Towards Corporate Environmental Responsibility in Sub-Saharan Africa's Oil and Gas Industry: Opportunities and Challenges

By

Wasiu Adebisi Omotoso

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Abstract

This thesis demonstrates the level of environmental disaster that oil TNCs have brought into Sub-Sahara Africa as a direct consequence of economic globalization. The analysis reveals the weaknesses of the environmental regime in the Sub-Sahara African region, particularly in Nigeria, Chad and Cameroon as well as the lack of administrative capacity of the governments. The thesis explores alternative means through which environmental responsibility of oil TNCs could be pursued at the supranational arena and within the legal system of home states of the oil TNCs. It seeks to do so by examining the phenomenon of tort-based action for foreign direct liability of the parent oil TNCs for the conduct of their foreign subsidiaries extraterritorially.

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Dedication

To the memory of my beloved parents

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Chapter Four: Regulation of TNCs under Home State Law and International Law

Introduction

Transnational Corporations (TNCs) are one of the most controversial subjects in the realm of international law and business today. The current trend of economic globalization, since the end of the Second World War, has placed TNCs in a powerful position in the world's social, political and economic life.[1] According to the United Nations Conference on Trade and Development (UNCTAD), as of 2009, there were an estimated 82,000 TNCs worldwide, with 810,000 foreign affiliates.[2] They represent 51 out of the largest 100 economies.[3] TNCs and their affiliates are responsible for about a third of total world exports of goods and services.[4] They also employed about 77 million workers in 2008 (more than double the total labour force of Germany).[5] In 2006, the world's top 10 companies recorded revenue of £10,000,000,000 with the top 50 representing 50% of world's GDP. Six of these top 10 corporations are oil corporations.[6]

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[1] Globalization connotes "an economic, open-market driven movement. The movement is grounded in the belief that growth, prosperity and the greatest good for humanity is possible only through construction of a tightly integrated global economy founded on trade liberalization, privatization, and macro-stability…" See Larry Cater Backer, "Ideologies of Globalization and Sovereign Debt: Cuba and IMF" (2006) 24 Penn State International Law 497. See also, Gralf-Peter Calliess, "Transnational Corporations Revisited" (2011) 18 Ind. J. Global Legal Stud. 602; Merab Sichinava and Evgeniya Vidishcheva, "Transnational Corporations: History, Evaluation, Modern Trends" (2011) 12 European Researcher 1626.

[2] United Nations Conference on Trade and Development, *World Investment Report: Transnational Corporations, Agricultural Production and Development,* UNCTADOR, 2009, UNCTAD/WIR/2009 [*World Investment Report, 2009*] at xiii.

[3] Alice de Jonge, "Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum" (2011) 7 Critical Perspectives on International Business 66.

[4] *Ibid.*

[5] *World Investment Report, 2009* at xiii.

[6] *Ibid.*

This notoriety is not new. In Europe, concerns about TNCs can be traced to the post-war period.[7] By the 1960's, TNCs had become subject of public criticism in the United States with the rise of investigative journalism. According to Hood:

> Investigative journalism became a heroic, even romantic, calling with name of the game being to catch greedy corporations in the act of polluting the water, selling shoddy overpriced products, exploiting workers and families, and sacrificing the public's health, safety and welfare to make a quick buck. On television and in the movies, business executives increasingly became villains, to be challenged by heroic lawyers, policemen, reporters and activists[8]

In the case of the developing countries, concerns about TNCs led to post-colonial campaign for a New International Economic Order by the G77. The developing host countries, many of which were just newly independent, were not sure if they wanted to welcome foreign investments from corporations who were deemed as economic agents of their colonialists.[9] These developing host states expressed concern about the likelihood of TNCs interference with the social and political processes in their country on behalf of themselves or that of their home states.[10]

Following the wave of economic liberalization as a political philosophy in the 1980's, the relations between states and corporations started to improve. Enormous growth in foreign direct investment (FDI) ensued due to the emergence of the World

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[7] See Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Oxford University Press, 2007). This was a period when American transnational enterprises were expanding across continents. The Europeans expressed distaste about the scale of their dependence on US foreign investments and the consequent 'Americanization' of culture, taste, fashion, consumer choice, and management structure. See also C. Tugendhat, *The Multinationals* (London: Eyre & Spottiswoode, 1971) and Raymond Vernon, *Sovereignty at Bay: the Multinational Spread of US Enterprise* (New York: Basic Books, 1971).

[8] J. Hood, *The Heroic Enterprise: Business and the Common Good* (New York: Free Press, 1996) at xiii.

[9] Peter Muchlinski, *supra* note *7 at 6-7.*

[10] *Ibid.*

Trade Organization in 1985[11], the adoption of the Single Europe Act in 1986[12] as well as the North American Free Trade Agreement (NAFTA), concluded in 1988 to, amongst other things, remove tariffs and other restrictions on foreign direct investment between parties. These efforts at the regional and supranational levels created an atmosphere that enhanced trade and economic globalization.

This thesis demonstrates the level of environmental degradation that the exploration and production of oil have brought to the Sub-Sahara African region by oil TNCs. It does so by analyzing the Chad-Cameroon Oil Pipeline Project and the Nigeria's Niger-Delta oil and gas activities. In addition, the thesis explores options available within the supranational realm and home states of the oil TNCs to make them accountable for their extraterritorial conduct in developing countries, particularly through tort-based foreign direct liability actions.

Methodology

The research methodology for this thesis comprised a review of relevant literature including references to non-legal sources on the subject. This entailed a detailed review of primary and secondary sources of environmental law and regulations governing the conduct of transnational enterprises within jurisdictions of their home states and host states; publicly available international documents and reports on the subject matter; independent studies of NGOs; and news publications relevant to the subject.

[11] Following the Uruguay Round of trade negotiations, WTO emerged and created new dispute resolution procedure, new agreements on trade in services and the protection of intellectual property rights, and significantly new commitments on the reduction of non-tariff barriers.

[12] This Act initiated the establishment of a single European market, and it was followed by the Maastricht Treaty which established the European Union.

Structure of the Thesis

This thesis is comprised of four chapters. Chapter one examines the theoretical framework of the communitarian paradigm of corporate responsibility as propounded by E. Merrick Dodd. This is done to establish the communitarian view of the corporation as the theoretical basis upon which the concept of corporate social and environmental responsibility is hinged. Thus, the models of the communitarian school of thought are reviewed in order to show how the school has driven corporate law, practice and jurisprudence over time. Chapter one also examines the nature and structure of the transnational corporation in a way that demonstrates the need for a binding regulatory regime which can instill corporate environmental responsibility into the operations of TNCs. Finally, the chapter explores the background and evolution of the concept of corporate environmental responsibility (CER), and briefly discusses different tools that impose CER.

Chapter two undertakes two case studies in Sub-Sahara Africa to clearly demonstrate the level of environmental externalities and regulatory challenges posed by the TNCs exploring and producing oil in the region. Firstly, the Chad-Cameroon Oil Pipeline Project (CCOPP) is examined. Chapter two discusses generally the nature and background of the CCOPP, and the environmental effects of the project are critically examined. The chapter evaluates the extant regulatory structure for the project since its inception. This evaluation reveals the regulatory weaknesses in the Chadian system as well as the shortcomings of the environmental regulatory framework of the World Bank and International Finance Corporation in the operation of the CCOPP. Secondly, chapter two explores the environmental crisis that has plagued Nigeria's Niger Delta region in the

course of oil exploration and production in the region. This is to show the level of environmental crisis caused by oil TNCs in the region.

Chapter three focuses on environmental regulation and institutional frameworks in Nigeria's oil and gas industry. It examines the flaws and gaps in the environmental statutes and regulations that govern oil and gas exploration and production in Nigeria. Chapter three also examines the government agencies that exercise oversight functions in the oil and gas industry in the country. The purpose here is to demonstrate the shortcomings of the regulatory framework governing environmental activities of oil TNCs in Nigeria. Also, chapter three examines the role played by NGOs and civil societies in making oil TNCs accountable for their environmental externalities. Further, Nigeria's Petroleum Industry Bill is reviewed in chapter three to determine the level of environmental responsibility obtainable under its regime if it is eventually passed into law. Finally, chapter three identifies and discusses certain factors responsible for the inefficiency that characterizes government agencies and institutions regulating the oil and gas industry in Nigeria.

Chapter four explores the opportunities available in home states to regulate the operations of their TNCs abroad, particularly in developing countries with weak regulatory regimes. The chapter examines the instrumentality of tort litigation in the courts of home states of TNCs on the basis of foreign direct liability. This analysis examines tort-based actions in the United States, United Kingdom, the Netherlands and Canada. Further, the challenges facing litigants in the course of bringing such actions are also discussed. Finally, Chapter four explores regulatory options at the supranational level. Multilateral instruments such as the United Nations Global Compact, OECD

Guidelines for Multinational Enterprise, Norms on the Responsibilities of Multinational Enterprises and the International Code of Ethics for Canadian Business are critically examined.

CHAPTER ONE

CORPORATE ENVIRONMENTAL RESPONSIBILITY AND TRANSNATIONALITY

1. Introduction

The corporation appears to be the greatest achievement of Anglo-American capitalism by enhancing both its economic abundance and its promoted ideals of freedom.[13] The corporation has assumed a unique position by creating jobs, transferring technological advancements, elevating standards of living and expanding educational opportunities.[14] This unique influence has equally raised questions of what, why, to whom and at what cost are the obligations of the corporation. In an attempt to answer these queries, the time and effort of many writers have been expended in debating the real "mission" of the corporation and to which constituency those objectives are to be delivered. As a result, these efforts have engendered variant theoretical camps in the realm of corporate law.[15]

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[13] Norman Barry, "The Theory of Corporation" *Ideas on Liberty* (March 2013) online: Foundation for Economic Education http://www.fee.org/files/docLib/feat5.pdf (accessed 21 December 2013).

[14] William Bradford, "Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights" (2012) 26 Notre Dame J.L. Ethics & Pub. Pol'y 141 at 146.

