LIABILITY INCORPORATE BETWEEN TRANSNATIONAL CORRUPTION CASES INDONESIA AND THE UNITED STATES OF AMERICA

Budi Suhariyanto, Faculty of Law Universitas Indonesia
Cecep Mustafa, University of Stirling
Topo Santoso, Faculty of Law Universitas Indonesia

ABSTRACT

This article compares corporate liability in transnational corruption cases between Indonesia and the United States. This article uses a statutory, case, conceptual, and comparative approach to document study to analyse what aspects of the arrangement and practical experience in the United States could be emulated and considered for application in Indonesia. This article concludes that Indonesia's anti-corruption laws are unclear and incomplete in regulating the accountability of transnational corruption-perpetrators so that prosecution of foreign corporations faces obstacles. US International Corrupt Practices Act United States (FCPA) has criminalised foreign corporations either as a holding or branch that has a working relationship with the corporation or someone involved in corruption in their country so that law enforcers and courts have the authority to prosecute accountability and decide on their conviction. In amending the anti-corruption law in Indonesia, it is necessary to criminalise corporate subjects that are holding company or associated with them abroad, which are involved in corruption both detrimental to state finances and in the private sector. Besides, for the effectiveness of cross-jurisdictional law enforcement authorities, it is also necessary to ratify the OECD and the United States so that the prosecution of corporate criminal liability involved in transnational corruption that occurs within and/or is related to Indonesia's interests can be sentenced by the Indonesian Court.

Keywords: Corporate Accountability, Transnational Corruption, Indonesia, England, United States.

INTRODUCTION

Since 1999, Indonesia has had 1999 Law Number 31 as amended by 2001 Law Number 20 on Corruption Eradication (UU Tipikor) which regulates corporate criminal liability. Even though corporations have been designated as legal subjects in the Corruption Act, but until now (for twenty years) there are still only 6 (six) corporate cases that have been punished by court decisions with permanent legal force. The problem of the lack of cases being prosecuted is for the Corruption Law which does not completely regulate corporate errors and procedural law. Particularly with corporations involved in transnational corruption, they limit Indonesian law enforcers to taking action against domestic corporations, while against foreign corporations involved; Indonesian law enforcers are powerless in demanding criminal accountability. As in the corruption case committed by Emirsyah Satar (ES) as the President Director of PT. Garuda

Indonesia (PT. GI), which allegedly received bribes in Singapore for the purchase of 50 Airbus SAS aircraft engines in the 2005-2014 periods from Rolls Royce (RR), a British company. The Indonesian Corruption Eradication Commission (KPK) has just demanded individual ES criminal responsibility and has not yet held PT. GI as a corporation. As for Airbus and RR as foreign corporations that gave bribes to ES, there was no or no prosecution by the KPK. The Royal Courts of Justice, in its decision No: U20200108, dated January 31, 2020, agreed to Airbus' Deferred Prosecution Agreement (DPA) and stop the prosecution of corruption. Is it a problem when the prosecution decision for the criminal responsibility of the foreign corporation depends on the country of origin and what is the legal impact on the abortion of criminal liability charges against it for one country concerned? In this context, Indonesian law enforcers will also face challenges in demanding criminal responsibility for Airbus based on Indonesian law.

The challenges of prosecuting corporate criminal responsibility in transnational corruption cases, as experienced by Indonesian law enforcers, are not experienced by US law enforcers. The United States also embraces the authority to implement the corporate criminal obligation for transnational corruption by the use of the Securities and Exchange Commission's (Case, 2020) arrangements, including the Ministry of Justice, for deferred prosecution and non-procurement agreements. Settlements that require companies to adopt effective compliance, as governed by the US International Corrupt Practices Act United States (FCPA**) (**Corrupt Act, 2020). The FCPA has expanded the scope and jurisdiction of corruption offences to include foreign companies as long as there is relationship activity in the United States (Sivachenko, 2013). Companies accused of violating the FCPA are deemed to be liable to severe penalties and multi-million dollar fines, even when the acts were committed or occurred in a foreign jurisdiction. Based on the aforementioned review, it is interesting to present in this paper an analysis of the comparative study of corporate responsibility in transnational corruption cases between Indonesia and the United States. We present in this paper, an examination of any regulatory aspects and practical experience in the United States that can be emulated and considered for application in Indonesia.

