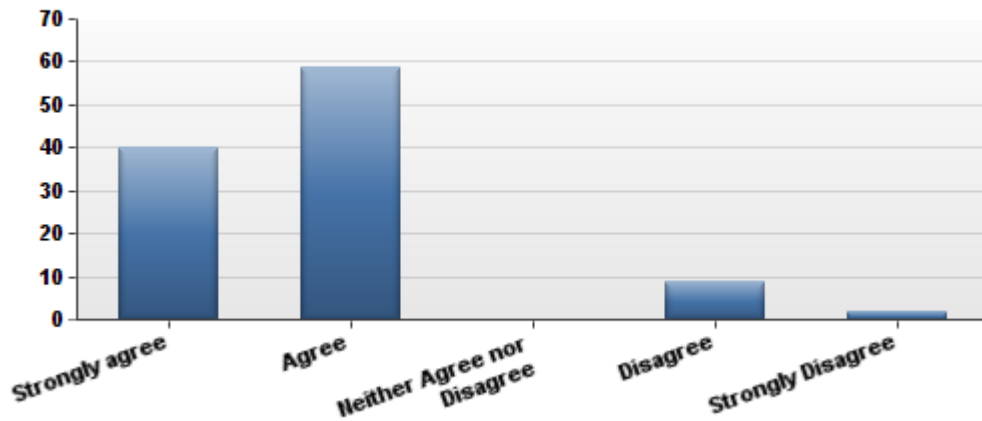
- d. Tax arbiters?
- 14) Why do businesses respond the way they do when the action is corruption? Are there any other reasons that affect the response?
- 15) What factors encourage corruption in the relationship between businesses and:
- a. Tax policy-makers?
 - b. Tax law-makers?
 - c. Tax officials?
 - d. Tax arbiters?
- 16) Are there laws or policies that contribute to corruption in these relationships?
- 17) How do the measures put in place to tackle corruption affect the interaction between businesses and:
- a. Tax policy-makers?
 - b. Tax law-makers?
 - c. Tax officials?
 - d. Tax arbiters?

B. BREAKDOWN OF PARTICIPANTS (SEMI-STRUCTURED INTERVIEWS)

TYPE	NUMBER
SMALL BUSINESS OWNERS	18
INHOUSE TAX CONSULTANTS (MAINLY LARGE BUSINESSES)	15
TAX OFFICIALS	10
EXTERNAL TAX ADVISERS	17

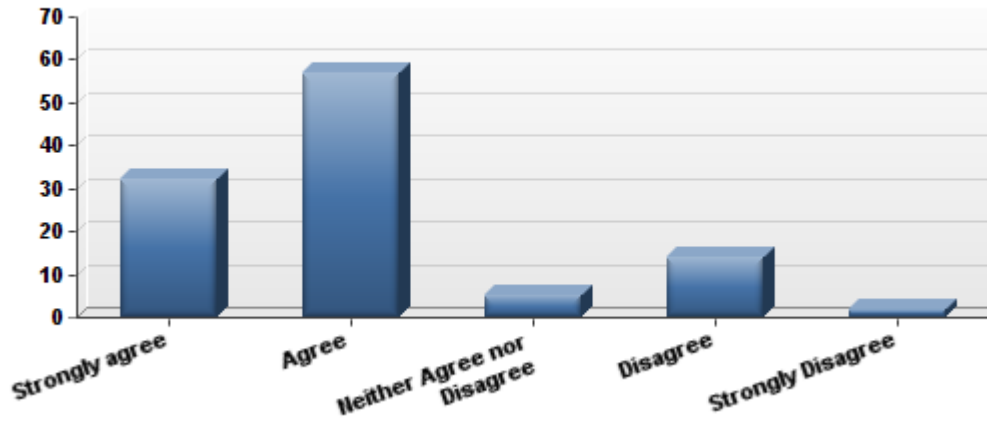
C. SURVEY REPORT

1. Large businesses are more likely to comply with their tax liabilities than small businesses



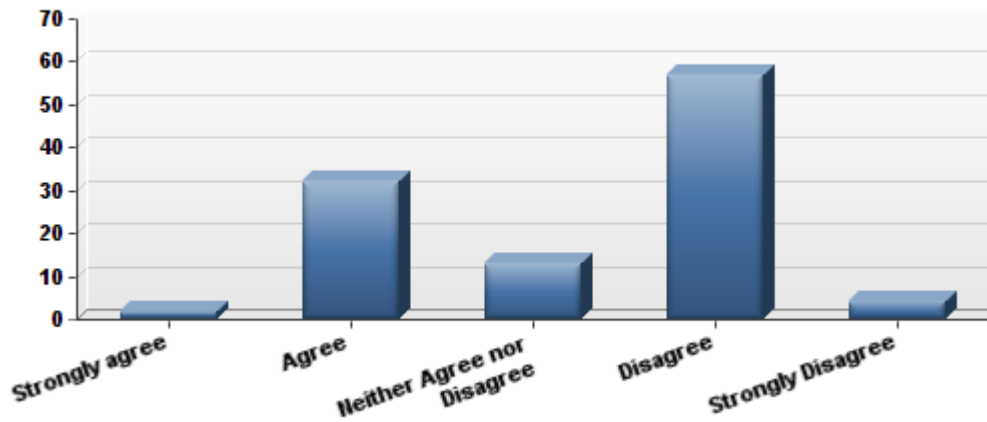
#	Answer	Response	%
1	Strongly Agree	40	36.36%
2	Agree	59	53.64%
3	Neither Agree nor Disagree	0	0.00%
4	Disagree	9	8.18%
5	Strongly Disagree	2	1.82%
	Total	110	100.00%

2. Multinational businesses are more likely to comply with their tax obligations than local businesses



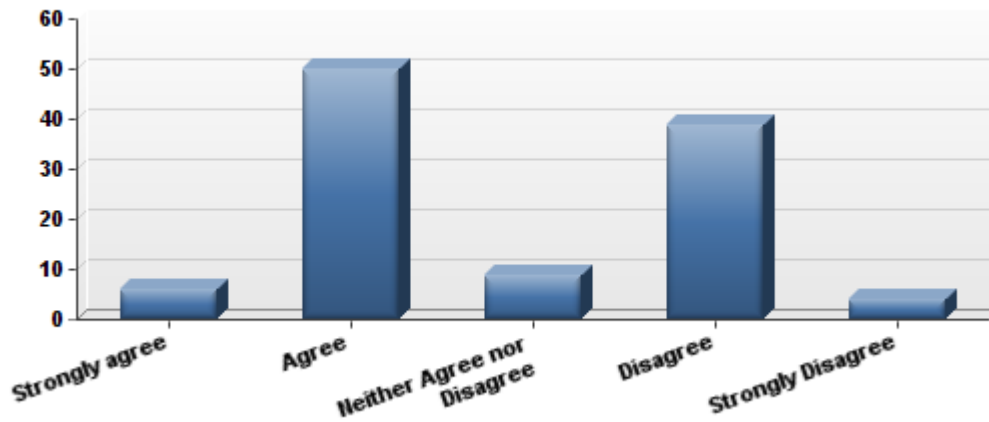
#	Answer	Response	%
1	Strongly Agree	32	29.09%
2	Agree	57	51.82%
4	Neither Agree nor Disagree	5	4.55%
5	Disagree	14	12.73%
6	Strongly Disagree	2	1.82%
	Total	110	100.00%

3. Nigerian tax laws are vague



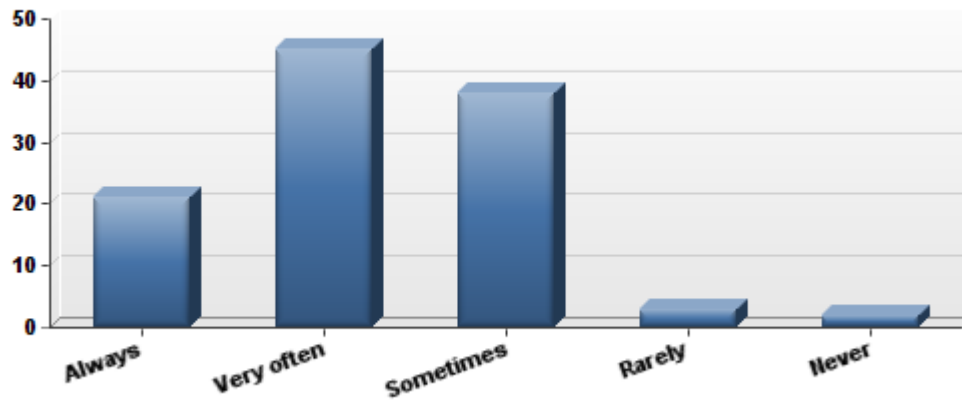
#	Answer	Response	%
1	Strongly Agree	2	1.85%
2	Agree	32	29.63%
3	Neither Agree nor Disagree	13	12.04%
4	Disagree	57	52.78%
5	Strongly Disagree	4	3.70%
	Total	108	100.00%

4. Tax officials have broad discretionary powers



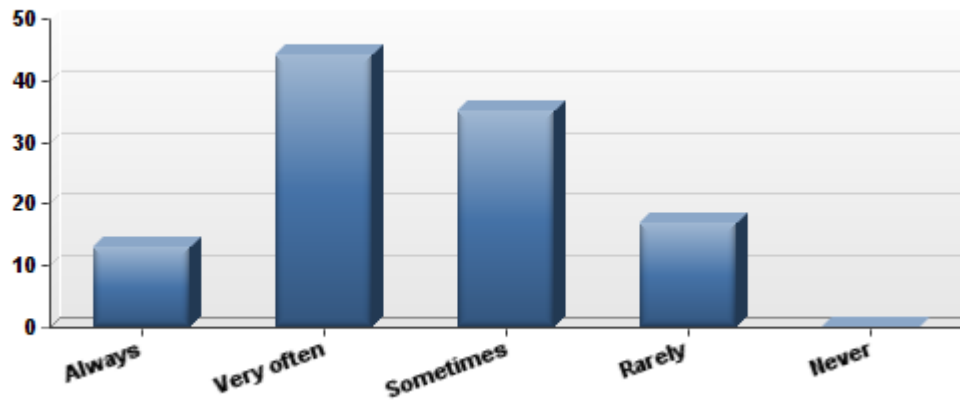
#	Answer	Response	%
1	Strongly Agree	6	5.56%
2	Agree	50	46.30%
3	Neither Agree nor Disagree	9	8.33%
4	Disagree	39	36.11%
5	Strongly Disagree	4	3.70%
	Total	108	100.00%