[15] There are different conceptions of the corporation: the artificial theory of corporation (argues that the corporation is an artificial entity that engages in business as a distinct, juridical personality); the natural entity theory (separating ownership from control, this theory argues that the corporation is a natural and real personality with pre-legal existence that is not subject to public control); the aggregate theory (this conception considers the corporation as an aggregate of natural persons who are considered one and the same as the corporation. Here, the constituting individuals do not enjoy distinct or separate legal personality from the corporation in the conduct of their business); the nexus-of-contract theory (also known as the New Economic Theory, it conceives of the corporation as an interrelation of different contracts that define and constitute the corporate enterprise). See generally, David Millon, "The Ambiguous Significance of Corporate Personhood", online: (2001) Stanford Agora: An Online Journal of Legal Perspectives http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264141 and also Katherine V Jackson, "Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis" (2011) 7 Hastings Bus. L.J. 336.

In this chapter, the classical communitarian paradigm of corporate governance, as postulated by E. Merrick Dodd, will be reviewed given that it is the theoretical underpinning of the concept of corporate environmental responsibility (CER). This is done by examining the different models of the paradigm and demonstrating the level of influence it now has in corporate law and jurisprudence. Further, this chapter examines the texture and contours of TNCs as corporate entities, particularly their nature, structure, impact and influence. This is to demonstrate the character of TNCs that necessitates a binding regime of regulation that can impose CER on their operation. Moreover, the concept of CER is generally analyzed with a view to tracing its background and evolution. The mechanisms that currently impose CER on TNCs are also considered briefly. Ultimately, the challenges and need for CER in the transnational enterprise is advanced in this chapter.

II. The Communitarian Paradigm

There are predominantly two paradigms on how the corporation should be governed, structured and held liable for its corporate actions, inactions and complicities: the contractarian (expressed in modern context as the shareholders' theory)[16] and the communitarian view also known as stakeholders' theory[17]. The shareholders' theory, which is considered as the traditional view of the firm, advances the primacy of stockholders of the corporation. According to the shareholders' primacy exponents, shareholders' interests will always supersede every other interest in the corporate

[16] The shareholder's theory will be used interchangeably with the Contractarian theory in this work.

[17] The stakeholder's theory will be interchangeably used with the Communitarian theory in the course of this thesis.

constituencies such as employees, trade creditors, customers and the general public.[18] Since it is assumed that the shareholders are the owners of the corporation, the shareholder theorists assert that the corporation must serve the interest of the shareholders, including the wealth maximization interest.[19] For instance, the firm should only engage in corporate philanthropy to comply with existing laws and regulations or to the extent that it will generate economic returns on shareholders' investment. This position was articulated in the seminal case of *Dodge v Ford Motor Co*[20], where the US Supreme Court stated that:

> A business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[21]

This comfortably captures the classical view of contractarians such as Milton Friedman who also stated that "the social responsibility of business is to increase its profit" since "the business of business is business".[22] The merits and shortcomings of this traditional

[18] Miriam A. Cherry and Judd F. Snierson, "Beyond Profits: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster" (2011) 85 Tul. L. Rev. at 1015. See also D. Gordon Smith, "The Shareholder's Primacy Norm" (1998) 23 J. Corp. L. at 290.

[19] See Julian Velasco, "Shareholder's Ownership and Primacy" (2010) 3 U. Ill. L. Rev. 897 at 944 (noting her point that shareholders' interests are not necessarily limited to profit maximization, but may include other non-pecuniary interests); Milton Freedman, "The Social Responsibility of Business is to Increase its Profits" in W Michael Hoffman and Robert E Fredrick, eds, *Business Ethics, Readings and Cases in Corporate Morality* (New York: McGraw Hill, 1995) at 133.

[20] *Dodge v Ford Motor Co.*, 170 NW 668 (Mich 1919).

[21] *Ibid* at para 684.

[22] Milton Friedman, "The Social Responsibility of Business Is To Increase Its Profits", *NY Times* (13 September 1970) 33.

view of the corporation has been the subject of vast literature in law and economics. It is, however, beyond the scope of this work to venture into a similar endeavour.[23]

In marked contradistinction, the stakeholders' theory, which forms the nucleus of this thesis, advances a nuanced position regarding the nature of responsibility and the constituencies owed such responsibility by the corporation. This school of thought considers more than the stockholders' interest in the corporation as taking primacy in the corporation's governance scheme; it extends the nature of corporate responsibility beyond profit maximization to cover other social issues and concerns including environmental accountability, human rights, anti-corruption, sustainable growth, equal opportunity employment and diversity.

The intellectual foundation of the communitarian paradigm is credited to E. Merrick Dodd's riposte to Adolph Berle's contractarian conception of the nature and purpose of the corporation.[24] In his 1931 Harvard Law Review article, Berle espoused the shareholder-oriented view that the corporation represents a nexus of contract amongst private entities with the chief aim of maximizing the shareholders' return on their

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[23] For the intellectual history and background of the contractarian paradigm of the corporation, see D. G. Smith, "The Shareholder Primacy Norm" (1998) 23 Journal of Corporate Law 277; L. Stout, "Bad and Not-So-Bad Arguments for Shareholder Primacy" (2002) 75 South California Law Review 1189; J. Fisch, "Measuring Efficiency in Corporate Law : The Role of Shareholder Primacy" (2006) 31 J Corp L 637; Andrew Keay, "Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?" online: (2010) 7:3 European Company and Financial Law Review 369 http://www.swetswise.com.proxy2.lib.umanitoba.ca/FullTextProxy/swproxy?url=http%3A%2F%2Fwww.degruyter.com%2Fdoi%2Fpdfdirect%2F10.1515%2Fecfr.2010.369&ts=1394069393888&cs=2052589270&userName=8980349.ipdirect&emCondId=8980349&articleID=167584891&yevoID=3181871&titleID=270653&remoteAddr=130.179.16.201&hostType=PRO (accessed 17 February 2014).

[24] Virginia Harper Ho, "Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide" (2012) 36 J. Corp. L. 59 at 71.

investment.[25] To him, constituencies other than the shareholders or activities that are profit-reducing are generally not permissible, as these will impinge on the ability of the corporation to attain shareholder wealth maximization.[26]

As a response to the law and economics scholarship advancing the shareholders' primacy in the 20th century, Dodd theorized the corporate responsibility model of the modern corporation from a corporate citizenship angle.[27] This perception grounded the communitarian paradigm of corporate governance. Dodd, basing his argument on the entity theory of corporation, asserted that the corporate interest can serve a wider range of stakeholders than that of the shareholders. He opined that the corporation is a community of persons where values of respect, trust and the idea of good citizen that dictate the willingness to sacrifice personal interests for the community, are the recipe for success of the business venture.[28]

Relying on the natural entity theory's argument that the corporation is autonomous of state-imposed control on its ability to pursue economic gains and as well absolved of any peculiar obligations other than those owed by natural persons; Dodd canvassed that corporate managers and other stakeholders should not only pursue

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[25] See Adolph Berle, "Corporate Powers as Powers in Trust" (1931) 44 Harv. L. Rev. 1049. The shareholder primacy model of corporate governance which constitutes the contractarian paradigm has further been advanced by economist such as Milton Friedman who maintained that: "[The responsibility of managers] is to conduct the business in accordance with [the] desires [of shareholders], which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and in ethical custom." See also Milton Friedman, *supra* note 22.

[26] Ho, *supra* note 24 at 73 and David Millon, "Shareholder Social Responsibility" (2013) 36 Seattle U. L. Rev. 911 at 913 (examining the role of shareholders' pressure for short-term value as a challenge to CSR objectives of the corporation).

[27] Jeffrey Bone, "Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought" (2011) 24 Can. J. L. & Jurisprudence 277 at 295.

[28] *Ibid.*

shareholders' interest but equally address the concerns of non-shareholders whose interest are affected by the externalities of the corporation, including environmental degradation. This formed the basis of the concept of corporate social responsibility and, its sub-category, corporate environmental responsibility, which will be later examined. According to Dodd:

> If we think of it as an institution which differs in the nature of things from the individuals who compose it, we may then readily conceive of it as a person, which, like other persons engaged in business, is affected not only by the laws which regulate business opinion as to the social obligations of business[29]

In essence, Dodd argued for corporate responsibility with regard to all stakeholders including employees, creditors, customers and the general public, and not only responsibility to stockholders, who have invested their capital into the business of the corporation. Corporations, according to Dodd, should not only assume freedom from coercion but should assume responsibilities accordingly.[30]

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[29] See E. Merrick Dodd, Jr, "For Whom Are Corporate Managers Trustees?" (1932) 45 Harvard Law Review 1145 at 1161.

[30] In his argument in favour of corporate social responsibility, Dodd quoted Owen Young of General Electric who canvassed for good corporate citizenship as follows:

> "[T]here are three groups of people who have an interest in that institution. One is the group of fifty-odd thousand people who have put their capital in the company, namely, its stockholders. Another group is a group of well toward one hundred thousand people who are putting their labour and their lives into the business of the company. The third group is of customers and the general public"
>
> Customers have a right to demand that a concern so large shall not only do its business honestly and properly, but, further, that it shall meet its public obligations and perform its public duties—in a word, vast as it is, that it should be a good citizen.
>
> Now, I conceive my trust first to be to see to it that the capital which is put into this concern is safe, honestly and wisely

However, this corporate responsibility proposition of Dodd has been challenged by questions on how to justify the marginal expenses incurred in carrying out corporate actions or policies that are set to benefit stakeholders who are not stockholders in the corporation. Further, Berle and Means responded to Dodd by adopting the property right argument that the corporation is an asset belonging to the stockholders, and managed by the corporate executives who act as trustees in respect of the corporation.[31] According to Freedman, "What does it mean to say that 'business' has responsibilities? Only people can have responsibilities."[32]

> used, and paid a fair rate of return. Otherwise we cannot get capital. The worker will have no tools.
>
> Second, that the people who put their labour and lives into this concern get fair wages, continuity of employment, and a recognition of their right to their jobs where they have educated themselves to highly skilled and specialized work.
>
> Third, that the customers get a product which is as represented and that the price is such as is consistent with the obligations to the people who put their capital and labour in.
>
> Last, that the public has a concern functioning in the public interest and performing its duties as a great and good citizen should.