METHOD

We use documentaries as a method in this comparative study of corporate responsibility in transnational corruption cases between Indonesia and the United States. In these papers, we carried a comparative approach and a conceptual approach. The statute approach is used to trace historical legalities and understand the legal reasoning (Marzuki, 2014) and any laws and regulations governing corporate criminal liability in transnational corruption cases (Soeprapto, 2014). Then connect them so we can know the harmonisation and disharmony and the hierarchy under positive law in Indonesia and the United States (Kelsen, 1945). Meanwhile, the "*case approach"* is used to trace and understand the "*legal reasoning"* of court decisions or law enforcement decisions in prosecuting corporate liability in transnational corruption. With it, it can be seen when there is an attempt to find a law (in concrete) (Panggabean, 2014) and differences in interpretation of the judges and law enforcement regarding corporate criminal liability, especially those related to transnational corruption in Indonesia and the United States (Cohen and Olson, 1992). The comparative approach is used to compare anti-corruption laws and their enforcement practices in prosecuting liability and imposing crimes against corporations in transnational corruption cases that apply in Indonesia and the United States. Meanwhile, the

conceptual approach is used to analyse and conceptualise the reform of the Corruption Eradication Act, especially related to corporate criminal liability in transnational corruption cases based on the results of comparisons with the United States. After collecting data from the document study, we carried the classification out and analysed descriptively qualitatively (Mustafa, 2021). As the end of the analysis, we also present prescriptions regarding solutions or recommendations to address corporate criminal liability issues in transnational corruption cases in Corruption's reform Act.

DISCUSSION

The Existence of Corporate Accountability in Transnational Corruption Cases in Indonesia

Law Number 8 of 1981 on Indonesian criminal cases, the Indonesian Criminal Code (KUHP) (KUHAP) does not recognise corporations as legal subjects. However, specific laws, including the Corruption Eradication Act, have regulated corporate criminal liability in Article 20, which rules that:

1. If a crime of corruption is committed by or on behalf of a company, the company and/or its management may be charged and punished.
2. A corporation undertakes Corruption when the illegal act includes individuals behaving separately or collectively in the corporate setting, either in a working arrangement or based upon other relationships.
3. The management represents the company if they bring a criminal case against a company other people can represent.
4. Managers who represent the corporation.
5. The judge may order the corporate board to enter a court trial and may also order to bring the management board to a court trial.
6. If they sue a company with a criminal offence, they transmit the appeal to appear before the convocation to the management in the management residence or the management office.
7. The death penalty for a business is only a fine when the full penalty applies to it by 1/3 (one third).

Regulation of corporate crime, as set out in Article 20 of the Law on Corruption, is considered incomplete and provides clarity in its application. The incompleteness of the Anti-Corruption Law in regulating corporate legal subjects as perpetrators of corruption was acknowledged by both the Office of the Prosecutor General and the Court so that the two institutions issued institutional regulations to overcome them and so they could be guided by Officers and prosecutors in law enforcement, namely Circular of the Indonesian Attorney General's Office Number B-36/2009 and Regulation of the Attorney general of the Republic of Indonesia Number: Per-028/27/2009 on Corporations as Victims and Defendants in Corruption Crimes and Regulation on Procedures in the Handling of Criminal Cases of Corporate Legal Subjects and Regulation Number 13 of 2016 on Procedures for Criminal Cases of Corporations. The three guidelines issued and enforced filling the legal void in handling Corporations as illegal act suspects, one of which is in the corruption case. The problem is, these regulations are hierarchically under the law so that the regulations cannot conflict or regulate beyond what is stipulated by law (in this case including the Corruption Act).