5. Tax officials apply the law based on their true meaning



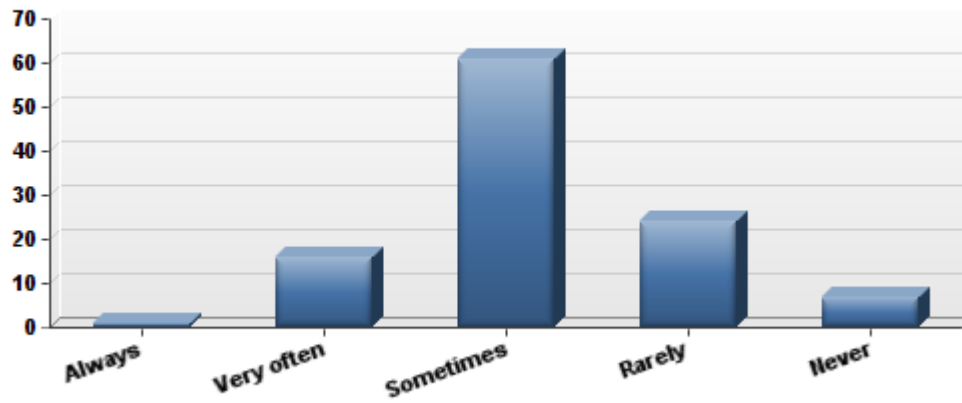
#	Answer	Response	%
1	Always	21	19.27%
2	Very often	45	41.28%
3	Sometimes	38	34.86%
4	Rarely	3	2.75%
5	Never	2	1.83%
	Total	109	100.00%

6. The tax collection activities of tax officials are adequately scrutinised



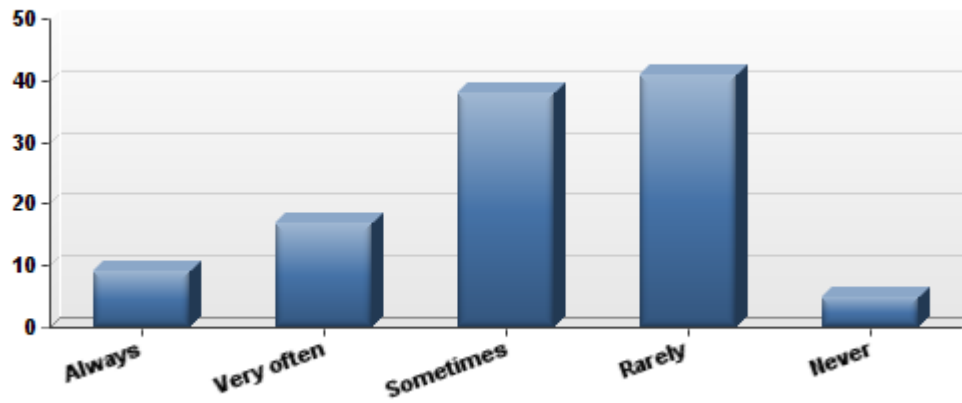
#	Answer	Response	%
1	Always	13	11.93%
2	Very often	44	40.37%
3	Sometimes	35	32.11%
4	Rarely	17	15.60%
5	Never	0	0.00%
	Total	109	100.00%

7. Tax officials abuse their powers



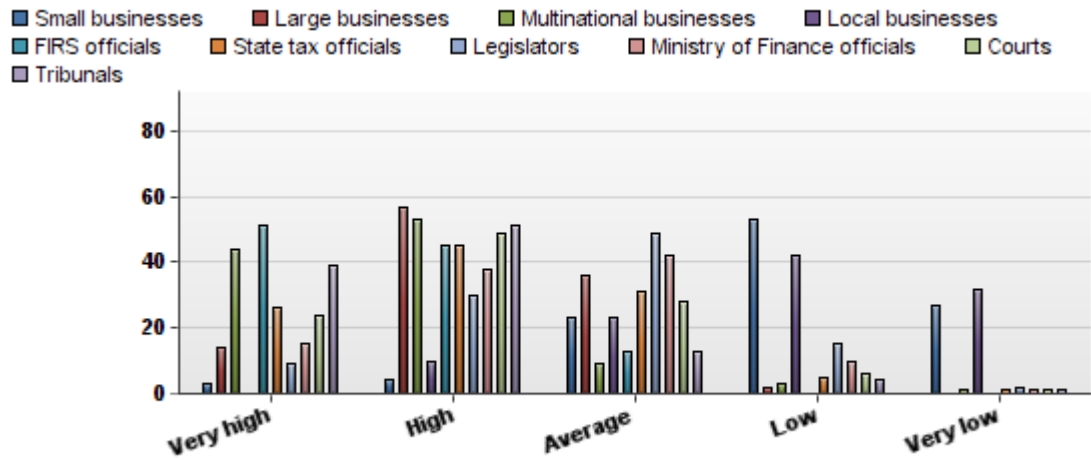
#	Answer	Response	%
1	Always	1	0.92%
2	Very often	16	14.68%
3	Sometimes	61	55.96%
4	Rarely	24	22.02%
5	Never	7	6.42%
	Total	109	100.00%

8. Businesses protest against corruption



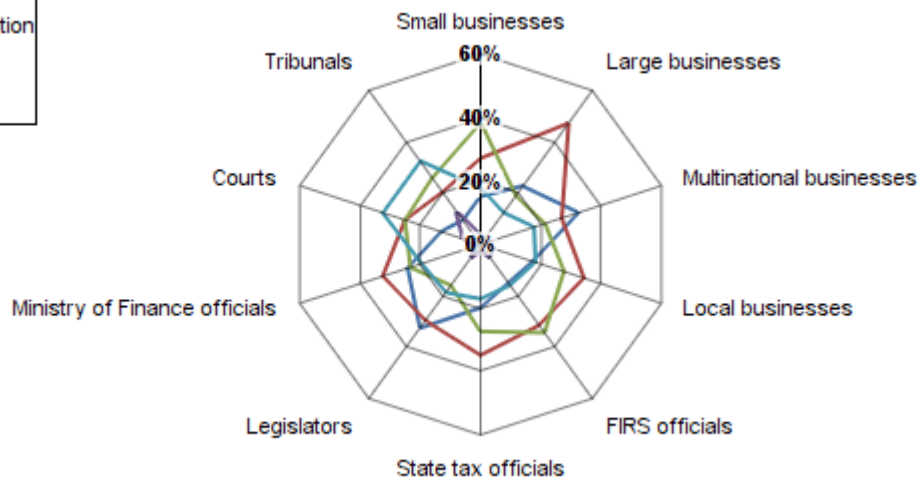
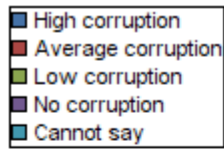
#	Answer	Response	%
1	Always	9	8.18%
2	Very often	17	15.45%
3	Sometimes	38	34.55%
4	Rarely	41	37.27%
5	Never	5	4.55%
	Total	110	100.00%

9. Please rank the following classes of actors based on their level of awareness of Nigerian tax laws



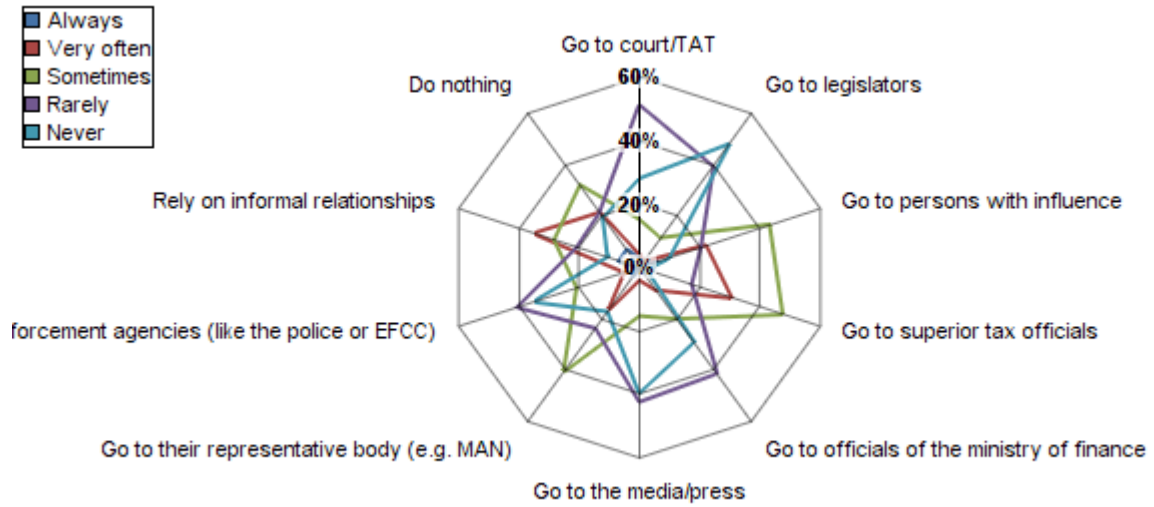
#	Question	Small businesses	Large businesses	Multinational businesses	Local businesses	FIRS officials	State tax officials	Legislators	Ministry of Finance officials	Courts	Tribunals
4	Low	53	2	3	42	0	5	15	10	6	4
5	Very low	27	0	1	32	0	1	2	1	1	1
3	Average	23	36	9	23	13	31	49	42	28	13
2	High	4	57	53	10	45	45	30	38	49	51
1	Very high	3	14	44	0	51	26	9	15	24	39