See, Orrin K. II Ames, "Closely Held Corporations: An Intersection of Business, Law, and Ethics" (2013) 43 Cumb. L. Rev. 171.

[31] See Adolph A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (New York: Commerce Clearing House Inc., 1932).

[32] Milton Freedman, "The Social Responsibility of Business is to Increase its Profits" in W Michael Hoffman and Robert E Fredrick, eds, *Business Ethics, Readings and Cases in Corporate Morality* (New York: McGraw Hill, 1995) at 133.

A. The Models of the Communitarian Paradigm

i. Single Constituency Theory

Some communitarians have advanced argument, grounded in economic theory of redistribution and allocative efficiency, for a single constituency primacy in the corporate governance scheme.[33] This approach to communitarianism, derived from the law-and-economics scholarship, proposes that the objective of business law (corporate law, antitrust law or bankruptcy law) should be focused on a defined constituency.[34] Thus, since the corporation represents an interrelationship between stakeholders, the wealth allocated to a section of the stakeholders will be redistributed to the others, and in effect the interests of all the stakeholders will be catered to effectively.[35] For instance, a company committed to its employees' welfare as its primary constituency will strive to keep the business from liquidation to avoid the economic dislocations that would follow the closure of the firm, and the consequent adverse effects on the local communities.

The practicality of this view has, however, been considered to be "rational and progressively optimistic" for a corporation, considering the complexities of co-opting the varying interests of corporate stakeholders.[36] It has been argued that the single

[33] This movement referred to as "Progressives" were piqued by the high rate of hostile takeovers during the 1980's and the consequent crises. See David Millon, "The Single Constituency Argument in the Economic Analysis of Business Law" in Dana L. Gold, ed, *Law & Economics: Towards Social Justice* (West Yorkshire, UK: Emerald Group Publishing Limited, 2007) 43.

[34] *Ibid.*

[35] Jeffrey Bone, *supra* note 27 at 294.

[36] *Ibid.*

constituency model appears to be closely related to the Team Production Model[37] as they both advocate for social and political interests beyond profit maximization.[38]

ii. Catholic Social Thought

The Catholic Social Thought (CST) model of communitarianism is as old as the modern Church, and based on Papal and ecclesiastical writings.[39] It is a doctrinal model that canvasses that the desired role of business is to pursue common good in the community of men. Thus, the corporation should be "characterized by their capacity to serve the common good of the society"[40]. The US Catholic Bishops, in 1986, called for "corporate moral responsibility and institutional accountability" of business.[41] They stated that:

> …Large corporations and large financial institutions have considerable power to help shape economic institutions within the United States and throughout the world. With this power comes responsibility and the need for those who manage it to be held to moral and institutional accountability.[42]

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[37] In 1999, Margaret Blair and Lynn Stout conceive of the Team Production Model as a new economic theory of corporate law. According to them, the interest of the corporation can be described as "a joint welfare function of all individuals making firm-specific investments" in the corporation, including the executives, regular employees, creditors, equity investors and the local community. Therefore, the "team" is protected from demands of any individual stakeholder group including the shareholder. See Margaret Blair and Lynn Stout, "Team Production Theory of Corporate Law" (1999) 24 J. Corp. L. 779. See also, David Millon, "New Game Plan or Business As Usual - a Critique of the Team Production Model of Corporate Law" (2000) 86 Va. L. Rev. 1001.

[38] Jeffrey Bone, *supra* note 27 at 294.

[39] For a legal history of the encyclical writings of the Papacy on the moral and social responsibility of the corporation, see generally William Quigley, "Catholic Social Thought and the Amorality of Large Corporations: Time to Abolish Corporate Personhood" (2004) 5 Loy. J. Pub. Int. L. 109.

[40] Susan J. Stabile, "Catholic Vision of the Corporation" (2006) 4 Seattle J. Soc. Just. 186. See also, Michael Naughton, "The Corporation as a Community of Work: Understanding the Firm within the Catholic Social Tradition" (2006) 4 Ave Maria L. Rev. 33.

[41] William Quigley, *supra* note 39 at 123.

[42] US Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the US Economy* (Washington, D.C: United States Conference of Catholic Bishops, 1986) at 25.

The core principles of the CST are identified as two.[43] First, business is created to pursue the common good, that is, the primacy of common good. Second, business must strive to bring value that will enhance the development of the person and society. CST argues that corporate activities must pursue the sanctity of human dignity and freedom. This is CST's way of expressing the communitarian ideals.

Although the CST communitarian view purports to advance a scheme of corporate governance and culture, it appears that corporate managers are not ready to inject theological ideals into secular paradigms of corporate governance. More so, the attitude of these corporate managers and directors shows they would rather separate "the world of business from the world of God."[44]

iii. Corporate Citizenship

Corporate citizenship, as a concept, can be described as a modern expression of communitarianism as classically postulated by Dodd.[45] It is akin to the corporate social responsibility (CSR) theory.[46] Thus, the idea of corporate citizenship entails a

[43] Gerald J. Russell, "Catholic Social Thought and the Large Multinational Corporation" (2007) 46 J. Cath. Leg. Stud. 107 at 114.

[44] Susan J. Stabile, *supra* note 40 and Christopher Lasch, *The Revolt of the Elites and the Betrayal of Democracy* (New York: WW Norton, 1995) at 215.

[45] Susanna Kim Ripken, "Corporations are People too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle" (2009) 15 Fordham J. Corp. & Fin. L. 97 at 117.

[46] Orrin K. Ames III, *supra* note 30 at 182 and Craig Ehrlich, "Is Business Ethics Necessary?" (2005) 4 Depaul Bus. & Com. L.J. 55. Many scholars consider the concept as uneasy to define. However, there appears to be a consensus between writers that CSR and corporate citizenship are synonymous or interrelated, at least. They resonate under the themes of accountability, responsibility and sustainability. See Mia Mahmude Rahim, "Raising Corporate Social Responsibility: the Legitimacy Approach" (2012) 9 Macquarie J. Bus. L. 111 and also Bradley K.

corporation's accountability of its social and environmental externalities in the community. The corporation as a good corporate citizen would modulate the harm and benefit of its operation to its stakeholders with a view to minimizing the negative impact of its footprint while "creating shared value in the form of economic wealth and social welfare" including environmental protection and care.[47]

To gain social license to operate within the community as a good corporate citizen, a corporate enterprise adopts "the concepts of stakeholder management, social accounting and sustainability."[48] According to Simon Zadek,

> corporations have sought under this umbrella to gain broader trust and legitimacy through visibility enhancing their non-financial performance. Today, the focus is shifting from philanthropy to the impact of core business activities across the broad spectrum of social, environmental and economic dimensions represented by the vision of sustainable development.[49]

Googins, Philip H. Mirvis and Steven A. Rochlin, *Beyond Good Company: Next Generation Corporate Citizenship* (Hampshire, UK: Palmgrave Macmillan, 2007).

[47] Bradley K. Googins, Philip H. Mirvis and Steven A. Rochlin, *Beyond Good Company: Next Generation Corporate Citizenship* (Hampshire, UK: Palmgrave Macmillan, 2007) at 19.

[48] *Ibid.* See also Neil Gunningham, Robert A Kagan & Dorothy Thornton, "Social License and Environmental Protection: Why Businesses Go Beyond Compliance" (2004) 29 Law & Soc Inquiry 307; Kernaghan Webb, "Corporate Citizenship and Private Regulatory Regime: Understanding New Governance Role and Function" in KeIngo Pies and Peter Koslowski, eds, *Corporate Citizenship and New Governance: The Political Role of Corporations* (New York: Springer Science+Business Media BV, 2011) at 39.

[49] Simon Zadek, *The Civil Corporation* (London: Earthscan, 2006) at 29.

In effect, when the corporate objective considers community interest and environmental welfare in its operations, it invariably invests in the credibility and image of the corporation.[50]

Impressively, this model of the communitarian paradigm has increasingly attracted legal and judicial affirmation. There has been a wave of constituency statutes across Anglo-American jurisdictions as well as judicial pronouncements expanding the duty of "corporate manager to act in the best interest of constituency communities", and not only the shareholders' interests.[51]

In the United States, since Pennsylvania enacted the first constituency statute in 1983, over 40 American states have adopted some form of constituency or stakeholder statutes. Even though the statutes may have been worded differently, the intent and purpose of the statutes are common.[52] The underpinning principle of the statutes is that corporate directors are permitted to consider the interest of stakeholders in the discharge of their duties.[53] They have in fact been regarded as the statutory effort to legally *require*

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[50] See generally, Archie B Carroll and Kareem M Shabana, "The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice" (2010) 12 International Journal of Management Reviews 85 at 87.

[51] David Millon, "Two Models of Corporate Social Responsibility" (2011) 46 Wake Forest L. Rev. 523 at 526. See also Walter A. Effross, *Corporate Governance: Principles and Practice* (New York: Aspen Publishers, 2010).

[52] For example, Section 17-16-830 (e) (ii) of Wyoming Statute states that "The director may consider local or national economies", whereas section 8.30 (a) (3) of Vermont Statute provides that "The director may consider any other relevant social factor."

[53] For an analysis of the theoretical basis and implication of constituency statutes, see Andrew Keay, "Moving towards Stakeholderism?: Statutes, Enlightened Shareholder Value, and all that: Much Ado about Little" (2011) 22 European Business Law Review 1 – 49. See also, Anthony Bisconti, "The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land" (2009) 42 Loy. L. A. L. Rev. 782 and Walter A. Effross, *supra* note 51.

CSR.[54] However, the statutes have been said to be only permissive and not obligatory.[55] They only allow for balancing of stakeholders' interest rather than mandating it.[56]

Similarly, in the United Kingdom, the paradigm of corporate governance has shifted to a communitarian model with the enactment of section 172 of the *Companies Act, 2006*. This provision endorses the communitarian model by introducing Enlightened Shareholder Value, which requires company directors to engage in inclusive decision making processes by considering the long term effect of their decisions on the stakeholders.[57] In fact, section 172 (d) of the Act imposes a duty on the directors to

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[54] Anthony Bisconti, *supra* note 53 at 786 (noting California's attempt in 2008 to legally mandate corporate directors to consider environmental concerns amongst other stakeholders' interests while making decisions).