The Anti-Corruption Law is also not sufficient in regulating the criteria for error; prosecution of criminal liability can be borne by the corporation (alternatives) and/or on the

management as well (cumulating). Article 20 paragraph (1) of the Corruption Eradication Act shows that the consequences of responsibility that creates the possibility of three models based on the phrase "*can*" be connected with the phrase "*and or*" where the response can be the corporation (without individual criminal responsibility for the management), or the management only (without corporate criminal responsibility), or both the corporation and its management are criminally responsible. The Corruption Act does not explain the requirements or criteria for the application of the three Corporate Fraud Responsibility Models. Although the Corporate Doctrine of criminal responsibility is not explicitly explained in the Corruption Act, but in Article 20(1) and Article 20(2) Corruption Act, it adheres to the doctrine of identification and aggregation. The doctrine of identification is clear from the use of the phrase "*carried out by and on behalf of a corporation"* in Article 20 paragraph (1) of the Corruption Act, while the doctrine of aggregation appears in the phrases use "*either alone or collectively"* in Article 20 paragraph (2) of the Corruption Act.

Regarding corporate responsibility which is holding company, the Corruption Act does not regulate it, especially if a corporation as a holding company that has branches or a combination of agents from several countries (multinational company) commits transnational (cross-jurisdictional) corruption in Indonesia or the company is based in the country but a criminal act the corruption was carried out abroad. Until now, there are still no cases of transnational corporations whose main holding companies are located abroad and their branch companies in Indonesia are involved in criminal acts of corruption and are held accountable for the crime through court decisions that have permanent legal force (legally binding). Or vice versa, there are no corporate cases headquartered in Indonesia that have been prosecuted for criminal responsibility for criminal corruption events abroad (across jurisdictions).

As with ES and PT. GI by Airbus and RR which are British companies, even though it is very visible in the case's chronology that was revealed in the decision of the Royal Courts of Justice Number U20200108 dated January 31, 2020, but because the decision stopped the persecution of Airbus, Indonesian law enforcers also could not prosecute them (The Airbus). The Anti-Corruption Act emphasises that they can hold both accountable for their bribery crimes, including corporate legal subjects. The helplessness of Indonesian law enforcers should not continue for cases of foreign corporate corruption. Therefore, legal reform is needed related to the criminalisation of foreign corporations and strengthening the prosecution and judicial authority of Indonesia in transnational corruption cases that are cross-jurisdictional.

United States Regulations and Enforcement of Corporate Liability Practices Involving Transnational Corruption

Criminal law arrangements in the United States refer to the Penal Code (MPC) Model. Specifically, for corporate criminal liability, it is regulated under Section 2.07. The MPC titled Obligation of Companies, Unincorporated Associations and Individuals Acting or Under Duty to Act, which regulates three situations in which the company will receive punishment based on the broadest responsibility, first, that arises because of the behaviour of corporate agents on behalf of and within the company, second when there is negligence for a specific violation of duties imposed on the corporation according to law, and third when the board of directors or high managers acting in their work commits a criminal act. Then the corporation is responsible (The American Law Institute, 1985). In the three regulatory contexts, we can say it that the United

States in this MPC adheres to several theories of corporate criminal responsibility, namely "*strict liability, vicarious liability,* and *reactive corporate fault".*

Apart from the MPC, the United States has a special law that can ensnare corporate criminal responsibility, especially in corruption cases, namely the FCPA. The FCPA provides two major clauses-accounting and anti-bribery provisions-and lays down the criminal and civil responsibility for international official bribes. Companies have to keep correct records and reasonably represent their transactions in accounting and maintain a suitable system of internal accounting checks, whereas anti-bribery laws forbid the use and maintenance of corrupt payments by foreign officials (Sivachenko, 2013). While this law applies within the United States, the FCPA applies not only to US businesses but also to foreign firms or persons, provided that bribery is partly carried out in the United States (Sivachenko, 2013). Through the use of bodies, including the DOJ for Delayed prosecution and non-procurement contracts and the SEC application for settlement agreements, efforts are being made to address the root causes of corruption in many companies (Hess & Ford, 2008). Prosecutors can determine guilt thorough knowledge of the causes of the corporate culture of corruption and then work to determine how to reform the corporate culture. In this context, we apply the "*corporate culture model"* doctrine.