10. Please rank the following classes of actors based on the level of corruption you believe they engage in



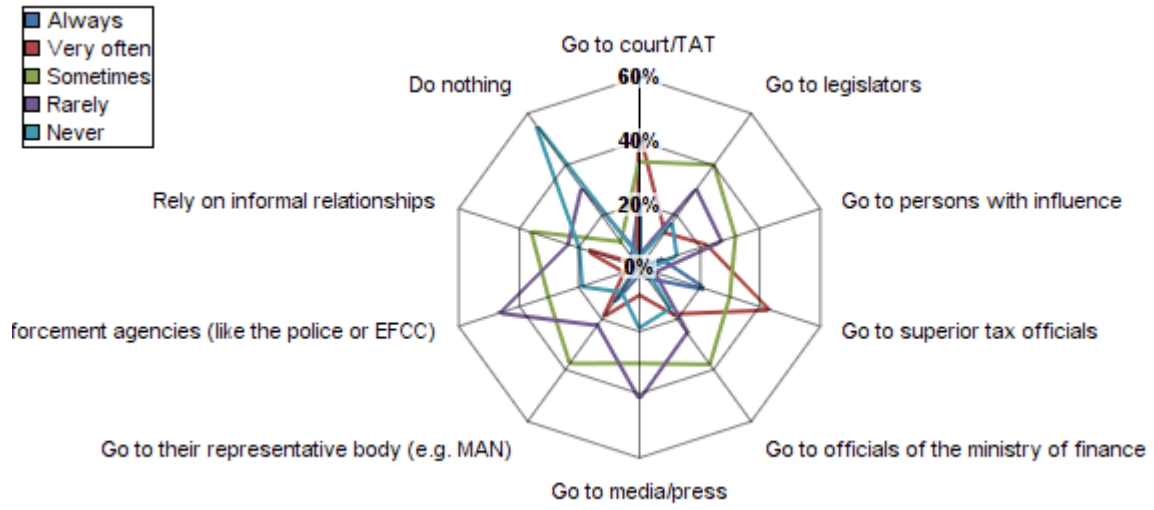
#	Question	High corruption	Average corruption	Low corruption	No corruption	Cannot say	Total Responses
7	Legislators	35	32	17	5	20	109
2	Large businesses	24	50	20	0	13	107
3	Multinational businesses	35	29	23	3	19	109
8	Ministry of Finance officials	26	35	25	2	21	109
9	Courts	14	27	27	6	35	109
10	Tribunals	10	22	28	14	35	109
6	State tax officials	21	37	29	2	18	107
4	Local businesses	18	36	29	4	19	106
5	FIRS officials	16	34	37	5	17	109
1	Small businesses	16	29	41	3	19	108

11. Where wronged or faced with a problem when handling their tax affairs, small businesses:



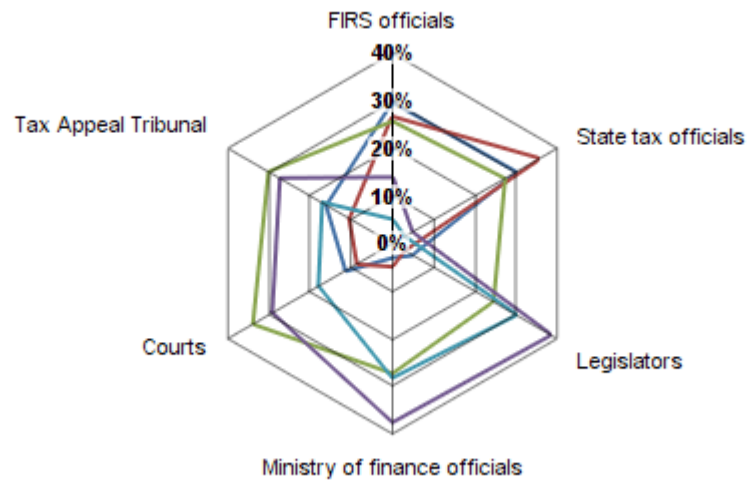
#	Question	Always	Very often	Sometimes	Rarely	Never	Total Responses
2	Go to legislators	0	2	12	42	51	107
6	Go to the media/press	0	4	16	45	42	107
8	Go to enforcement agencies (like the police or EFCC)	0	5	22	43	37	107
5	Go to officials of the ministry of finance	2	9	21	44	31	107
1	Go to court/TAT	3	4	16	55	30	108
10	Do nothing	7	22	33	22	20	104
7	Go to their representative body (e.g. MAN)	4	17	43	25	18	107
9	Rely on informal relationships	7	37	30	22	11	107
3	Go to persons with influence	6	23	45	21	10	105
4	Go to superior tax officials	4	32	50	18	2	106

12. Where wrong or faced with a problem when handling their tax affairs, large businesses



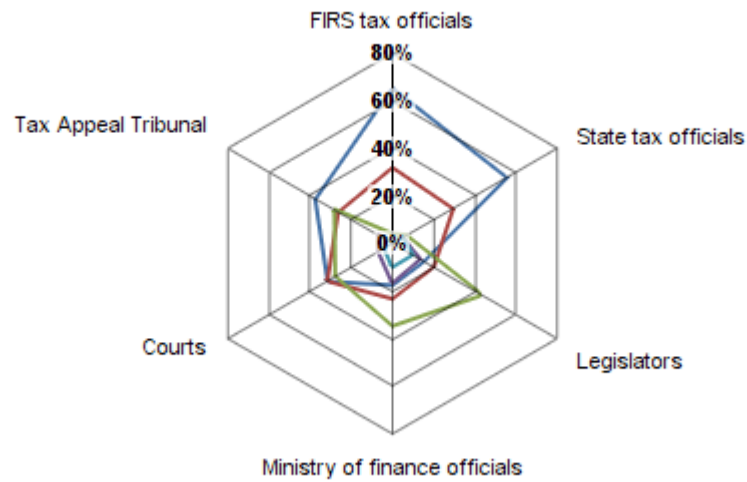
#	Question	Always	Very often	Sometimes	Rarely	Never	Total Responses
10	Do nothing	4	1	10	32	57	104
1	Go to court/TAT	21	45	36	4	3	109
8	Go to enforcement agencies (like the police or EFCC)	1	5	32	49	20	107
2	Go to legislators	0	14	42	32	18	106
6	Go to media/press	2	9	32	44	20	107
5	Go to officials of the ministry of finance	4	19	40	27	17	107
3	Go to persons with influence	8	24	34	29	13	108
4	Go to superior tax officials	23	46	32	5	2	108
7	Go to their representative body (e.g. MAN)	14	20	40	24	10	108
9	Rely on informal relationships	5	18	38	25	21	107

13. Small businesses have access to:





#	Question	Always	Very often	Sometimes	Rarely	Never	Total Responses
1	FIRS officials	30	27	26	14	5	102
2	State tax officials	32	38	29	5	3	107
3	Legislators	5	3	26	41	32	107
4	Ministry of finance officials	3	5	29	40	30	107
5	Courts	12	9	36	31	19	107
6	Tax Appeal Tribunal	17	11	32	29	18	107

14. Large businesses have access to:






#	Question	Always	Very often	Sometimes	Rarely	Never	Total Responses
1	FIRS tax officials	70	34	4	0	0	108
2	State tax officials	59	31	7	5	5	107
3	Legislators	16	21	46	14	10	107
4	Ministry of finance officials	18	24	36	17	10	105
5	Courts	33	33	29	7	4	106
6	Tax Appeal Tribunal	40	28	30	7	3	108

15. I work in the:

#	Answer		Response	%
1	Private sector		27	27.00%
2	Public sector		73	73.00%
	Total		100	100.00%





Statistic	Value
Min Value	1
Max Value	2
Mean	1.73
Variance	0.20
Standard Deviation	0.45
Total Responses	100

16. I deal with:

#	Answer		Response	%
1	Small businesses		5	5.38%
2	Large businesses		15	16.13%
3	Small and large businesses		73	78.49%
	Total		93	100.00%

Statistic	Value
Min Value	1
Max Value	3
Mean	2.73
Variance	0.31
Standard Deviation	0.55
Total Responses	93

17. I have been engaged in tax practice for:

#	Answer		Response	%
1	1-5 years		36	36.00%
2	6-10 years		24	24.00%
3	11-20 years		34	34.00%
4	More than 20 years		6	6.00%
	Total		100	100.00%

Statistic	Value
Min Value	1
Max Value	4
Mean	2.10
Variance	0.94
Standard Deviation	0.97
Total Responses	100

Table of Cases

Aberuagba v AG Ogun State (1985) 3 NWLR 260

Ade Adesanya v President of the FRN (1981) 2 NCLR 388

Adesanya v President of Nigeria and anor (1981) 1 All NLR 1

Adewunmi v AG Ekiti State [2002] 2 NWLR

AG Kano State v AGF [2007] 3 SC

Al Fayed and Others v Advocate General of Scotland [2004] Scot SC 278

Al Fayed v Advocate General of Scotland [2004] STC 1703

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147

Araka v Egbue [2003] MJSC 17

Atherton v British Insulated and Helsby Cables Ltd [1926] AC 205

Attorney General Ogun State v Attorney General Federation (1982) 13 NSCC 1

Attorney General, Bendel State v Attorney General Federation (1982) All NLR 85

Attorney-General of Rivers State v Attorney-General of Bayelsa State & Anor (2013) 3 NWLR

Barclays Mercantile Business Finance Ltd v Mawson [2004] UKHL 51

Barclays Mercantile Finance Ltd v Mawson (Inspector of Taxes) [2004] UKHL 51

Benin Rubber Producers Ltd v Ojo (1997) 9 NWLR

Cadbury (Nigeria) Plc v FBIR (2010) 2 NWLR

Cadbury v Federal Board of Inland Revenue (2010) 2 NWLR

Campbell Connelly & Co Ltd v Barnett (Inspector of Taxes) [1992] STC 316

Case C-324/00 Lankhorst-Hohorst GmbH v Finanzamt Steinfurt [2003] STC 607

Case C-446/03 Marks & Spencer v Halsey (2005) 8 ITLR 358

Case FHC/L/CS/1906/14 (Unreported)

Cheney v Conn [Inspector of Taxes] [1968] 1 WLR 242

Chevron v FIRS TAT/LZ/025/2012 (unreported)

Dairo v UBN PLC (2007) 16 NWLR

Dalhatu v Turaki (2003) 15 NWLR

Edwards (Inspector of Taxes) v Bairstow [1956] AC 14

Egyamwense v Amaghizemwen (1993) 9 NWLR

Ellen Street Estates v Ministry of Health [1934] 1 KB 590

Ex parte Unilever and Ex parte MFC Underwriting Agencies Ltd cases

Federal Inland Revenue Service v Nigerian National Petroleum Corporation & 4 Ors (2012) 6 TLRN 1

Furniss v Dawson [1984] AC 474

Gaiman v National Association for Mental Health [1971] Ch 317

Global International Drilling Corporation v FIRS (2013) 12 TLRN 1

Gregory v Helvering 293 US 465 (1935)

Hanover Company Services Ltd v HMRC [2010] UKFTT 256

Inland Revenue Commissioners v Duke of Westminster [1935] All ER 259

IRC v Willoughby [1997] STC 995

James Couzens v Commissioner of Internal Revenue (1928) 11 BTA 1040

Lakanmi v Attorney-General Western Region (1970) 6 NSCC 143

MacNiven v Westmoreland Investments Ltd [2011] UKHL 6

Mama Cass Restaurant Limited & 2 Ors v Federal Board of Inland Revenue and Attorney General of Lagos (2010) 2 TLRN 1

Nigerian National Petroleum Corporation v Tax Appeal Tribunal & Ors (2014) 13 TLRN 39