[55] For instance, the Pennsylvania statute reads: "In discharging the duties of their respective positions, the board of directors, committee of the board, individual directors of a domestic corporation *may,* in considering the best interests of the corporation, consider the effects of any action upon employees, upon suppliers and customers of the corporation and upon communities in which offices or other establishments of the corporation are located, and all other pertinent factors." See Pa Stat Ann tit 15 s 516.a. For a critique of the American regime of constituency statutes, see Andrew Keay, *supra* note 53 and Anthony Bisconti, *supra* note 53.

[56] Although Arizona and Connecticut's statutes have been identified as mandatory in language, constituency statutes are generally hortatory in tone. Nathan Standley, "Lessons Learned from the Capitulation of the Constituency Statute" (2012) 4 Elon Law Review 209 at 215.

[57] *Companies' Act 2006* (UK), c 46, s 172 (1). According to Section 172(1):

> "a director of a corporation must act in the way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole, and in doing so have regard (amongst other matters) to :
>
> (a) the likely consequences of any decision in the long term;
>
> (b) the interests of the company's employees;
>
> (c) the need to foster the company's business relationships with suppliers, customers and others;
>
> (d) the impact of the company's operations on the community and the environment
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct; and

consider the consequences of their operation on the natural environment and local communities.[58] This clearly imposes CSR (and CER) in the corporate governance order of the corporation. [59]

In Canada, corporate citizenship has also been revived in recent jurisprudence.[60] The Supreme Court of Canada has now judicially endorsed the communitarian model when it held in *Peoples Department Stores Inc. (Trustee of) v. Wise*[61] that:

> …We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, *the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment*[62]
>
> (Emphasis Added)

More recently, the Supreme Court of Canada confirmed and articulated its view regarding corporate citizenship; social and environmental responsibility of the

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(f) the need to act fairly between the members of the company."

[58] *Ibid* at s 172 (1) (d).

[59] For a critique of the Enlightened Shareholder Value under the Act, see G. L. Clark and E. R. W. Knight, "Implications of the UK Companies Act 2006 for Institutional Investors and the Market for Corporate Social Responsibility" (2009)11 U. Pa. J. Bus. L. 259 at 276.

[60] The judicial attitude of Canadian courts, mostly the Ontario courts, had not been receptive to the idea of corporate responsibility and good corporate citizenship. See e.g. *Casurina Limited Partnership v Rio Algom Ltd*, 2004 181 ONCA 19, 40 BLR (3d) 112 at para 27; *Pacifica Papers Inc v Johnstone*, 2001BCSC 1069, 15 BLR (3d) 249 at para 30 affirmed in *Pacifica Papers Inc v. Johnstone*, 2001BCCA 363, 90 BCLR (3d) 94; *Gazit (1997) Inc v Centrefund Realty Corp*, 2000 ONSC 3070, 8 BLR (3d) 81 at para 69. Also, Justice Freedman remarked that: "Perhaps the true ground of company responsibility to communities was indicated by the company itself. It is grounded of *good corporate citizenship.* It has no basis in law, it is unenforceable, and it has very distinct limits. But in the context of a good society it does exist, and it can function as an operating principle." See Samuel Freedman, *Report of the Industrial Inquiry Commission on Canadian National Railways "Run-Through"* (Ottawa, ON: Queen's Printer, 1965) at 111.

[61] *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] SCC 68, 3 SCR 461.

[62] *Ibid* at para 42. See also *Teck Corp. v. Millar* (1972), 33 D.L.R. (3d) 288 (B.C.S.C.).

corporation in its prominent decision in *BCE Inc. v 1976 Debentureholders.*[63] According to the court, the company is viewed as a corporate citizen and "commensurate with the corporation's duties as a responsible citizen", its directors must act in the best interest of the company.[64] Further, the court stated that: "In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions."[65]

From these cases, it is clear that the judicial attitude of the court has shifted to the communitarian wing. Perhaps, this is driving the undercurrent of adoption of hybrid models of corporate laws across Canada by way of "social enterprise" such as Community Contribution Company[66] and other hybrid corporate models[67].

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[63] *BCE Inc. v 1976 Debentureholders*, [2008] 3 SCR 560. See Carol Liao, "The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise" (2013) 9 McGill Int'l J. Sust. Dev. L. & Pol'y 53; J Anthony VanDuzer, "BCE v. 1976Debentureholders: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision since *Peoples*" (2009) 43 UBC L Rev 205; Sarah P Bradley, "BCE Inc. v. 1976 Debentureholders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance, and Good Corporate Citizenship?" (2010) 41 Ottawa L Rev 325.

[64] [2008] 3 SCR 560 at paras 66 and 82.

[65] *Ibid* at para 40. For a review of the *BCE* case, see Mohammad Fadel, "BCE and the Long Shadow of American Corporate Law" (2009) 48 Can Bus L.J. 190 and Edward Waitzer & Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47 Osgoode Hall LJ 439 at 442.

[66] See British Columbia Ministry of Finance, News Release, 2012 FIN0011-000240, "BC Introduces Act Allowing Social Enterprise Companies" (5 March 2012) online: Government of British Columbia http://www2.news.gov.bc.ca/news_releases_2009-2013/2012FIN0011-000240.htm (accessed 6 February 2014).

[67] See Service Nova Scotia and Municipal Relations, "New Opportunities for Social Entrepreneurs" (28 November 2012) online: Province of Nova Scotia http://novascotia.ca/news/release/?id=20121128010 (introducing the Community Interest Company Act in Nova Scotia). For a general read about the emergence of the social enterprise in Canada, see e.g. BC Social Innovation Council, "Action Plan Recommendations to Maximize Social Innovations in British Columbia" (March 2012) online: Government of British Columbia http://www.innovatebc.ca/documents/Social_InnovationBC_C.pdf at 11; Adam Spence, "In Search of the Benefit Corporation" (25 November 2010) online: MaRS Centre for Impact

II. The Transnational Corporation

A. Nature and Structure of TNCs

The concept and legal form of TNCs are not clear cut. This is because TNCs consist of multiple legal entities, which make them flexible in operation and elusory in accountability. Today, TNCs are not only considered as companies that own assets, directly or through their subsidiaries, in more than one state, but also economists have come to recognize the organizational turn-around in the form and structure of TNCs. There are now many other means of business affiliation in the affairs of TNCs, such as contractual partnerships, joint ventures, franchising and distribution arrangements.[68] In essence, the main denominator in distinguishing TNCs from other forms of investments is the presence of foreign direct investment (FDI).[69] According to United Nations Conference on Trade and Development (UNCTAD) in its 2008 World Investment Report:

> Transnational corporations (TNCs) are incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake. An equity capital stake of 10 per cent or more of the ordinary shares or voting power for an incorporated enterprise, or its equivalent for an unincorporated enterprise, is normally considered the threshold for the control of assets. A foreign affiliate is an incorporated or unincorporated enterprise in which an investor that is

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Investing http://www.marsdd.com/2010/11/25/in-search-of-the-benefit-corporation/ (accessed 06 February 2013).

[68] See J. Birkinshaw, "Multinational Corporate Strategy and Organization: An Internal Market Perspective" in N. Hood and S. Young, eds, *The Globalization of Multinational Enterprise Activity and Economic Development* (London: Macmillan, 2000).

[69] John H. Dunning and Sarianna M. Lundan, *Multinationals and the Global Economy,* 2nd Ed (Cheltenham, UK: Edward Elgar Publishing Limited, 2008) at 3. See also Jennifer A. Zack, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006).

> a resident in another economy owns a stake that permits a lasting interest in the management of that enterprise[70]

In effect, the key factor that determines the nature and organizational form of TNCs is control. An organizational structure of a corporation will not be considered transnational by mere ownership of assets or equity in another entity in another country, but by relationships of 'control' of the management and assets of such corporation. Hence, the Organisation for Economic Co-operation and Development (OECD) defines a multinational enterprise as an enterprise comprising:

> companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.[71]

The courts have adopted this view in a number of instances. For example, in the precedent-setting case of *Friday Akpan v. Royal Dutch Shell,*[72] the Dutch District Court upheld the argument of one of the plaintiffs that Royal Dutch Shell PLC (the parent company) can be sued in Hague for the wrongs of Shell Petroleum Development Company (SPDC) - its foreign subsidiary because the control and policy decisions are made in the corporate headquarters in The Hague. [73] It is on this basis of control that the

[70] United Nations Conference on Trade and Development, *World Investment Report: Transnational Corporation and the Infrastructural Challenge*, UNCTADOR, 2008, UNCTAD/WIR/2008 at 249.

[71] OECD, *OECD Guidelines for Multinational Enterprise*, Doc No 00 2008 4C 1 P – No. 89095 2008 (Paris: OECD Publishing, 2008) at 12.

[72] *Friday Akpan v. Royal Dutch Shell* (30 January 2013), The Hague C/09/337050 / HA ZA 09-1580 (District Court).

[73] For the factual background and judgment of the court, see *Friday Akpan v Royal Dutch Shell* (30 January 2013), The Hague C/09/337050 / HA ZA 09-1580, (District Court of the Hague)

District Court of the Hague assumed jurisdiction in this matter and considered Royal Dutch Shell PLC and SPDC as necessary and proper parties to the claim. Similar jurisprudence has been adopted in the Canadian case of *Hudbay Mineral Inc. v CGN*.[74]

B. Impact and Influence of TNCs

The socio-economic power and stature of the TNCs cannot be overemphasized. TNCs have assumed a dominant position as influential actors in world trade since the nineteenth century.[75] Today, they determine the level and scale of economic prosperity and misfortune in our world. They have continued to capitalize on the benefits they bring to their host states through economic growth, favourable balance of payments, technology transfer and innovation, employment opportunities, import substitution and export promotion. As a result, they enjoy favourable treatment from host government and often operate in a regulatory void. This dominance is further underscored by the appreciable growth of FDI. As illustrated by the World Investment Report 2009, there is a meteoric rise in the total annual figure of FDI over the last few decades. As of 1980, the inflow of FDI stood at approximately $50 billion; and by 1990 and 2000, the figure had risen to about $200 billion and $1400 billion, respectively.[76] The figure stood at a record high of

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online: http://www.menschenrechte.uzh.ch/entscheide/Friday_Alfred.pdf (accessed 12 December 2013)

[74] *Hudbay Mineral Inc. v CGN*, 2013 ONSC 1414.