In its development, because of the treaty obligations of the United States to become a party to the Organisation for Economic Co-operation and Development, FCPA amendment was held in 1988 which updated the definition of offences in the FCPA more broadly (Low, 2003). Also, the 1998 amendments strengthen the broad range of laws and significantly expand their scope and jurisdiction, including federal and international firms in violation of FCPA provisions while in the US, and also apply for foreigners not present physically at the US as long as there is a relationship between activities in the US relating to bribery related-payments (Corrupt Act, 2020). Specifically, for corporate criminal liability, the FCPA Amendment 1998 provides requirements for knowledge of "*high probability*" (being aware that behaviour can lead to results, even if it is uncertain) and "*wilful blindness*" (situations in which a reasonable person will know the results) in determining the awareness of corporate intentions of bribery of the management office or its agents (Taylor, 2001).

Besides the MPC and FCPA above, the DOJ has two sets of guidelines that regulate decisions to sue management officers with the "*principles of federal prosecution* and for companies based on the *principles of federal prosecution of business organisations"*. Under these guidelines, the decision to sue the company or its employees who are guilty or both falls under the DOJ, while the court only reviews the implementation of that policy to secure the civil rights of the defendant or prospective defendant in the exceptional cases and then mainly (Doyle, 2013). The DOJ may state that it considers the adequacy of the Enforcement Program for the organization when determining what to do in connection with identified FCPA violations or charges under the results of an SEC investigation. The DOJ may state that the compliance program affects how claims are resolved, for example, a Delayed Trial Arrangement or a Non-Proceedings Agreement (NPA) (Chance, 2019). Prosecutors can enter a defence agreement with the company whereby any negotiation results are disclosed to the court, however before that the corporation must be made to recognise and admit guilt to criminal charges stated in a "*Statement of Offense"*. 133 (one hundred and thirty-three) corporations have been entangled with the FCPA from 2010 to 2019. For example, in the most recent case, namely, in 2019 there were 10 (ten) corporate cases including:

1. Ericsson: This telecommunications multinational company has agreed to pay more than $1 billion to the SEC and DOJ to settle allegations of FCPA violations, including involvement in large-scale bribery schemes involving the use of fake consultants to channel money to government officials in several countries (12/6/19);
2. Westport and Nancy Gogarty: The SEC charged Westport and its former CEO Gougarty with bribing a Chinese government official who violated the FCPA along with a related violation of books and records and internal accounting controls. Westport and Gogarty agreed to pay more than $4.1 million (9/27/19);
3. Barclays: This UK-based bank agreed to pay $6.3 million to resolve breaches of internal accounting controls and record-keeping requirements related to its Asian hiring practices (9/27/19);
4. Quad/Graphics, Inc.: the marketing and printing service provider has agreed to pay almost ten million dollars for resolving FCPA charges of violations of various bribery schemes in Peru and China and for the creation of faulty documents to hide trade with the telecommunications companies Cuba (9/26/19);
5. TechnipFMC plc: This multinational company oil and gas services firm paid over $5 million before its 2017 merger with Technip to fix FMC Technology's anti-bribery breaches, internal accounting inspections and record-keeping measures.SA regarding its behaviour with Iraq (19/9/19);
6. Juniper Networks: This CATT Corporation has agreed to pay more than $11.7 million for FPCA domestic accounting and listing breaches in China and Russia. The company has agreed to pay over $10.7 million (11/19/2013);
7. Deutsche Bank AG: The Dutch bank approved paying more than $16 million to deal with a breach of internal accounting controls of the FCPA and compliance requirements according to its recruitment (22/11/2010);
8. Microsoft Corporation: The firm located in Hungary, Thailand, Saudi Arabia, Turkey, and Hungary agreed to pay over US$24 million in the settlement for SEC's fees about FCPA breaches. Other (7/22/2019);
9. Walmart Inc. is fined under the SEC for violation of the FCPA's internal accounting rules and Walmart agreed to pay SEC fines over $144 million and agreed to pay the parallel criminal charges for an amount of over $282,000,000 by the DOJ for around $138 million (20/6/19);
10. Telefônica Brasil SA: In sponsoring government officials at the world cup and the confederations cup, SEC is accusing Telefónica of violating accounting provisions of the FCPA. Telefonica Brasil made a $4,125,000 settlement charge (5/9/19).