Oando Supply and Trading Limited v Federal Board of Inland Revenue (2011) 4 TLRN 119

Oando Supply and Trading Limited v Federal Inland Revenue Service (2013) 11 TLRN 169

Oando Supply and Trading Limited v Federal Inland Revenue Service (2009) 1 TLRN 61

Ocean & Oil Ltd v Federal Board of Inland Revenue (2011) 4 TLRN 135

Ogbuagu v Ogbuagu (1981) 2 NCLR 680

Ogbuanyinya v Okudo (1990) (No 2) 4 NWLR

Osakwe v FCE Asaba (2010) 10 NWLR

Ossom v Ossom (1993) 8 NWLR

Pepper v Hart [1993] AC 593

Philips Electronics UK Ltd v HMRC [2009] UKFTT 226

Pollack v Farmers Loan & Trust Co (1985) 158 US 601

R (on the application of Davies and another) v HMRC and R (on the application of Gaines-Cooper) v HMRC [2011] UKSC 47

R (on the application of Davies) v Revenue and Customs Commissioners and R (on the application of Gaines Cooper) v Revenue and Customs Commissioners [2011] UKSC 47

R (on the application of UK Uncut Legal Action Ltd) v Revenue and Customs Commissioners [2013] EWHC 1283

R (on the application of Wilkinson) v Inland Revenue Commissioners [2005] UKHL 30

R v Attorney General ex p ICI Plc [1987] 1 CMLR 72

R v Felixstowe JJ, ex parte Leigh [1987] 1 All ER 583

R v Inland Revenue Commissioner ex parte Unilever Plc [1996] STC 681

R v Inland Revenue Commissioners ex p MFK Underwriting Agents Ltd [1989] STC 873

R v Inland Revenue Commissioners ex p MKF Underwriting Agents Ltd [1990] 1 WLR 1545

R v Inland Revenue Commissioners ex p MKF Underwriting Agents Ltd [1990] 1 WLR 1545

R v Inland Revenue Commissioners ex p National Federation of Self Employed and Small Businesses Ltd [1982] AC 617

R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd [1989] STC 873

R v North and East Devon HA, ex p Coughlan [2001] QB 213

R v Secretary of State for the Environment Transport and Regions ex parte Spath Holme Ltd [2000] 1 All ER 884

Rex v Gaskin (1799) 8 Term Rep 209

Rowland v Environment Agency [2003] EWCA Civ 1885

Shell Petroleum Development Company of Nigeria v Federal Board of Inland Revenue (1996) 8 NWLR

Stabilini v Federal Board of Inland Revenue (2009) 13 NWLR

Stabilini Visinoni Ltd v FBIR (2009) 13 NWLR

Test Claimants in the Thin Capitalisation Group Litigation v HMRC [2011] EWCA Civ 127

Thoburn v Sunderland City Council [2002] EWHC 195

TSKJ II Construces Internacionals Sociadade LDA v FIRS (2014) 3 TLRN 1

Vauxhall Estates Ltd v Liverpool Corporation [1932] 1 KB 733

Vodafone International Holdings BV v India 14 ITL Rep 431

WT Ramsay v IRC [1982] AC 300

Table of Legislation and Conventions

Bribery Act 2010

Commissioners for Revenue and Customs Act 2005

Companies Act 2006

Companies and Allied Matters Act 2004

Companies Income Tax Act 1990

Constitution of the Federal Republic of Nigeria

Corporation Tax Act 2010

Electoral Act 2010

Federal Inland Revenue Service (Establishment) Act 2007

Foreign Corrupt Practices Act 1977

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997

OECD Model Tax Convention on Income and on Capital 2014

Parliamentary Act 1911

Petroleum Profits Tax Act 1990

Public Officer Protection Act 2004

Taxation (International and Other Provisions) Act 2010

United Nations Global Compact 2004

Value Added Tax Act 2007

Bibliography

Books, Book Chapters and Reports

Aaronson G, *A Study to Consider Whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System* (The Stationery Office 2011)

Akrich M and Latour B, 'A Convenient Vocabulary for the Semiotics of Human and Non-Human Actors' in Wiebe Bijker and John Law (eds), *Shaping Technology/Building Society Studies in Socio-technological Change* (MIT Press 1992) 259

Anechiarico F and Jacobs J, *The Pursuit of Absolute Integrity: How Corruption Controls Make Government Ineffective* (University of Chicago Press 1996)

Aristotle, *On Generation and Corruption, Book I Symposium Aristotelicum* (Frans Haas (ed), Oxford Clarendon Press 2004)

Avi-Yonah RS, *International Tax as International Law* (Cambridge University Press 2007)

Baistrocchi E and Roxan I (eds), *Resolving Transfer Pricing Disputes* (Cambridge University Press 2012)

Bakker H, 'Corruption and Legitimacy: An Institutional Perspective' in Helen Bakker and Nico Nordholt (eds), *Corruption and Legitimacy* (SISWO Publications 2000)

Banfield E, 'Corruption as a Feature of Government Organisation' in Monday Ekpo (ed), *Bureaucratic Corruption in Sub-Saharan Africa: Towards a Search for Causes and Consequences* (University Press of America 1979) 98

Batra G, Kaufmann D and Stone AH, *Investment Climate Around the World: Voices of the Firms from the World Business Environment Survey* (World Bank 2003)

Benson G and others, *Political Corruption in America* (Lexington Books 1978)

- Besley T, *Principled Agents? The Political Economy of Good Government* (Oxford University Press 2006)
- Block F, *Revising State Theory: Essays in Politics and Post-Industrialism* (Temple University Press 1987)
- Braithwaite V, 'Dancing with Tax Authorities: Motivational Postures and Non-Complaint Actions' in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate 2003)
- Breton A, *Competitive Governments: An Economic Theory of Politics and Public Finance* (Cambridge University Press 1996)
- Brooks RC, 'The Nature of Political Corruption' in Arnold J Heidenheimer (ed) *Political Corruption* (Holt Rinehart and Winston 1970) 56
- Byrne Edsall T, *Power and Money* (WW Norton 1988)
- Callon M and Latour B, 'Unscrewing the Big Leviathan: How Actors Macro-Structure Reality and How Sociologists Help Them To Do So' in Karin Knorr-Cetina and Aaron Cicouvel (eds), *Advances in Social Theory and Methodology Towards and Integration of Micro and Macro-Sociology* (Routledge 1981)
- Callon M, 'Society in the Making: The Study of Technology as a Tool for Sociological Analysis' in Wiebe Bijker and others (eds), *The Social Construction of Technological Systems: New Directions in the Sociology and History of Technology* (MIT Press 1987) 9
- Callon M, 'Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St. Bieue Bay' in John Law, *Power, Action and Belief: A New Sociology of Knowledge?* (Routledge 1986) 196
- Callon M, 'The Dynamics of Techno-Economic Networks' in Rod Coombs, Paolo Saviotti and Vivien Walsh (eds), *Technological Change and Company Strategies: Economic and Social Perspectives* (Harcourt Brace Jovanovich 1992)
- Cranborne Viscount, 'Parliamentary Resolution on Ministerial Accountability' (Lords Hansard, Ministerial Accountability Col 1057, 20 March 1997)
- Cyert R and March J, *A Behavioural Theory of the Firm* (Wiley Blackwell 1992)
- Dicey AV, *An Introduction to the Study of the Law of the Constitution* (Macmillan 1996)
- Estache A and Sinha S, 'Does Decentralisation Increase Public Infrastructure Expenditure?' in Antonio Estache (ed), *Decentralising Infrastructure: Advantages and Limitations* (World Bank 1995)
- Ewing K and Issacharoff S, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing 2006)
- Foucault M, *The History of Sexuality. Volume 1: An Introduction* (Allen Lane 1980)
- Foucault M, *The History of Sexuality. Volume 1: The Will to Knowledge* (Penguin 1981)
- Fox RJ, *Managing Business-Government Relations: Cases and Notes on Business-Government Problems* (Irwin 1982)
- Friedmann W, *Legal Theory* (Columbia University Press 1967)
- Friedrich CJ, *Man and his Government* (New York 1963)
- Friedrich CJ, *The Pathology of Politics: Violence, Betrayal Corruption, Secrecy and Propaganda* (Harper & Row 1972)
- Galligan D, *Discretionary Powers: A Study of Official Discretion* (Clarendon Press 1986)

- Gardiner J, 'Defining Corruption' in Arnold Heidenheimer and Michael Johnson (eds), *Political Corruption Concepts & Contexts* (Transaction 2002) 31
- Girling J, *Corruption, Capitalism and Democracy* (Routledge 1997)
- Ghura D, 'Tax Revenue in Sub Saharan Africa: Effects of Economic Policies and Corruption' in George T Abed and Sanjeev Gupta (eds), *Governance, Corruption and Economic Performance* (International Monetary Fund 2002)
- Gould D, *Bureaucratic Corruption and Underdevelopment in the Third World: The Case of Zaire* (Pergamon Press 1980)
- Gray-Molina G and others, 'Does Voice Matter? Participation and Controlling Corruption in Bolivian Hospital' in Rafael Di Tella and William Savedoff (eds), *Diagnosis Corruption: Fraud in Latin America's Public Hospitals* (Inter-American Development Bank 2001)
- Great Edict of Horemheb, King of Egypt
- Habermas J, *The Theory of Communicative Action* (Beacon Press 1984)
- Haugaard M, *Power: A Reader* (Manchester University Press 2002)
- Hayek FA, *New Studies in Philosophy* (Routledge and K Paul 1978)
- Heidenheimer A, 'The Context of Analysis' in Arnold Heidenheimer and Michael Johnson (eds), *Political Corruption Concepts & Contexts* (Transaction 2002)
- Helmke G and Levitsky S, *Informal Institutions and Democracy* (Johns Hopkins University Press 2006)
- Hobbes T, *Leviathan* (Bobbs-Merrill 1963)
- Hope KR and Chikulo BC, *Corruption and Development in Africa* (Macmillan 1999)
- Huang R, *Taxation and Government Finance in Sixteenth Century Ming China* (Cambridge University Press 1974)
- Hume D, *A Treatise of Human Nature* (LA Selby-Bigge and PH Nidditch (eds), Clarendon Press 1978)
- Huntington SP, *Political Order in Changing Societies* (Yale University Press 1968)
- Jenkins I, *Social Order and the Limits of Law* (Princeton University Press 1980)
- Kautilya's Arthashastra
- Khan M, 'The Role of Civil Society and Patron-Client Networks in the Analysis of Corruption' in Sahr John Kpundeh and Irene Hors (eds), *Corruption & Integrity Improvement Initiatives in Developing Countries* (United Nations Development Programme 1998) 111
- Klitgaard RE, *Controlling Corruption* (University of California Press 1988)
- Knight J, *Institutions and Social Conflict* (Cambridge University Press 1992)
- Lambsdorff J, *The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy* (Cambridge University Press 2007)
- Lange B, 'Social Dynamics of Regulatory Interactions: An Exploration of Three Sociological Perspectives' in Michael Freeman (ed), *Law and Sociology: Current Legal Issues*, Vol 8 (Oxford University Press 2006) 149
- Latour B, 'The Sociology of a Few Mundane Artefacts' in Wiebe Bijker and John Law (eds), *Shaping Technology/Building Society Studies in Socio-technological Change* (MIT Press 1992) 241