[75] For the historical background and development of transnational enterprise in different epochs with case studies see Mira Wilkins, "The History of the Multinational Enterprise*"* in Alan Rugman, ed, *The Oxford Handbook of International Business*, 2nd Ed (Oxford: Oxford University Press, 2009).

[76] UNCTAD, *supra* note 2.

$1979 billion in 2007 before plunging in 2008 and 2009 owing to the global financial crisis.[77]

Looking closer, the largest oil TNCs have continued to record huge revenues and massive profits. In 2011, for example, ExxonMobil recorded a whooping $486 billion in revenues, from which it made a profit of $30.4 billion, the highest for any TNC for the year. In the same year, Royal Dutch Shell came next in revenues with the sum of $470 billion dollars and declared $30.9 billion as profit; British Petroleum earned a total of $386 billion in revenues with a profit of $25.7 billion; Chevron made $253 billion in revenues and gained $26.9 billion as profit; and ConocoPhillips recorded $244.8 billion as revenues out of which it made a profit of $12.4 billion.[78]

As a result of this level of economic power, TNCs now exert a considerable degree of leverage over governments (home or host) especially in the developing world most of which are poor, ill governed and economically dependent on the TNCs economic activities in their countries.[79] Furthermore, it is common to have TNCs enlisting the support of their governments (most of which are industrialized and powerful) to protect or advance their interests in developing nations. Assistance provided by government could take the form of loan guarantees, diplomatic protection, negotiation of favourable terms in bilateral treaties and investment contracts or military intervention. For example,

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[77] *Ibid*

[78] Revenue Watch Institute, *Oil vs. the World*, online: Revenue Watch Institute http://www.revenuewatch.org/issues/dodd-frank/oilvsworld (accessed 7th November 2013)

[79] Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press Incorporated, 2009) at 6. It is interesting to note the observation of Braithwaite & Drahos that "the global law-makers today are the men who run the largest corporations, the US and the EC". See John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

in 1954, the US invaded Guatemala to prevent the Guatemalan government from expropriating and reallocating unused prime farmland belonging to the United Fruit Company.[80]

The level and nature of TNCs' interference with political process of an independent state was notably demonstrated in the early 1970s, when International Telephone and Telegraph (ITT) offered the US Central Intelligence Agency (CIA) US$1 million to sponsor a campaign against the candidacy of Salvador Allende in Chilean national elections.[81] Though the CIA refused the offer, and although Allende was democratically elected, ITT continued to lobby the US government and other US corporations to promote opposition to Allende through economic pressure including the cut-off of credit and aid and support of Allende's political rivals. After copper mines in Chile owned by the firms Kennecott and Anaconda were nationalised, the US government took a series of steps based largely on the recommendations of ITT to subvert Allende.[82]

The revelation of ITT's involvement in plots to overthrow Allende culminated in efforts within the United Nations to draft a TNC Code of Conduct to establish some guidelines for corporate conduct. This move was part of a more general concern about the extent of the economic and political influence of corporations in the 1960s and 1970s,

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[80] Dalip Swamy, *Multinational Corporation and the World Economy* (New Delhi: Alps Publisher, 1980) at 130.

[81] Glenn P. Hastedt, ed, *Spies, Wiretap and Secret Operations* (California: ABC-CLIO LLC, 2011) at 158. See also Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Picardo, 2010).

[82] Richard Barnet and Ronald Muller, *Global Reach: The Power of the Multinational Corporations* (London: Jonathan Cape, 1975) at 81.

and which led some less-industrialised countries to demand that TNCs divest from certain sectors or to require changes in the terms of a company's investment.

In some cases, TNCs even make economic threats to host governments so as to compel them to relax their legal regimes or even abandon an existing one. In Nigeria, for instance, following the initiation of the Petroleum Industry Bill, which seeks to reform and revamp the oil industry particularly by introducing a new fiscal regime and institution of a Petroleum Host Communities Fund, coupled with the operational difficulties and security challenges faced by oil corporations in the Nigeria's Niger Delta region, the oil TNCs operating in Nigeria have been divesting their business interests in the country.[83] This is in a bid to bring the government to its knees and abandon the reform process.

III. Corporate Environmental Responsibility

The environment as a focus of law is a familiar domain in theory and practice.[84] Due to the biophysical reality that transcends the political division of the world into sovereign states, environmental protection is now of international or global concern beyond state jurisdiction. Ecosystems are interrelated in profound and complex ways. As

[83] Business Day, "PIB and threats to Nigeria's Oil Industry" *Business Day* (15 October 2013) online: Business Day http://businessdayonline.com/2013/10/pib-and-threats-to-nigerias-oil-industry/ (accessed 06 February 2014); Johnson Eze, "PIB: Why Nigeria Must Act Fast" *This Day* (17 December 2013) online: This Day Live http://www.thisdaylive.com/articles/pib-why-nigeria-must-act-fast/166756/ (accessed 06 February 2014).

[84] Stephen Dovers and Robin Connor, "Institutional Policy Change for Sustainability" in Benjamin Richardson and Stepan Wood, eds, *Environmental Law for Sustainability* (Oregon: Hart Publishing, 2006) at 21.

a result of these interrelationships, environmental impacts can have widespread repercussions across vast distances and over long periods of time.[85]

Development through economic growth and technological innovation has brought major gains. But it has also begun to eat away at the world's ecological base and digging a dangerously expanding gulf between the rich and poor.[86] Scientific evidence has established that human activities are responsible for significant adverse environmental effects well beyond the national and local reach of most environmental law.[87] In dealing with emission of greenhouse gases (GHG) that are responsible for global warming and a host of other transboundary pollution, resource depletion and ecological damage, there is a need to develop a new approach to regulation and a sustainable model of production and consumption.[88] It is imperative for businesses to adopt production design and technologies that would: 1) increase the productivity of natural resources; 2) eliminate the concept of waste and not merely reduce waste; 3) move towards a solution-based

[85]Jaye Ellis and Stepan Wood, "International Environmental Law" in *ibid* at 344.

[86] This reality explains the findings of the World Commission on Environment and Development chaired by the Mrs Gro Harlem Brundtland in 1987. The commission, in its report, proclaimed that the current economic path was not sustainable and would lead humanity to chaos. Hence, a radical shift in agenda was imperative. On the mandate and proceedings of the Brundtland Commission, see *Report of the World Commission and Environment and Development : Our Common Future*, WCED, 4th year, Annex, Agenda Item 1, UN Doc A/42/427 (1987) at 3.

[87] Paul Muldoon et al, *An Introduction to Environmental Law and Policy in Canada* (Toronto: Emond Montgomery Publications Limited, 2009) at 14. The Intergovernmental Panel on Climate Change (IPCC) reports have clearly established the interconnection between human activities and global warming, which has resulted in anthropogenic climate change. See R.K. Pachuri & A. Reisinger, eds, *Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Switzerland: IPCC, 2007) at 104.

[88] Amory B. Lovins, Hunter Lovins & Paul Hawken, "A Road Map for Natural Capitalism" in Neil Gunningham, ed, *Corporate Environmental Responsibility* (Surrey, UK: Ashgate Publishing Limited, 2009) at 5.

business model; and 4) reinvest in natural capital by restoring, sustaining and expanding planet's ecosystems.[89] This is the thrust of corporate environmental responsibility (CER).

CER is a subcategory of corporate social responsibility (CSR).[90] CER can be said to be a duty call on companies to integrate environmental concerns in their business operation and in their interactions with their stakeholders on a voluntary basis.[91] It takes into account environmental commitment, whereby the company fully embraces sustainability and has a net positive impact on environment and society.[92] It entails practices that benefit the environment or mitigate the adverse impact of business on the environment, even though they are not legally mandatory.

A. Historical Perspectives and Evolution of CER

In the discourse of corporate environmental management and responsibility, a long line of literature has argued that levels of environmental protection and compliance are uneven. Poorer areas and populations are likely to be exposed to higher levels of emissions and lower levels of environmental quality.[93] In developing countries,

[89] See Giorgios Papagiannakis & Lioukas Spyros, "Values, Attitudes and Perceptions of Managers as Predictors of Corporate Environmental Responsiveness" (2012) 100 Journal of Environmental Management 41.

[90] Neil Gunningham, "Introduction" in *supra* note 88 at xiii.

[91] Philip Pattberg & Johannes Stripple, "Beyond the Public and Private Divide: Remapping the Transitional Climate Governance in the 21st Century" (2008) 8 International Environmental Agreements: Politics, Law and Economics 367.

[92] See Alison Jamison et al., "Defining Corporate Environmental Responsibility: Canadian ENGO Perspective" The Pembina Institute and Pollution Probe (August 2005) online: http://environment.alberta.ca/documents/Defining_Corporate_Environmental_Responsibility.pdf (accessed 06 February 2014).

[93] See J. Agyeman , "Constructing Environmental (In)justice: Transatlantic Tales" (2002) 11 Environmental Politics 632; J Bullard and GS Johnson, "Environmental Justice: Grassroots Activism and its Impact on Public Policy Decision Making" (2000) 56 Journal of Social Issues

environmental laws are lax and monitoring and evaluation slack.[94] The enforcement of existing laws by governmental agencies has also been relatively loose because more emphasis is placed on economic gain and material well-being.[95] Therefore, levels of compliance are low and pollution is considered an acceptable side effect of economic growth. Firms tend to pick and choose violations of environmental standards where the expected penalty for violation is lesser than the cost of compliance, whereas when a country attains a sufficiently high standard of living, the environmental law regime and accountability is enhanced.[96] Environmental legislation is passed, regulatory framework for protection is installed, compliance enforced and the quality of the environment improves.[97]

Many authors have set out the stages in the evolution of CER from reactive to proactive.[98] Over the last two decades, the relationship between business and the

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578; Lyuba Zarky, ed, *Human Rights and the Environment: Conflicts and Norms in a Globalizing World* (London: Earthscan, 2002) and United Stated Environmental Protection Agency (US EPA), "Moving towards Collaborative Problem Solving: Business and Industry Perspectives on Environmental Justice", Report No. EPA/300-R-03-003, US EPA, Cincinnati, OH, online: <www.epa.gov/compliance/resources/publications/ej/annual_project-reports/study-industry-perspective-ej-permitting.pdf> (accessed 23 November 2012).