Comparative Analysis of Corporate Liability in Transnational Corruption Cases between Indonesia and the United States

In terms of the legal system family, Indonesia adheres to "*civil law"* or continental Europe, while the United States is a country that adheres to a "*common law"* system which has the main characteristics of developing its law through court decisions, however, statutory regulations are also made as a substantive crystallisation of legal practice of court decisions in the United States. So in its development, they also refer the legislation to by law enforcers and judges in the United States, including in regulating the liability of corporations involved in transnational corruption cases referring to the FCPA.

If we compare the regulatory aspects of corporate criminal liability, we can map it as shown in the following Table 1:

From the Table 1 below, to regulate the liability of corporations of transnational corruption present in the United States; it is sufficient. This is very unequal when compared to the norms of regulating corporate responsibility in transnational corruption cases in Indonesia. The United States law enforcement agencies have broader, jurisdictional powers under the FCPA. Besides, US law enforcers have a more bargaining position in demanding corporate accountability in transnational corruption cases than Indonesian law enforcers.

Table 1
REGULATORY ASPECTS OF CORPORATE CRIMINAL LIABILITY

Number	Aspect Comparison	Indonesia	United States of America
1.	General criminal law	The Criminal Code does not consider businesses as criminal offences so They cannot prosecute it for general criminal responsibility	The MPC has regarded the enterprise as a criminal offence so they can prosecute it for general criminal responsibility
2.	Special criminal law for corruption	The Corruption Act has recognised corporations as legal subjects and can be held criminally liable to corruption cases	The FCPA has recognised corporations as legal subjects and can be held criminally liable to corruption cases
3.	Adhered doctrine or theory of corporate criminal responsibility	The Anti-Corruption Act adheres to the doctrine of identification and aggregation	MPC and FCPA adhere to the doctrines of strict liability, vicarious liability, reactive corporate fault and corporate culture model.
4.	The criminalisation of corporations involved in transnational corruption	There is no explicit regulation in the Corruption Act	The FCPA provides explicitly that corporations can be criminally liable for their involvement in transnational corruption
5.	The responsibility of the holding corporation for transnational corruption by employees or its branch companies abroad	There is no explicit regulation in the Corruption Act	The FCPA explicitly stipulates that the holding corporation handles the transnational corruption of its employees or branches of the company
6.	The basis of ratified international conventions	UNCAC	UNCAC and OECD

In connection with the entrapment of criminal liability for corporations that are holding in nature, where the holding company can be liable for criminal liability for transnational corruption crimes committed by its overseas branch companies. The subsidiary's indictment of wrongdoing can be attributed to the holding company to be criminally liable based on failure to prevent and implement internal compliance procedures. Even if it occurs abroad (across jurisdictions) both the corruption incident and involving foreign officials can also be subject to corporate criminal responsibility. As with the United States v. WMT Brasilia SarL, Number 1: 19-Cr-192 where Walmart Inc., which is a retail company based in Bentonville, Arkansas. Walmart shares will be traded publicly on the New York Stock Exchange, so Walmart is an 'emitter' according to the FCPA concept. WMT Brasilia has since become a wholly-owned

Walmart affiliate headquartered in São Paulo, Brazil (Walmart Brasil). Walmart Brazil falsely recorded a payment of $ 527,000 to Brazilian Intermediary as payment to the *Brazilian Construction Company*. These false reports are then consolidated into the finances of Walmart and used for the Walmart financial statements (Case, 2020). Walmart also, through its representatives, stated that it was subject to and entered the Plea Agreement in compliance with Rule II(c)(1)(c) of the Federal Regulations. The parties to this agreement agreed that the gross profit resulting from the breach was $ 3,624,490. Therefore, under 18 USC § 3571 (c), the maximum fine that can be imposed is $ 25,000,000.