- Latour B, 'The Sociology of a Few Mundane Artifacts' in Wiebe Bijker and John Law (eds), *Shaping Technology/Building Society Studies in Socio-technological Change* (MIT Press 1992) 2
- Latour B, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press 2005)
- Latour B, *Science in Action: How to Follow Scientists and Engineers Through Society* (Oxford University Press 1987)
- Law Code of Hammurabi, King of Babylon
- Law J, 'After ANT: Complexity, Naming and Topology' in John Law and John Hassard (eds), *Actor Network Theory and After* (Oxford University Press 1999) 4
- Lay Williams D, *Rousseau's Social Contract* (Cambridge University Press 2014)
- Lindblom CE, *Politics and Markets* (Basic Books 1977)
- Lipset S, *Political Man: The Social Bases of Politics* (John Hopkins University Press 1981)
- Locke J, *Two Treatises of Government* (Peter Laslett (ed), Cambridge University Press 1988)
- Luhmann N, 'The Autopoiesis of Social Systems' in Felix Geyer and J Van Der Zeuwen (eds), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* (Sage 1986) 178
- Luhmann N, *Observations on Modernity* (Stanford University Press 1998)
- Luhmann N, Ziegert KA and Kastner F, *Law as a Social System* (Oxford University Press 2004) 173
- Lukes S, *Power: A Radical View* (MacMillan 1974)
- Macdonnell R and Pesic M, 'The Role of the Media in Curbing Corruption' in Rick Stapenhurst and others (eds), *The Role of Parliament in Curbing Corruption* (World Bank 2006) 112
- Manor J, *The Political Economy of Democracy Decentralisation* (World Bank 1999)
- Marshall G, *Ministerial Responsibility* (Oxford University Press 1989)
- Marx K, 'A Preface to a Critique of Political Economy' in Jon Elster (ed), *Karl Marx: A Reader* (Cambridge University Press 1970) 187
- Maxfield S and Schneider BR, *Business and the State in Developing Countries* (Cornell University Press 1997)
- McBarnet D, 'Corporate Social Responsibility Beyond the Law, Through the Law, for Law: The New Corporate Accountability' in Doreen McBarnet and others (eds), *The New Corporate Accountability* (Cambridge University Press 2007)
- McBarnet D, 'When Compliance is Not the Solution But the Problem: From Changes in Law to Changes in Attitude' in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate 2003)
- Mingers J, *Self-Producing Systems* (Plenum Press 1995)
- Morriss P, *Power: A Philosophical Analysis* (Manchester University Press 1987)
- Myrdal G, *Asian Drama; An Inquiry into the Poverty of Nations*, Vol 2 (Pantheon 1968)
- Nakhle C, *Petroleum Taxation: Sharing the Oil Wealth: A Study of Petroleum Taxation Yesterday, Today and Tomorrow* (Routledge 2008)

North DC, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990)

Nozick R, *Anarchy, State and Utopia* (Basic Books 1974)

Nwabueze B, *Military Rule and Constitutionalism in Nigeria* (Spectrum Law 1992)

OECD, *Addressing Base Erosion and Profit Shifting* (OECD 2013)

Okauru I, *Federal Inland Revenue Service and Taxation Reforms in Democratic Nigeria* (Safari Books 2012)

Olson M, *The Logic of Collective Action* (Harvard University Press 1965)

Olson M, *The Rise and Decline of Nations* (Yale University Press 1982)

Oratore V, 'The Making of Tax Law' (CIOT, 2010)

Public Accounts Committee, *HM Revenue and Customs 2010-11 Accounts: Tax Disputes, Sixty-First Report of the Session 2010-12* (HC 2010-12, 1531)

Punch M, *Conduct Unbecoming: The Social Construction of Police Deviance and Control* (Tavistock 1985)

Rose-Ackerman S, *Corruption and Government: Causes, Consequences and Reform* (Cambridge University Press 1999)

Rose-Ackerman S, *Corruption: A Study of Political Economy* (Academic Press 1978)

Rousseau JJ, *The Social Contract* (Penguin 1968)

Scott JC, *Comparative Political Corruption* (Prentice Hall 1972)

Shah A (ed), *Fiscal Incentives for Investment and Innovation* (Oxford University Press 1995)

Shuy RW, 'In-person versus Telephone Interviewing' in James Holstein and Jaber Gubrium (eds), *Inside Interviewing: New Lenses, New Concerns* (Sage Publications 2003)

Siegmann T, 'The Impact of Bilateral Investment Treaties and Double Taxation Treaties on Foreign Direct Investments' (University of St.Gallen Law and Economics Working Papers 2008/22)

Simon H, *Administrative Behaviour: A Study of Decision-Making Processes in Administrative Organisations* (MacMillan 1957)

Slemrod J and Sorum N, 'The Compliance Cost of the US Individual Income Tax System' (NBER Working Papers 1401, 1985)

Smith A, *An Inquiry Into The Nature and Causes of the Wealth of Nations* (Liberty Classics 1976)

Smith D, 'Tax Policy and Business Investment' in American Enterprises Institute for Public Policy Research, *Fiscal Policy and Business Capital Formation* (American Enterprise Institute 1967) 19

Smith KW, 'Reciprocity and Fairness: Positive Incentives' in Joel Slemrod (ed), *Why People Pay Taxes: Tax Compliance and Enforcement* (University of Michigan Press 1992) 227

Spencer H, *The Principles of Sociology* (Archon Books 1969)

Spencer-Brown G, *Laws of Form* (Allen & Unwin 1969)

Tanzi V and Davoodi H, 'Corruption, Growth, and Public Finances' in KJ Arvind (ed), *Political Economy of Corruption* (Routledge 2001) 89

Tanzi V and Davoodi H, 'Corruption, Public Investment and Growth' (International Monetary Fund, IMF WP97/139, October 1997)

Tanzi V, 'Corruption Around the World: Causes, Consequences, Scope and Cures' (International Monetary Fund, IMF WP98/63, May 1998)

Taube G and Tadesse H, 'Presumptive Taxation in Sub-Saharan Africa: Experience and Prospects' (International Monetary Fund, IMF WP/96/5)

Teubner G, 'Introduction to Autopoietic Law' in Gunther Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter 1988) 3

Transparency International, *Global Corruption Report 2009 – Corruption and the Private Sector* (Cambridge University Press 2009)

Tuck R, *Hobbes: Leviathan* (Cambridge University Press 1991)

Tyson R, 'Business Capital Spending and Investment Decisions' in American Enterprises Institute for Public Policy Research (ed), *Fiscal Policy and Business Capital Formation* (1967) 4

Underkuffler L, 'Captured by Evil: The Idea of Corruption in Law' (Duke Law School, Legal Studies Research Paper Series, 2005) 5 <http://scholarship.law.duke.edu/faculty_scholarship/1245> accessed 5 July 2015

Underkuffler L, *Captured by Evil: The Idea of Corruption in Law* (Yale University Press 2013)

Uslaner EM, *Corruption, Inequality, and the Rule of Law* (Cambridge University Press 2008)

Weber M, *Economy and Society* (University of California Press 1978)

Weber M, *The Protestant Ethic and the Spirit of Capitalism* (Unwin Hyman 1989)

Wei SJ, 'Why is Corruption So Much More Taxing than Tax? Arbitrariness Kills' (NBER Working Papers No 6255, 1997)

Wittgenstein L, *Philosophical Investigations* (Basil Blackwell 1958)

Wraith R and Simpkins E, *Corruption in Developing Countries* (Allen and Unwin 1963)

Journal Articles

Abbink K and others, 'Letting the Briber Go Free: An Experiment on Mitigating Harassment Bribes' (2014) 111 *Journal of Public Economics* 17

Ackerman B, 'Taxation and the Constitution' (1999) 99 *Columbia Law Review* 1

Adam C, 'Testing for Regime Shifts in Short-Sample African Macroeconomic data: A Survey of Some Monte Carlo Evidence' (Centre for the Study of African Economies, University of Oxford, Working Paper 93.1, 1993)

Ades A and Di Tella R, 'Rents, Competition and Corruption' (1999) 89(4) *The American Economic Review* 982

Ades A and Di Tella R, 'The New Economies of Corruption: A Survey and Some New Results' (1997) 45 *Political Studies* 496

Agodo O, 'The Determinants of US Private Manufacturing Investment in Africa' (1978) *Journal of International Business Studies* 9

Ahlerup P and others, 'Tax Innovations and Public Revenues in Sub-Saharan Africa' (2015) 51(6) *The Journal of Development Studies* 689