[94] Andrew J. Hoffman, *From Heresy to Dogma: An Institutional History of Corporate Environmentalis*m (California: New Lexington Press, 1997) and Evan Schoefar & Francisco Grenalos, "Environmentalism, Globalization and National Economies, 1980 - 2000" (2006) 85 Social Forces 965.

[95] F. Kusku, "From Necessity to Responsibility: Evidence for Corporate Environmental Citizenship Activities from a Developing Country's Perspective" (2007) 14 Corporate Social Responsibility and Environmental Management 74 and J.C. Lang & A.C. Ho, "Environmentalism and the Multinational Corporation: A Viewpoint-Part II" (2000) 57 The International Journal of Environmental Studies 373.

[96] *Ibid.*

[97] F. Kusku *supra* note 95.

[98] *See* S.L. Hart, "A Natural Resource-Based View of the Firm" (1995) 20 Academy of Management Review 986; Jamison Allison et al, "Defining Corporate Environmental Responsibility: Canadian ENGO Perspectives" (4 November 2005) online: Pembina Institute and

environment has experienced a significant level of transformation.[99] Corporate environmentalism[100] has attracted considerable interest over this period[101] as industry has been accused of 'environmental rape and pillage.'[102]

With increasing awareness on environmental issues and the magnitude of associated costs, it has become imperative for companies to integrate environmental efforts into their business strategy.[103] Today under CER, a growing number of business organizations are seeking to improve their environmental performance and to mitigate their environmental harm in ways that earn them a competitive advantage.[104] Such organizations are deploying diverse initiatives intended to earn them new market opportunities, generate cost savings, improve efficiency, reduce environmental risk and enhance their corporate image.[105]

Pollution Probe <www.pollutionprobe.org/old_files/Reports/cerreport.pdf> (accessed 29 October 2012).

[99] Gunningham, *supra* note 88 at xiii.

[100] This is the movement advancing effective environmental performance of businesses through their activities and supply chain.

[101] Anja Schaefer and Brian Harvey, "Stage Models of Corporate 'Greening': A Critical Evaluation" in Gunningham, *supra* note 88 at 435.

[102] Sumita Sindhi and Niraj Kumar, "Corporate Environmental Responsibility – Transitional and Evolving" (2012) 23 Management of Environmental Quality: An International Journal 640.

[103] *Ibid*. True social and environmental costs are negative externalities that are not accounted for in markets. For instance, in a number of economic sectors such as transportation, negative externalities such as pollution, health impacts or loss of productivity (due to heavy traffic) are typically not reflected in costs of an activity. See Nicholas Low et al, eds, *Consuming Cities: The Urban Environment in the Global Economy after Rio Declaration* (London: Routledge, 2012) at 265.

[104] Gunningham, *supra* note 88 at xiii and Bobby S Banarjee, "Corporate Environmentalism: the Construct and its Measurement" (2012) 55 Journal of Business Research 177.

[105] *Ibid.* These initiatives include pollution prevention and control, material and energy efficiency initiatives, development of clean technology and product stewardship. See Julia Farthing, Bridget Marshall and Peter Kellett, *Pollution Prevention and Control: The New Regime* (London: Tottel,

The doctrine of CER is a child of humble beginning. Though the concept is not new, its current emphasis is. It emanated from the web of argument against CSR by the neo-classical economists of the 1970's.[106] In the 1990s, the assertion of the neo-classics that corporate spending on environmental protection will almost inevitably impose cost rather than benefit was under attack.[107] Business strategists, environmental commentators and even corporations themselves argued that the objectives of environmental protection and economic growth are achievable contemporaneously.[108] Smart corporations could ease the pressures imposed by regulators and the public. They could increase profits directly and develop the environmental technologies necessary to compete effectively in the global environmental market.[109] According to Amory Lovins, Hunter Lovins and Paul

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2003) and Nicholas P Cheremisinoff, *Handbook of Air Pollution Prevention and Control* (Oxford: Butterworth-Heinemann, 2002) at 19.

[106] The neo classical economic theorists found no justification in corporate spending beyond the requirement of the law. According to this school, altruistic spending on matters such as environmental protection and sustainable development outside the prescription of law is an anathema. This view is hinged on Milton Friedman's famous declaration of shareholder's primacy and maximization of outstanding shares value. See David Vogel, "Is There A Market for Virtue?: The Business Case for Corporate Social Responsibility" in Gunningham, *supra* note 88 at 187.

[107] Much of these 1990s debate took place within the pages of the Harvard Business Review, with the main advocates as Amory Lovins, Hunter Lovins and Paul Hawkins who argued for natural capitalism. On their rehashed arguments on natural capitalism, see Paul Hawkens, Amory B Lovins & Hunter Lovins, *Natural Capitalism: The Next Industrial Revolution*, 10th ed (Washington DC: Earthscan Limited, 2010).

[108] Gunningham, *supra* note 88 at xv. This might be achieved through initiatives such as preventing pollution and thereby cutting costs and avoiding waste directly, by more effective risk management or gaining price premium with expanding 'green markets' etc. See also David T Jess, *Good Green Jobs in a Global Economy: Making and Keeping New Industries in the United States* (Massachusetts: MIT Press, 2012) at 49.

[109] Gunningham, *supra* note 88 at xvii. See also Paddock LeRoy et al, eds, *Compliance and enforcement in Environmental Law: Towards More Effective Implementation* (London: Edward Edgar, 2012).

Hawken, due recognition of natural capital would attain the dual objectives of business and environmental interests.[110]

Stuart Hart also argued that there are considerable business opportunities not only by reducing pollution and increasing profits at the same time or by risk reduction, re-engineering or cost-cutting but by going 'beyond greening'.[111] He advocates for product stewardship and development of clean technology, which will make business sense if strategically approached. This view is representative of the *natural-resource-based view of the firm*, which perceives the technological, organizational and human resources that can be turned to environmental ends as increasingly valuable and draws the link between environmental capacities and strategic competitive advantage.[112]

On the other end of the spectrum, skeptics - most prominently David Vogel - argue that the circumstances in which CER is likely to be a viable business strategy are seriously circumscribed.[113] This view was embraced by a variety of commentators who view CER as a trivial concern at business margins rather than substantial action at its core.[114] To this school, CER does not make any business case for an organization.

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[110] Paul Hawkens, Amory B. Lovins & Hunter Lovins, *supra* note 107 at 144.

[111] Stuart Hart, "Beyond Greening: Strategies for a Sustainable World" (1997) 1 Harvard Business Review 66.

[112] *Ibid.*

[113] According to Vogel, CSR generally and CER in particular do matter, but they are not critical issues and certainly not business strategy. After examining approaches of companies such as Ford, British Petroleum, Toyota, Honda and some other power generating firms, he concluded that there is no evidence that behaving more virtuously makes firms more profitable. See David Vogel, *Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington DC: Brookings Institution Press, 2006) at 110.

[114] Gunningham, *supra* note 88 at xvi. See also Interview of Clive Crook by The Economist (20 January 2005 on *The Economist* online: http://www.economist.com/node/3555212 (accessed 13 December 2012) (wherein Crook opined that CSR is little more than "a cosmetic treatment that gets smeared by the day and washes off at night").

However, CER initiatives of global corporations have continued to gain well-deserved visibility. According to Chris Laszlo:

> A small but influential group, they are now reinventing the role of business in society. They are shifting focus away from minimizing negative impacts (such as brutally downsizing employees or unintentionally contaminating soil and water) to offering new solutions to global problems that the public sector has been unable to tackle alone[115]

Andrew Hoffman has also shown in his book how multinational companies have incorporated carbon reduction initiatives into their business plans for reasons of both environmental risk and opportunity.[116] In fact, leading companies themselves have expressed such belief.[117] Yet, there remains limited understanding about why organizations go beyond regulations when they are not significantly pressured by society to do so.

B. Tools and Mechanisms Imposing CER

During the last two decades there has been tremendous pressure on firms to minimize or eliminate emissions, effluents and waste in their operations.[118] Considering

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[115] Chris Laszlo, *Sustainable Value: How the World's Leading Companies are Doing Well by Doing Good* (Sheffield: Greenleaf Publishing, 2008) at 21.

[116] See Andrew Hoffman, *Carbon Strategies: How Leading Companies Are Reducing their Climate Change* (Michigan: University of Michigan, 2007).

[117] Some influential business leaders formed the World Business Council for Sustainable Development, where the term 'eco-efficiency' was coined and they facilitated dialogue with politicians about means of achieving sustainability in preparations to the Johannesburg environmental summit in 2002. See Stephan Schmidheiny & World Business Council for Sustainable Development, *Changing Course: A Global Business Perspective on Development and the Environment* (Massachusetts: MIT Press, 1992).

[118] Hart, *supra* note 111 at 992. In 1989, for example, the *Superfund Amendments and Reauthorization Act* (SARA) was passed in the United States. It amended the *Corporate Environmental Response, Compensation and Liability Act* and now requires companies to

the theoretical outlook of Hart's Natural-Resource-Based View (NRBV) and Scott's neo-Institutional theory, factors of CER have been broadly divided into market based and institutional categories.[119] These factors have different influencing mechanisms but they are interlinked and have synergistic effects.[120] These categories include:

i. Statutory Regulation;

ii. Market forces;

iii. Stakeholder pressure; and

iv. Self-regulation

i. Statutory Regulation

Several academic studies have shown that the most influential driver of CER is the command and control regimes of state intervention.[121] According to Professor John Hewson: "it is clearly evident that where a legislative, regulatory and compliance framework is present, companies, because they are required to comply, tend to perform

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publicly disclose their emission levels of some 300 toxic or hazardous chemicals through what is now known as the toxic release inventory (TRI). It now imposes on US Environmental Protection Agency duty to revise the Hazard Ranking System. See *Superfund Amendments and Reauthorization Act*, SARA 2002, as amended through PL 107-377, s 311.