It takes the construction of logical (rational) legal considerations from the allowed law enforcer to link individual mistakes of branch managers who have committed acts of corruption with the corporate criminal liability of the holding company abroad. As MR Goode argues that in the allegation that the company has conspired with its owners and directors, or it could be a conspiracy with employees, and a conspiracy with multi-corporate companies so it applies to ask for corporate criminal responsibility, then there must be a conspiracy relationship (mistake) between the holding company and its subsidiaries his company (Goode, 1975). Explained by MR Goode that such a condition can only occur when the "*brain and nerve centre*" of a subsidiary differs from its holding, however, in such a case; several human actors must be present as representatives of their respective companies (Goode, 1975). Meanwhile, the Anti-Corruption Act does not provide detailed arrangements regarding the form of accountability of such holding and subsidiary models, including if it is cross-border (bribery of foreign officials). While the Government of Indonesia has ratified UNCAC by Law Number 7 of 2006, in fact not all offences (including bribery of foreign public officials and private-to-private bribes) and the existing mechanisms (including the restorative approach) in UNCAC are accommodated or followed up through reform of the Corruption Act. In this context, the scope of the Anti-Corruption Act was narrower than that of the FCPA (Santoso, 2011). Also, in terms of the legal arrangements for the procedure, implementing the settlement model through the DPA and NPA in the United States has proven to be effective and solves facilitate the investigation of corporate corruption perpetrators. Through the DPA and NPA, corporations can acknowledge and cooperate with the prosecutor and negotiate the payment of fines that must be resolved, if agreed, it will be beneficial for the corporation because it need not deal with court litigation processes which of course will consume time and energy and large financial costs (including reputation in the financial/investment market), while it is also beneficial for law enforcers to save resources and simplify the investigation process that was initially complicated to become handy.

Reform of the Indonesian Corruption Act, it is necessary that the corporate criminalisation policy in transnational corruption cases in the United States can be accommodated and used as a reference. The accommodated aspects start from criminalisation, namely including corruption in the private sector (private to private), adding the doctrine of vicarious liability, reactive corporate fault and corporate culture model, and regulating the DPA mechanism as applicable in the United States. Likewise, it is also necessary to attach cross-jurisdictional powers to investigate and hold corporations and parties related to transnational corruption accountable. For the problem of the attachment of authority across jurisdictions mentioned above, including those who do transnational corporations, it is necessary to harmonise the substance if there are differences in regulating corruption offences and synergy (cooperation) in law enforcement between countries based on the accommodation of the international convention (UNCAC), without it, overlapping and violations of unnecessarily duplicated trial

against the same transnational corporation corruption case (the deed/incident). As Andrew T. Bukovsky suggested that multinational corporations are increasingly becoming the subject of responsibility in many jurisdictions for the same behaviour that overlapping responsibilities occur when countries have a high interest in enforcing their anti-corruption laws, by which joint investigations and prosecutions by many countries become a global problem (Bulovsky, 2019). To overcome this problem, Indonesia needs to expand its network of international conventions, including the ratification of the OECD. By ratifying the OECD and elaborating it with UNCAC, the reform would drive for better provision of the Indonesian Corruption Act.

CONCLUSION

Based on a comparative analysis of corporate criminal liability in transnational corruption cases between Indonesia and the United States, it can be concluded that: from the aspect of criminalisation regulation, the doctrine of determining guilt and the mechanism corporate criminal negligence in the US is more coherent. In terms of the attachment of prosecution and judicial powers across jurisdictions, the nature of FCPA enforcement is also stronger and more stringent in its regulation than the Indonesian Corruption Act. Until now, Indonesian law enforcers have failed in holding foreign corporations accountable for being involved in transnational corruption that occurs within and/or related to Indonesia's interests. In contrast to the United States, which has held many corporate liabilities involved in transnational corruption crimes that occur within and/or are related to the interests of the United States. Based on this condition, to overcome the obstacles that have existed so far, the Government of Indonesia needs to reform the Corruption Act by following the policy of criminalisation and prosecution of corporate criminal liability from the United States.

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