- Alm J and others, 'Institutional Uncertainty and Taxpayer Compliance' (1992) 82 *American Economic Review* 1018
- Anvig JC and Moene KO, 'How Corruption May Corrupt' (1990) 13 *Journal of Economic Behavior & Organization* 63
- Antle R, 'An Agency Model of Auditing' (1982) 20 *Journal of Accounting Research* 503
- Anvig J and Moene K, 'How Corruption May Corrupt' (1990) 13 *Journal of Economic Behaviours & Organisation* 63
- Avi Yonah RS, 'The Cyclical Transformations of Corporate Form: A Historical Perspective on Corporate Social Responsibility' (2005) 30(3) *Del J Corp L* 767
- Bailey D, 'The Effects of Corruption in a Developing Nation' (1966) 19(4) *The Western Political Quarterly* 719
- Bailey J and Valenzuela A, 'The Shape of the Future' (1997) 8 *Journal of Democracy* 43
- Bardhan P, 'Corruption and Development: A Review of the Issues' (1997) 35 *Journal of Economic Literature* 1320
- Barr A and Serra D, 'Culture and Corruption: An Experimental Analysis' (2010) 94 *Journal of Public Economics* 862
- Basu K, 'Why, for a Class of Bribes, the Act of Giving a Bribe should be Treated as Legal' (Ministry of Finance, Working Paper, 2011) <http://www.kaushikbasu.org/Act_Giving_Bribe_Legal.pdf> accessed 5 July 2015
- Bauhr M and Grimes M, 'Indignation or Resignation: The Implications of Transparency for Societal Accountability' (2013) 27 *Governance* 291
- Baumol WJ, 'Entrepreneurship: Productive, Unproductive and Destructive' (1990) 98 *Journal of Political Economy* 893
- Beck PJ and Maher MW, 'A Comparison of Bribery and Bidding in Thin Markets' (1986) 20 *Economics Letters* 1
- Bennet M and Dunghoo C, 'The Attribution of Profits to a Permanent Establishment: Issues and Recommendations' (2005) 33(2) *Intertax* 51
- Besley T and Prat A, 'Handcuffs for the Grabbing Hand? Media Capture and Government Accountability' (2006) 96(3) *American Economic Review* 720
- Bird R, Martinez-Vazquez J and Torgler B, 'Tax Effort in Developing Countries and High Income Countries: The Impact of Corruption, Voice and Accountability' (2008) 38(1) *Economic Analysis and Policy* 55
- Boll K, 'Taxing Assemblages: Laborious and Meticulous Achievements of Tax Compliance' (PhD Thesis, IT University of Copenhagen 2011)
- Bowers S, 'Luxembourg Tax Files: How Tiny State Rubber-Stamped Tax Avoidance on an Industrial Scale' *The Guardian* (London, 5 November 2014) <<https://www.theguardian.com/business/2014/nov/05/-sp-luxembourg-tax-files-tax-avoidance-industrial-scale>> accessed 7 June 2017
- Bowler T, 'Tax Policymaking in the UK' (Tax Law Rewrite Committee Discussion Paper No 8, 2010) <<http://www.ifs.org.uk/comms/dp8.pdf>> accessed 5 July 2015
- Bräutigam D, Rakner L and Taylor S, 'Business Associations and Growth Coalitions in Sub-Saharan Africa' (2002) 40 *The Journal of Modern African Studies* 519
- Brock G and Russel H, 'Abusive Tax Avoidance and Institutional Corruption: The Responsibilities of Tax Professionals' (Edmond J Salta, Working Paper No 56, 2015)

- Brock G, 'The Leveson Inquiry: There is a Bargain to be Struck over Media Freedom and Regulation' (2012) 13(4) *Journalism* 519
- Brunetti A and Weder B, 'A Free Press is Bad News for Corruption' (2003) *Journal of Public Economics* 1801
- Buttner T and others, 'Taxation and Corporate Structure Choice: Evidence from a Panel of German Multinationals' (CESifo, Working Paper Series 1841, 2006)
- Callon M and Law J, 'On Interests and their Transformation: Enrolment and Counter-Enrolment' (1982) 12 *Social Studies of Science* 617
- Chand S and Moene K, 'Controlling Fiscal Corruption' (International Monetary Fund, IMF WP/97/100, 1997) <<http://www.imf.org/external/pubs/ft/wp/wp97100.pdf>> accessed 5 July 2015
- Chand SK and Moene KO, 'Controlling Fiscal Corruption' (1999) 27(7) *World Development* 1129
- Choi JP and Thum M, 'Corruption and the Shadow Economy' (2005) 46 *International Economic Review* 817
- Chun C, 'A Model of Income Tax Evasion with Venal Tax Officials: The Case of Taiwan' (1990) 45(3) *Public Finance/Finances Publiques* 392
- Clarke G, 'How Petty is Petty Corruption? Evidence from Firm Surveys in Africa' (2011) 39(7) *World Development* 1122
- Clotfelter C, 'Tax Evasion and Tax Rates: An Analysis of Individual Returns' (1983) 65(3) *The Review of Economics and Statistics* 363
- Collins JD, Uhlenbruck K and Rodriguez P, 'Why Firms Engage in Corruption: A Top Management Perspective' (2008) 87 *Journal of Business Ethics* 89
- Cule M and Fulton M, 'Business Culture and Tax Evasion: Why Corruption and the Unofficial Economy can Persist' (2009) 72 *Journal of Economic Behaviour & Organisation* 811
- Dagan T, 'The Tax Treaty Myth' (2000) 32 *Journal of International Law and Politics* 939
- Dahl RA, 'The Concept of Power' (1957) 2 *Syst Res* 80
- Davis M, 'The Special Role of Professionals in Business Ethics' (1988) 7(2) *Business and Professional Ethics Journal* 51
- de Cogan D, 'UK Uncut Legal Action v HMRC: Legal Inaction and a Return to Fleet Street' (2003) 4 *BTR* 552
- de Mooij R and Ederveen S, 'Taxation and Foreign Direct Investment: A Synthesis of Empirical Research' (2003) 10(6) *International Tax and Public Finance* 673
- De Mooij R and Nicodeme G, 'Corporate Tax Policy and Incorporation in the EU' (2008) 15(4) *International Tax and Public Finance* 478
- De Scitovszky T, 'A Note on Profit Maximisation and its Implications' (1943) 11(1) *The Review of Economic Studies* 57
- Del Monte A and Papagni E, 'The Determinants of Corruption in Italy: Regional Panel Data Analysis' (2007) 23 *European Journal of Political Economy* 379
- Deloitte Nigeria, 'Pioneer Status and the Return of the 3 year Rule: Weep not Taxpayer' (2015) <<https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/tax/inside-tax/ng-pioneer-status-and-the-return-of-the-3-year-rule.pdf>> accessed 17 May 2016

- Devereux M and Griffith R, 'Taxes and the Location of Production: Evidence from a Panel of US Multinationals' (1998) 68 *Journal of Public Economics* 335
- Devereux M and Maffini G, 'The Impact of Taxation on the Location of Capital, Firms and Profits: A Survey of Empirical Evidence' (CBT Working Paper WP/07/02, 2007)
- Devereux MP, 'The Impact of Taxation on the Location of Capital, Firms and Profit: A Survey of Empirical Evidence' (Oxford University Centre for Business Taxation, Working Paper No 07/02, April 2006) <<http://eureka.sbs.ox.ac.uk/3395/1/WP0702.pdf>> accessed 5 July 2015
- Dharmapala D, 'What Do We Know about Base Erosion and Profit Shifting' (2014) 35(4) *Fiscal Studies* 421
- DiMaggio PJ and Powell WW, 'The Iron Cage Revisited: Institutional Isomorphism And Collective Rationality In Organizational Fields' (1983) 48 *American Sociological Review* 147
- Djankov S and others, 'Who Owns the Media?' (2003) 46 *The Journal of Law and Economics* 341
- Doner R and Schneider BR, 'Business Associations and Economic Development: Why Some Associations Contribute More than Others' (2000) 2(3) *Business and Politics* 261
- Dong B, Dulleck U and Torgler B, 'Conditional Corruption' (2012) 33 *Journal of Economic Psychology* 609
- Duru N, 'Rebasing of Nigerian Economy Creates Huge Gaps in Tax to GDP Ratio' (*ThisDayLive*, 21 May 2014) <<http://www.thisdaylive.com/articles/-rebasing-of-nigerian-economy-creates-huge-gap-in-tax-to-gdp-ratio-/179014>> accessed 1 July 2015
- Duvanova D, 'Bureaucratic Corruption and Collective Action: Business Associations in the Post-Communist Transition' (2007) 39(4) *Comparative Politics* 441
- Dyreng S and others, 'Public Pressure and Corporate Tax Behaviour' (Fisher College of Business Working Paper No 2014-02-003) <<http://ssrn.com/abstract=2474346>> accessed 1 September 2015
- Ebrahimi H, 'Starbucks, Amazon and Google Accused of Being Immoral' *The Telegraph* (12 November 2012)
- Edelman L and others, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406
- Editorial Board, 'Public Workers and Unpaid Salaries' (*The Guardian*, 9 June 2015) <<http://www.nguardiannews.com/2015/06/public-workers-and-unpaid-salaries/>> accessed 1 July 2015
- Edrey J, 'Constitutional Review and Tax Law: An Analytical Framework' (2007) 56(5) *American University Law Review* 1187
- Egger P and Winner H, 'Evidence on Corruption as an Incentive for Foreign Direct Investment' (2005) 21 *European Journal of Political Economy* 932
- Egger P and Winner H, 'How Corruption Influences Foreign Direct Investment: A Panel Data Study' (2006) 54(2) *Economic Development and Cultural Change* 459
- Elliot M, 'United Kingdom: Parliamentary Sovereignty Under Pressure' (2004) 2 *International J Const L* 545
- Engel C, Goerg S and Yu G, 'Symmetric vs. Asymmetric Punishment Regimes for Bribery' (MPI Collective Goods Preprint, No 2012/1, 2013) <<http://ssrn.com/abstract=1983969>> accessed 5 July 2015
- Erskine H, 'The Polls: Corruption in Government' (1973) 37 *Public Opinion Quarterly* 628
- Ezeoha A and Oganha E, 'Corporate Tax Shield or Fraud? Insight from Nigeria' (2010) 52(1) *International Journal of Law and Management* 5
- Faccio M, 'Politically Connected Firms' (2006) 96 *American Economic Review* 369

Federal Inland Revenue Service, 'History of the FIRS' <<http://www.firs.gov.ng/aboutus/Pages/History-of-FIRS.aspx>> accessed 16 November 2014

Fisman R and Svensson J, 'Are Corruption and Taxation Really Harmful to Growth? Firm Level Evidence' (World Bank, Policy Research Working Paper No 2485, 2000)

Fjeldstad O and others, 'Autonomy, Incentives and Patronage: A Study of Corruption in the Tanzania and Uganda Revenue Authorities' (Chr Michelsen Institute, R 2003:9) <<http://www.cmi.no/publications/publication/?1688=autonomy-incentives-and-patronage>> accessed 5 July 2015

Fjeldstad O and Tungodden B, 'Fiscal Corruption: A Vice or a Virtue?' (2003) 31 *World Development* 1459

Fjeldstad O, 'Fighting Fiscal Corruption: Lessons from the Tanzania Revenue Authority' (2003) 23(2) *Public Admin Dev* 165

Fjeldstad O, 'Corruption in Tax Administration: Lessons from Institutional Reforms in Uganda' (Chr Michelsen Institute Working Paper No 10, 2005)

Flinders M, 'The Enduring Centrality of Individual Ministerial Responsibility within the British Constitution' (2000) 6 *The Journal of Legislative Studies* 73

Foucault M, 'The Subject and Power' (1982) 8(4) *Critical Inquiry* 777

Fox J, 'The Uncertain Relationship between Transparency and Accountability' (2007) 17 *Development in Practice* 663