[119] The NRBV theory states how an individual firm might earn competitive advantage by going green while the Institutional theory emphasizes the role of social and cultural pressures imposed on organizations that influence organizational practices and structures. See Gregorio Martin de Castro et al, *Environmental Innovation and Firm Performance: A Natural Resource Based View* (Hampshire, UK: Palgrave McMillan, 2013) at 18.

[120] Sumita Sindhi and Niraj Kumar, "Corporate Environmental Responsibility – Transitional and Evolving" (2012) 23 Management of Environmental Quality: An International Journal 642.

[121] The command and control mechanism entails the entire process of promulgating authoritative rules for human behavior by the state and ensuring compliance with these rules. See Evaristus Oshionebo, "Transnational Corporations, Civil Society Organizations and Social Accountability in Nigeria's Oil and Gas Industry" (2007) 15 African Journal of International and Comparative Law 3 and Muldoon et al, *supra* note 87 at 72.

better in terms of social responsibility."[122] In fact, it has been argued that industry needs the certainty of regulations otherwise they risk commercial disadvantage. Stephen Porter states that:

> Most industries won't go too far ahead of regulation, so you tend to get compliance reactions, rather than 'compliance plus' reactions because most industries feel it would be too risky to go too far ahead of legislation [because it may] put them at a commercial disadvantage or that legislation might go off in a different direction[123]

Authors have identified regulations as being both beneficial and at other times the major cause of non-compliance due to its complexities.[124] Indeed, the central focus of traditional regulatory approach is to promote corporate greening and sustainability but scholars have acknowledged its inefficiencies and difficulties when harmonizing enforcement across time and place. The legal framework of the regulatory mechanism is a visible drawback. The legal framework frequently measures compliance against "industry standards", "business necessity", and "the limits of current technology". [125] Many a time, costs of compliance could be large enough to discourage firms with minimal capacity to invest in compliance equipment. However, positive incentives such

[122] For the transcript of his interview on drivers of CER, see Kel Dummet, "Drivers for Corporate Environmental Responsibility (CER)" (2006) 8 Environment, Development and Sustainability 378.

[123] To illustrate his point, Porter cited the case study of Rover. In the 1980s, the vehicle manufacturer invested a vast amount of money in clean burn engine design as a technically better alternative to the catalytic converter for reducing vehicle emission in engines. This 'compliance plus' initiative cost Rover heavy loss when the UK government legislated for catalytic converters. *Ibid* at 378.

[124] G.D. Garrod, "The Non-Use Benefits of Enhancing Forest Biodiversity: A Contingent Ranking Study" (1997) 21 Ecological Economics 45.

[125] Sindhi & Kumar, *supra* note 120 at 642.

as lowered pollution reduction per unit costs, tax breaks and investment subsidy can enhance a firm's level of compliance.[126]

Either way, the principle of environmental protection as a matter of state responsibility has attained international legitimacy with the increase in interaction, learning and exposure to a wide range of environmental advocacy groups, as well as scientific knowledge.[127] Furthermore, it is a familiar lesson that scientific certainty about environmental harm often comes too late to formulate effective legal and policy response for preventing potential environmental risks.[128] This lesson brought about a re-evaluation in the manner of approaching environmental problems. At the center of this re-evaluation is the precautionary principle which stipulates taking anticipatory actions to avoid environmental harm before it occurs.[129] This principle has informed regulations with effective tools for inducing beneficial environmental effects by enhancing competitiveness, offsetting costs of compliance and by stimulating innovation in business operation and strategy.[130] It has also been suggested that although environmental

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[126] Principle 10 of the Rio Declaration on Environment and Development declares that 'states shall enact effective environmental legislation'. See also K. Priyadarshini & O.K. Gupta, "Compliance to Environmental Regulations: the Indian Context" (2003) 2 International Journal of Business and Economics 26.

[127] A Sawhney, "Greening Indian Businesses for the World Market" (2004) 46 Asian Economic Review 413.

[128] Chris Wold, David Hunter & Melissa Powers, *Climate Change and the Law* (New Jersey: LexisNexis Matthew Bender, 2009) at 166.

[129] It has hitherto informed the major environmental treaties and conventions including the UNFCCC and the Kyoto Protocol. This principle is well elaborated under Principle 15 of the Rio Declaration See *Rio Declaration on Environment and Development*, UNCED, 10th year, Annex Agenda, Item 1, UN Doc A/CONF 151/26 (1992) at 3.

[130] An apt example is the German "take-back" law for selected industries (e.g. automobiles). This law gave customers right to return spent products to the manufacturer at no charge. In turn, manufacturers were prevented from disposing of these used products. Hence, the law provided tremendous incentive for companies to lean towards designing products and packaging that could

regulations may reduce productivity in the short term it can lead to long-term increases in total factor productivity.[131]

In view of its advantages, statutory regulation remains the most effective driver for environmental compliance. Going beyond environmental compliance however requires other non-regulatory considerations.

ii. Market Forces

Competitive market pressure is another major driver of corporate environmentalism.[132] Business leaders have recognized the significance of environmental protection and sustainability to their international competitive advantage. This recognition has led to a new round of proactive voluntary standards emphasizing the integration of environmental management and corporate strategy.[133] Firms now deploy strategic capabilities for pollution prevention and control, product stewardship and sustainability to realize cost advantage relative to competitors.[134] Market pressures to enhance cost competitiveness have additionally stimulated the adoption of environmental

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be easily composted, reused or recycled in order to avoid prohibitive disposal cost and penalty. This novel initiative has received acceptance in the economies of the European Union, Japan and even the United States. See Hannah McCrea, "Germany's "Take Back" Approach to Waste Management: Is There a Legal Basis for Adoption in the United States?" (2011) 23 Geo Int'l Envt'l L Rev 513.

[131] Sindhi & Kumar, *supra* note 120 at 644.

[132] Andrew J. Hoffman, *Competitive Environmental Strategy: A Guide To The Changing Business Landscape* (Washington DC: Island Press, 2000) at 10 and Olive Salzmann, *Corporate Sustainability Management in The Energy Sector* (Wiesbaden: Gabler, 2008).

[133] *Ibid*; Mahdu Khanna & William Rose Q. Anton, "Corporate Environmental Management: Regulatory and Market-Based Incentives" (2002) 78 Land Economics 539 and Hart, *supra* note 13 at 992.

[134] For example, with the pollution control equipment, emissions and effluents are trapped, treated, stored and disposed of during the manufacturing process. In prevention mechanisms, emissions and effluents are reduced, changed or prevented through better house-keeping, material substitution, recycling, or process innovation. See Hoffman, *supra* note 132 at 107.

management standards (EMS) such as ISO 14001 because they contribute to identifying and implementing efficiency improvements.[135] Sustainability-inclined corporations have adopted the 3R's – reducing, recycling and reusing. They reduce energy and material input cost by replacing older, inefficient process technologies with modern, efficient alternatives.

Further, the emergence of the concept of Socially Responsible Investment (SRI) and the ethical funds indexes such as Dow Jones Sustainability World Index (DJSWI), Domini 400 Social Index and the FTSE4Good Index have also influenced environmental performance of companies.[136] Now, investors aim to reconcile their portfolios with their consciences and sustainability ethos.[137] They choose to invest more in firms with acclaimed sound environmental practices and performance. This phenomenon has promoted *green* transparency in business conduct. Indeed, it is a remarkable driver of CER and it has influenced market and investment.

iii. Stakeholder Pressure

The rising influence of societal stakeholders, such as communities, civil society groups, and consumers, is one of the most significant developments in international

[135] Dean Dwane, "Consumer Perception of Corporate Donations: Effect of Company Reputation for Social Responsibility and Type of Donation" (2003) 32 Journal of Advertising 91.

[136] Neil Gunningham, Robert Allen Kagan & Dorothy Thornton, *Shades of Green: Business, Regulation and Environment* (California: Stanford University Press, 2003) at 26 and David Vogel, "Private Global Business Regulation" (2008) 11 Annual Review of Political Science 261.

[137] Gunningham, Kagan & Thornton, *supra* note 136 at 47.

affairs in the last two decades.[138] There is an affirmative relationship between stakeholder pressures and the adoption of proactive environmental practices.[139] Stakeholders are known for encouraging adoption of environmental management systems (EMS) and improved environmental performance. These in turn demand integrity, standards, transparency, and accountability in CER.[140]

Civil society and non-governmental organizations (NGOs) play very useful roles in regulating corporations and the polity as a whole. NGOs are free from business and government interference due to their diverse nature and composition.[141] NGOs have heightened their focus on accountability and transparency across a range of corporate behavioural issues. When a positive connection is made, positive opinions of the corporation are generated, the trust by the stakeholder is enhanced, the community offers wider support, and corporate brand management can receive a boost.[142] Civil society wields this regulatory force through the instrumentality of its public campaigns, boycott or divestment. Civil society pressure is one of the major drivers of corporate environmentalism. Its influence has been mobilized in at least three ways – involvement

[138] JP Doh & TR Guay, "Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective" (2006) 43 Journal of Management Studies 47.

[139] Sindhi & Kumar, *supra* note 120 at 645.

[140] *Ibid* and Gunningham, Kagan & Thornton, *supra* note 136 at 19.

[141] Oshionebo, *supra* note121 at 112.