Freedman J, 'Interpreting Tax Statutes: Tax Avoidance and the Intention of the Parliament' (2007) 123 *LQR* 53

Friedman M, 'The Social Responsibility of Business is to Increase its Profits' *New York Times* (13 September 1970) 33

Frynas JG, 'Problem of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' (2001) 10(3) *Social and Legal Studies* 397

Galtung F, 'Current Strategies for Combating Corruption: A Study of Corruption in the Tax Administration' (Transparency International, 1995)

Gherardi S and Nicolini D, 'To Transfer is to Transform: The Circulation of Safety Knowledge' (2000) 7(2) *Organization* 335

Glaeser EL and Saks RE, 'Corruption in America' (2006) 90 *Journal of Public Economics* 1053

Goel R and Nelson M, 'Are Corrupt Acts Contagious? Evidence from the United States' (2007) 29(6) *Journal of Policy Modelling* 839

Goel R and Nelson M, 'Corruption and Government Size: A Disaggregated Analysis' (1998) 97 *Public Choice* 107

Goldsmith A, 'Slapping the Grasping Hand: Correlates of Political Corruption in Emerging Markets' (1999) *American Journal of Economics and Sociology* 866

Goldsmith AA, 'Business Associations and Better Governance in Africa' (2002) 22 *Public Admin Dev* 39

Goolsbee A, 'The Impact of Corporate Income Tax: Evidence from State Organisational Form Data' (2004) 88(11) *Journal of Public Economics* 2283

Groenendijk N, 'A Principal-Agent Model of Corruption' (1997) 27 *Crime, Law & Social Change* 207

- Grzymala-Busse A, 'The Best Laid Plans: The Impact of Informal Rules on Formal Institutions in Transitional Regimes' (2010) 45 *Studies in Comparative International Development* 311
- Guerra J, 'Limitation on Benefit Clause and EU Law' (2011) 51(2/3) *Euro Tax* 85
- Gupta S, Davoodi H and Alonso-Terme R, 'Does Corruption Affect Income Inequality and Poverty?' (International Monetary Fund, IMF WP98/76, May 1998)
- Gurgur T and Shah A, 'Localisation and Corruption: Panacea or Pandora's Box?' (OECD/World Bank 2000)
- Hall RE and Jones CI, 'Why Do Some Countries Produce So Much More Output Per Worker Than Others?' (1999) 114 *The Quarterly Journal of Economics* 83
- Haugaard M, 'Power: A Family Resemblance Concept' (2010) 13(4) *European Journal of Cultural Studies* 419
- Hayward C and Lukes S, 'Nobody to Shoot? Power, Structure and Agency: A Dialogue' (2008) 1 *Journal of Power* 5
- Hellman J, Geraint Jones and Daniel Kaufman, 'Seize the State, Seize the Day: State Capture and Influence in Transition Economies (2008) 31 *Journal of Comparative Economics* 751
- Helmke G and Levitsky S, 'Informal Institutions and Comparative Politics: A Research Agenda' (2004) 2(4) *Perspectives on Politics* 725
- Heritage Foundation, '2015 Macro-Economic Data' (2015) <<http://www.heritage.org/index/explore?view=by-variables>> accessed 1 July 2015
- Hicks A, 'Social Democratic Corporatism and Economic Growth' (1988) 50 *Journal of Politics* 677
- Hindricks J and others, 'Corruption, Extortion and Evasion' (1999) 74(3) *Journal of Public Economics* 395
- Hines J, 'Tax Policy and the Activities of Multinational Companies' (NBER Working Paper 5589, 1996)
- HMRC, 'Resolving Tax Disputes: Commentary on the Litigation and Settlement Strategy' (2013) 9 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387770/Commentary_on_litigation.pdf> accessed 5 July 2015
- Hodgson GM and Jiang S, 'The Economics of Corruption and the Corruption of Economics: An Institutional Perspective' (2007) 41(4) *Journal of Economic Issues* 1043
- Houlder V, 'Leaks Reveals the Scale of Tax Deals with Luxembourg' *Financial Times* (London, 6 November 2014)
- Houston J and others, 'Media Ownership, Concentration and Corruption in Bank Lending' (2011) 100 *Journal of Financial Economics* 326
- Howe G, 'Reform of Taxation of Machinery' [1977] *British Tax Review* 97
- Huizinga H, Laeven L and Nicodeme G, 'Capital Structure and International Debt Shifting' (2008) 88 *Journal of Financial Economics* 80
- Husted BW, 'Wealth, Culture and Corruption' (1999) 30 *Journal of International Business Studies* 339
- Jerven M and others, 'GDP Revisions and Updating Statistical Systems in Sub-Saharan Africa: Reports from the Statistical Offices in Nigeria, Liberia and Zimbabwe' (2015) 51(2) *The Journal of Development Studies* 194
- Johannesen N and Zucman G, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown' (2014) 6(1) *American Economic Journal: Economic Policy* 65

- Johnson S and others, 'Why do Firms Hide? Bribes and Unofficial Activity after Communism' (2000) 76 *Journal of Public Economics* 495
- Johnson S, Daniel Kaufmann and Pablo Zoido-Lobaton, 'Regulatory Discretion and the Unofficial Economy' (1998) 88 *American Economic Review* 387
- Johnston M, 'Political Corruption and Public Policy in America' (1983) 77 *The American Political Science Review* 208
- Kahan DM, 'Social Meaning and the Economic Analysis of Crime' (1998) 27 *Journal of Legal Studies* 394
- Kasipillai J and Mutihiah M, 'Thin Capitalisation and its Impact on Taxable Income' (2009) 20(8) *ICCLR* 263
- Katsios S, 'The Shadow Economy and Corruption in Greece' (2006) 1 *South-Eastern European Journal of Economics* 61
- Kaufmann D and Siegelbaum P, 'Privatisation and Corruption in Transition Economies' (1997) 50 *Journal of International Affairs* 519
- Kaufmann D, Mehrez G and Gurgur T, 'Voice or Public Sector Management? An Empirical Investigation of Determinants of Public Sector Performance Based on a Survey of Public Officials' SSRN Electronic Journal <<http://ssrn.com/abstract=316865>> accessed 5 July 2015
- Kavanagh A, 'Pepper v Hart and Matters of Constitutional Principle' (2005) 121 *LQR* 98
- Kavka G, 'When Two "Wrongs" Make a Right: An Essay on Business Ethics' (1983) 2 *Journal of Business Ethics* 61
- Key A, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach"' (2007) 29 *Sydney L Rev* 577
- Kittrell S, 'Administrative Prerequisites for Declaratory Judgements about the Tax Issues' (1980) 66(12) *American Bar Association Journal* 1570
- Knack S and Keefer P, 'Does Social Capital Have an Economic Payoff? A Cross-Country Investigation' (1997) 112(4) *The Quarterly Journal of Economics* 1251
- Krarup T and Block A, 'Unfolding the Social: Quasi-Actants, Virtual Theory, and the New Empiricism of Bruno Latour' (2011) 59(1) *The Sociological Review* 42
- Kurer O, 'Corruption: An Alternative Approach to its Definition and Measurement' (2005) 53 *Political Studies* 222
- Kurtzman J and others, 'The Global Costs of Opacity: Measuring Business and Investment Risk Worldwide' (2004) 46(1) *MIT Sloan Management Review* 38
- Laffront JJ and Meleu M, 'Separation of Powers and Development' (2001) 64 *Journal of Development Economics* 129
- Langseth P, 'Judicial Integrity and its Capacity to Enhance the Public Interest' (UNODC, CICP8, 2002)
- Langseth P, Stapenhurst R and Pope J, 'The Role of a National Integrity System in Fighting Corruption' (1997) 23 *Commonwealth Law Bulletin* 3
- Law J, 'Actor Network Theory and Material Semiotics' (25 April 2007) <<http://www.heterogeneities.net/publications/Law2007ANTandMaterialSemiotics.pdf>> accessed 5 July 2015
- Law J, 'Notes on the Theory of the Actor Network: Ordering, Strategy and Heterogeneity' (Centre for Science Studies, 2003)

- Law J, 'Notes on the Theory of the Actor-Network: Ordering and Strategy and Heterogeneity' (1992) 5 *Systems Practice* 379
- Leff N, 'Economic Development through Bureaucratic Corruption' (1964) 82(2) *American Behavioural Scientists* 337
- Levitt T, 'The Dangers of Social Responsibility' (1958) *Harvard Business Review* 41
- Leys C, 'What is the Problem about Corruption?' (1965) 3(2) *The Journal of Modern African Studies* 215
- Li S and Ouyang M, 'A Dynamic Model to Explain the Bribery Behaviour of Firms' (2007) 24(3) *International Journal of Management* 605
- Lindstedt C and Naurin D, 'Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption' (2010) 31 *International Political Science Review* 301
- Linz J and Stephan A, 'Towards Consolidated Democracies' (1996) 7 *Journal of Democracy* 14
- Liu Y and Feng H, 'Tax Structure and Corruption: Cross Country Evidence' (2014) 162 *Public Choice* 57
- Long M and Spuma R, 'The Wealth Effect of Unethical Business Behaviour' (1995) 19 *Journal of Economics and Finance* 65
- Lowry J, 'The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure' (2009) 68(3) *Cambridge Law Journal* 615
- Luhmann N, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Review* 1419
- Lui F, 'An Equilibrium Queuing Model of Bribery' (1985) 93 *Journal of Political Economy* 760
- Lui FT, 'A Dynamic Model of Corruption Deterrence' (1986) 31 *Journal of Public Economics* 1
- Lyons T, 'Legislative Comment Finance Act Notes: Section 12 and sch 6: Consortium Claim for Group Relief' (2011) 1 *BTR* 60
- Macalister T, 'George Osborne Unveils Tax Break for Older North Sea Oil and Gas fields' *The Guardian* (London, 7 September 2012) <<https://www.theguardian.com/business/2012/sep/07/george-osborne-north-sea-oil>> accessed 30 May 2017
- Mahalingham S, 'UK Thin Capitalisation: Is it Time to Eradicate Domestic (UK-UK) Legislation' (2012) 2 *BTR* 134
- Marquette H, Pavarala V and Malik KK, 'Religion and Attitudes Towards Corruption in India: A Collective Action Problem?' (2014) 24 *Development in Practice* 854
- Mba O, 'Transparency and Accountability of the Tax Administration in the UK: The Nature and Scope of Taxpayer Confidentiality' (2012) 2 *BTR* 187
- Méon P and Sekkat K, 'Does Corruption Grease or Sand the Wheels of Growth?' (2005) 122 *Public Choice* 69
- Méon P and Weill L, 'Is Corruption an Efficient Grease?' (2010) 38 *World Development* 2449
- Mo PH, 'Corruption and Economic Growth' (2001) 29 *Journal of Comparative Economics* 66
- Murphy K, Shleifer A and Vishny R, 'Why is Rent-Seeking So Costly to Growth?' (1993) 83 *The American Economic Review* 409
- Nas T and others, 'A Policy Oriented Theory of Corruption' (1986) 80 *American Political Science Review* 107

- Nayak R, 'India SC Rules in Favour of Vodafone' (2012) 3 IT Rev 89
- Neumayer E, 'Do Double Taxation Treaties Increase Foreign Direct Investment to Developing Countries?' (2006) 43(8) *The Journal of Development Studies* 1561
- Nielsen R, 'Corruption Networks and Implications for Ethical Corruption Reform' (2003) 42(2) *Journal of Business Ethics* 125
- North D, 'Institutions and Credible Commitment' (1993) 149 *Journal of Institutional and Theoretical Economics* 11
- North D, 'Institutions' (1991) 5 *Journal of Economic Perspectives* 97
- North D, 'The Contribution of the New Institutional Economics to an Understanding of the Transition Problem' (WIDER Annual Lecture 1, UNU/WIDER, March 1997)
- Norton P, 'The Case for First-Past-The-Post' (1997) 34(2) *Representation* 84
- Novick G, 'Is There a Bias against Telephone Interviews in Qualitative Research?' (2008) 31 *Research in Nursing and Health* 391
- Nozick R, 'Invisible Hand Explanations' (1994) 84 *American Economic Association Papers and Proceedings* 314
- Nur-tegin K, 'Determinants of Business Tax Compliance' (2008) 8 *The BE Journal of Economic Analysis & Policy* 1
- Nye J, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61(2) *The American Political Science Review* 417
- O'Higgins E, 'Corruption, Underdevelopment, and Extractive Resource Industries: Addressing the Vicious Cycle' (2006) 16(2) *Business Ethics Quarterly* 235
- Ochonu M, 'Corruption and Political Culture in Africa: History, Meaning, and the Problem of Naming' (2011) 4(13) *Law and Development Review* 33
- Oyedele T, 'Still on Excess Dividends Tax: Why is the National Assembly Slow to Act' (2014) <http://www.pwc.com/en_NG/ng/assets/pdf/tax-watch-september-2014.pdf> accessed 5 May 2015
- Okeke G, 'Re-Examining the Role of Locus Standi in the Nigerian Legal Jurisprudence' (2013) 6(3) *Journal of Politics and Law* 209
- Olamade O, 'Nigeria in Global Competitiveness Comparison' (2015) 3(2) *Journal of Economics* 146
- Olivier de Sardan JP, 'A Moral Economy of Corruption in Africa?' (1999) 31(1) *The Journal of Modern African Studies* 25
- Page SE, 'Path Dependence' (2006) 1 *Quarterly Journal of Political Science* 87
- Osoba S, 'Corruption in Nigeria: Historical Perspectives' (1996) 23(69) *Review of African Political Economy* 371
- Persson T and others, 'Separation of Powers and Political Accountability' (1997) 112 *Quarterly Journal of Economics* 1163
- Pfeifer S and Whiffin A, 'Centrica Feels the Heat over Tax Rise' *The Financial Times* (London, 9 May 2011) <<https://www.ft.com/content/672af278-7a0b-11e0-bc74-00144feabdc0>> accessed 30 May 2017
- Pommerehne W and Weck-Hannemann H, 'Tax Rates, Tax Administration and Income Tax Evasion in Switzerland' (1996) 88(1-2) *Public Choice* 161

- Prebble J, 'Ectopia. Tax Law and International Taxation' (1991) 5 BTR 383
- Quinn D and Shapiro R, 'Economic Growth Strategies: The Effect of Partisan and Electoral Politics on Interest Rates' (1991) 35 American Journal of Political Science 656
- Quinn DP and Shapiro RY, 'Business Political Power: The Case of Taxation' (1991) 85(3) American Political Science Review 851
- Rawlinson K, 'UK Uncut Protesters Blockade Vodafone Stores Across Country' *The Guardian* (London, 15 June 2014)
- Reuters, 'Luxembourg Court Charges French Journalist over LuxLeaks Role' *The Guardian* (London, 23 April 2015)
- Roberts J, 'Poststructuralism Against Poststructuralism: Actor-Network Theory, Organisations and Economic Markets' (2012) 15 European Journal of Social Theory 35
- Rodriguez P, Uhlenbruck K and Eden L, 'Government Corruption and the Entry Strategies of Multinationals' (2005) 30(2) Academy of Management Review 383
- Sah R, 'Corruption Across Countries and Regions: Some Consequences of Local Osmosis' (2007) 31 Journal of Economic Dynamics and Control 2573
- Sanyal A, Gang IN and Goswami O, 'Corruption, Tax Evasion and the Laffer Curve' (2000) 105 Public Choice 61
- Schneider F, 'Shadow Economies and Corruption All Over the World: What Do We Really Know?' (Kiel Institute for the World Economy, *Economics Discussion Papers*, No 2007-9, 2006)
- Scott J, 'An Analysis of Corruption in Developing Nations' (1969) 11(3) Comparative Studies in Society and History 315
- Scott J, 'Corruption, Machine Politics and Political Change' (1969) 63(4) The American Political Science Review 1142
- Scott J, 'The Analysis of Corruption in Developing Nations' (1969) 11(3) Comparative Studies in Society and History 315
- Seligson M, 'The Independence of the Judiciary: Appointing the Guardians' (1991) 16(4) ILP 105
- Shabbir G and Anwar M, 'Determinants of Corruption in Developing Countries' (2007) 46(4) The Pakistan Development Review 751
- Shahid Alam M, 'Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment' (1989) 48 American Journal of Economics and Sociology 441
- Shleifer A and Vishny R, 'Corruption' (1993) 108 Quarterly Journal of Economics 591
- Simon HA, 'Notes on the Observation and Measurement of Political Power' (1953) 15 Journal of Politics 500
- Stalder F, 'Actor-Network-Theory and Communication Networks: Towards Convergence' (1997) <http://felix.openflows.com/html/Network_Theory.html#6> accessed 5 July 2015
- Stefes C, 'Measuring, Conceptualising and Fighting Systemic Corruption: Evidence from Post-Soviet Countries' (2007) 2(1) Perspectives on Global Issues 1
- Strauss L, 'Critical Note: Locke's Doctrine of Natural Law' (1958) 52 The American Political Science Review 490

- Sturges JE and Hanrahan KJ, 'Comparing Telephone and Face-To-Face Qualitative Interviewing: A Research Note' (2004) 4 *Qualitative Research* 107
- Suberu R, 'Nigeria's Muddled Elections' (2007) 18(4) *Journal of Democracy* 95
- Svensson J, 'Eight Questions About Corruption' (2005) 19 *Journal of Economic Perspectives* 19
- Syal R, 'How HMRC Treated its Goldman Sachs Tax Deal Whistle-blower as a Criminal' *The Guardian* (London, 29 April 2013)
- Szarmach L, 'Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case' (2010) 43 *Cornell International Law Journal* 409
- Taliercio R, 'Administrative Reform as a Credible Commitment: The Impact of Autonomy on Revenue Authority Performance in Latin America' (2004) 32(2) *World Development* 213
- Taylor D and Sykes L, 'Controlled Foreign Companies and Foreign Profits' (2007) 5 *BTR* 609
- Teather R, 'Harmful Tax Competition?' (2002) 22(4) *Economic Affairs* 58
- Thuronyi V, 'Presumptive Taxation of the Hard-to-Tax' (2004) 268 *Contribution to Economic Analysis* 101
- Tignor R, 'Political Corruption in Nigeria before Independence' (1993) 31(2) *Journal of Modern African Studies* 175
- Tirole J, 'Hierarchies and Bureaucracies: On the Role of Collusion in Organisations' (1986) 2(2) *Journal of Law, Economics and Organisation* 181
- Tornell A and Lane P, 'The Voracity Effect' (1999) 89(1) *American Economic Review* 22
- Toye J, 'Interest Group Politics and the Implementation of Adjustment Policies in Sub-Saharan Africa' (1992) 4(2) *Journal of International Development* 183
- Transparency International, 'Corruption Perception Index 2014' <<http://www.transparency.org/cpi2014/results>> accessed 1 September 2015
- Treisman D, 'The Causes of Corruption: A Cross National Study' (2000) *Journal of Public Economics* 399
- Ufere N and others, 'Merchants of Corruption: How Entrepreneurs Manufacture and Supply Bribes' (2012) 40(12) *World Development* 2440
- Uhlenbruck K and others, 'The Impact of Corruption on Entry Strategy: Evidence from Telecommunication Projects in Emerging Economies' (2006) 17 *Organization Science* 402
- Usher D, 'The Economics of Tax Incentives to Encourage Investment in Less Developed Countries' (1977) 4 *Journal of Development Economics* 119
- Uwaifo S JSC, 'Valedictory Speech' (2005) 1 *Supreme Court of Nigerian Judgment* 20
- Van Rijckeghem C and Beatrice W, 'Bureaucratic Corruption and the Rate of Temptation: How Much do Wages in the Civil Service affect Corruption?' (2001) 65 *Journal of Development Economics* 307
- Venard B, 'Organizational Isomorphism and Corruption: An Empirical Research in Russia' (2008) 89 *Journal of Business Ethics* 59
- Villoria M, Van Ryzin GG and Lavena CF, 'Social and Political Consequences of Administrative Corruption: A Study of Public Perceptions in Spain' (2012) 73 *Public Administration Review* 85
- Von Muhlenbrock G, 'Discretion and Corruption: The Chilean Judiciary' (1997) 25 *Crime, Law and Social Change* 335

Weingast B, 'The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development' (1995) *Journal of Law, Economics and Organisation* 1

Weyland K, 'The Politics of Corruption in Latin America' (1998) 9 *Journal of Democracy* 108

Williams R, 'Corruption: New Concepts for Old?' (1999) 20 *Third World Quarterly* 503

Williamson O, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38 *Journal of Economic Literature* 595

Wilson G, 'Corporate Political Strategies' (1990) 20 *British Journal of Political Science* 281

Zee H, Stotsky J and Ley E, 'Tax Incentives for Business Investment: A Primer for Policy-Makers in Developing Countries' (2002) 30(9) *World Development* 1497