[142] David Armstrong & Julie Gilson, "Introduction: Civil Society and Global Governance" in David Armstrong et al, eds, *International Governance: The Role of Non-State Actors in Global and Regional Regulatory Frameworks* (London: Routledge, 2011) at 6 and Gerd Winter, *Multilevel Governance of Global Environmental Change*: *Perspective from Science, Sociology and the Law* (Cambridge: Cambridge University Press, 2006).

in public hearings, sponsorship of public interest litigation and monitoring of transnational corporations.[143]

iv. Self Regulation

Self regulatory mechanisms, such as voluntary codes, broadly refer to "commitments undertaken by one or more polluters or resource users, in the absence of an express legal requirement to do so, prescribing norms to regulate their behavior in relation to their interaction with the environment".[144] There exists a cascade of variations of self regulatory codes along many dimensions – one corresponds to polluters or resource users; one to the public authorities and one to third parties.[145] Self regulatory codes are central drivers for profit-seeking firms as the benefits range from cost savings

[143] See A Ebrahim & E Weisband, *Global Accountabilities: Globalism, Pluralism and Public Ethics* (Cambridge: Cambridge University Press, 2007) and Petra Christmann, "Multinational Companies and the Natural Environment: Determinants of Global Environmental Policy Standardization" (2004) 47 Academy Management Journal 747. In Canada, community groups and NGOs have been able to delay, or scuttle altogether, project proposals by raising objections at the public hearing stage of statutory environmental impact assessments. For instance, recently, over 4, 000 concerned citizens and environmental groups led by Environmental Defence successfully foiled the construction of TransCanada's proposed KeyStone XL tar sands pipeline of 1, 897km from Alberta to Nebraska in the United States. According to these groups, this project would have carried about 150 million of carbon pollution from tar sands to the US each year. To read further, see Environmental Defence, Media Release, "Statement by Rick Smith, Executive Director of Environmental Defence, in response to President Obama's decision to reject TransCanada's Proposed XL Keystone Tar Sands Pipeline" (18 January 2012) online: Environmental Defence < http://environmentaldefence.ca/articles/statement-rick-smith-executive-director-environmental-defence-in-response-president-obama%E2%80%99s> (accessed 12 December 2012). Also of significance is the role of the civil society in the Clean Environment Commission's public hearing in respect of the BIPOLE III Transmission and Keeyask Generation projects of Manitoba Hydro. See Manitoba Clean Environment Commission, Media Release, "Hearings" (November 2012) online: Manitoba Clean Environment Commission http://www.cecmanitoba.ca/hearings/index.cfm?hearingid=39 (accessed 13 December 2012).

[144] Wood, "Voluntary Environmental Codes and Sustainability", *supra* note 141 at 231.

[145] Andre Nollkaemper, "Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives" in Winter, *supra* note 141 at 179.

to regulatory gains, increased revenues, reputational gains as well as fulfillment of legal stipulations.[146]

Conclusion

Now it is clear that TNCs wield wide economic and political powers that make the regulation of their operations impracticable within both domestic and international regimes. They control massive resources and determine the economic fate of nations—a stature that has put them ahead of the regulatory bandwidth. This is problematic as it creates a void in the regulatory scheme, and their externalities, particularly; environmental lawlessness remains a challenge in the poorest regions of the world.

Going by emerging evidence of statutory and judicial affirmation of the communitarian paradigm of corporate governance, it seems to be a promising avenue to pursue CER especially in transnational enterprise. It is still theoretically valid and capable of revolutionizing corporate law and practice in the realm of corporate social and environmental responsibility to the point where corporate law will fully recognize CER as a mandate and not philanthropy. In other words, the concept of good corporate citizenship will not be a noble cause, but one that attracts sanction when derogated from.

[146] Wood, *supra* note 141.

CHAPTER TWO

ENVIRONMENTAL RESPONSIBILITY OF TNCS IN AFRICA: CASE STUDIES OF THE CHAD-CAMEROON OIL AND PIPELINE PROJECT AND THE NIGER-DELTA OIL AND GAS EXPLORATION IN NIGERIA

I. Introduction

Africa is a prominent driver of world's energy. It accounts for over 12 percent of oil and gas supplies in the world, and has overtaken the Middle East as the United States' largest regional supplier.[1] Out of the 54 countries in Africa, 16 are oil exporting countries with over 500 oil companies exploiting oil and gas resources on the continent.[2] In 2010, Africa recorded about 20 percent of world's oil export while holding about 10% of the world's proven reserve of oil.[3] According to US Energy Information Agency, Africa's proven oil reserves have grown from 57 billion barrels in 1980 to 124 billion barrels in 2012.[4] This

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[1] See generally, African Development Bank and African Union, *Oil and Gas in Africa - Supplement to the African Development Report*, AfDBOR 978–0–19–956578–8 (2009) online: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf (accessed 07 February 2014). See also Alex Vines et al, "Thirst for African Oil", Chatam House online: http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SU004/vines.pdf (accessed 07 February 2014).

[2] As of 2012, the sixteen African countries exporting oil in varying quantities are: Nigeria, Angola, Libya, Algeria, Sudan, South Sudan, Equatorial Guinea, Congo (Brazzaville), Gabon, Chad, Egypt, Tunisia, Cameroon, Ivory Coast, Democratic Republic of Congo (DRC) and Mauritania. See KPMG, *Oil and Gas in Africa: Africa's Reserves, Potentials and Prospects,* online: KPMG [Africa] https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/Documents/Oil%20and%20Gas%20in%20Africa.pdf (accessed 17 February 2013) and Ernst & Young, *African Oil and Gas: A Continent on the Move* online: Ernst & Young http://www.ey.com/GL/en/Industries/Oil---Gas/Africa-oil-and-gas--a-continent-on-the-move---The-African-oil-and-gas-landscape (accessed 05 March 2014).

[3] *Ibid.*

[4] US EIA, *International Energy Statistics*, online: US Energy Information Administration http://www.eia.gov/countries/data.cfm (accessed 05 March 2014).

impressive energy profile has not only attracted investment from oil TNCs, it has ushered serious environmental externalities into the continent.

According to a 2011 report of United Nations Environment Programme (UNEP), the scale of environmental pollution that has been caused by oil exploitation in Nigeria's Niger Delta region is disastrous.[5] It has caused grievous contamination of the air, water systems and land sites. Thus, the Executive Director of UNEP, Achim Steiner, said: "[t]he oil industry has been a key sector of the Nigerian economy for over 50 years, but many Nigerian have paid a high price…"[6] In fact, the environmental restoration of the region, which was recommended by UNEP, has been valued at an initial $1 billion spanning about 30 years to clean up.[7]

This chapter will attempt an examination of the environmental consequences of the operations of oil TNCs in Sub-Saharan Africa. To do this, two case studies are undertaken: the Chad-Cameroon Oil Pipeline Project (CCOPP) and the Niger-Delta Oil and Gas Exploration in Nigeria. The CCOPP is a project touted by the World Bank as a 'model project' that could aid development and rebuff the resource curse that has perennially confronted countries extracting natural resources. This chapter gives a general overview of the Project, and then analyzes the social and environmental risks posed by the Project as well as the regulatory framework available to address the

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[5] See United Nations Environment Programme, *Environmental Assessment of Ogoniland* (Nairobi: United Nations Environment Programme, 2011) [Ogoniland Report].

[6] United Nations Environment Programme, News Release, "UNEP Ogoniland Oil Assessment Reveals Extent of Environmental Contamination and Threat to Human Life" (04 August 2011) online: http://www.unep.org/newscentre/default.aspx?ArticleID=8827&DocumentID=2649 (accessed 19 February 2014).

[7] Ogoniland Report at 227.

concerns. For the Niger-Delta case study, the Nigerian oil and gas industry is generally reviewed, including the environmental crisis in the region.

II. The Chad-Cameroon Oil and Pipeline Project: An Overview

The hydrocarbon potential of Chad was first discovered in the 1950's when oil deposits were believed to be present in Lake Chad.[8] It was not until 1975 that the quest for alternative sources of energy by the West yielded positive results when oil was struck in southern Chad (not Lake Chad).[9] Unfortunately, the exploration and development of the oil wells were abandoned in 1981 as a result of the civil war in the country. After the civil war, the government of Chad was spurred to exploit the oil resources so as to raise petro-dollars to fund war against the FROLINAT rebels whilst catering to other governmental concerns. Upon the emergence of democratic institutions that brought about minimal political stability after the 1996 elections and the ratification of the constitution, the World Bank and the multinational oil consortium felt more comfortable to invest in Chad's oil and gas development project.[10] The CCOPP was then commissioned in 2000 for the extraction of about 1 billion barrels of oil from Belobo, Kome and Miandoum oil fields in the Doba region of Chad.[11]

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[8] Audrey Cash, "Corporate Social Responsibility and Petroleum Development in Sub-Sahara Africa: The Case of Chad" (2012) 37 Resources Policy 144 at 147. See also, Douglas Yates, "The Scramble for African Oil" (2006) 13 South African Journal of International Affairs 11-31.

[9] Reginald Dale, "An African Answer for US Oil Woes", *International Herald Tribune,* 1 February 2001; see also Mohamed El-Khawas and J.A. Ndumbe, "The Chad-Cameroon Oil Pipeline: Hope for Poverty Reduction?" in Olufemi Wusu, ed, *Politics and Economy of Africa* (New York: Nova Science Publishers, Inc, 2007).

[10] Audrey Cash, *supra* note 8 at 147

[11] Nikola Kojucharov, "Poverty, Petroleum & Policy Intervention: Lessons from Chad-Cameroon Pipeline" (2007) 34 Review of African Political Economy 477 at 481.

Due to the landlocked location of Chad and its remoteness to potential oil market, the only reasonable option was to transport the crude from the oil basin in Doba to marine terminals near the Cameroonian town of Kribi on the Atlantic coast for delivery to the world markets.[12] Therefore, Chad and Cameroon entered into a treaty providing for the construction and operation of an oil pipeline crossing Cameroon's territory as well as related facilities. The treaty created the procedures and rules applicable to land acquisition, environmental and social safeguards, and the revenue entitlements of Cameroon as a transit country.[13]

At the cost of $3.7 billion, the Chad-Cameroon Oil Pipeline Project (CCOPP) is acclaimed to be the largest privately financed investment in Africa.[14] The project is being executed by a consortium of oil TNCs: ExxonMobil, PETRONAS, ConocoPhillips, and the joint venture companies of the governments of Chad and Cameroon, that is, the Tchad Oil Transportation Company (TOTCO), which is responsible for building and operating from the oil fields in Chad up to the border with Cameroon, and the Cameroon Oil Transportation Company (COTCO), which is responsible for building and operating oil

[12] Based on the feasibility studies conducted on the best means of transporting Chad's crude oil in 1985 and 1994, it proved infeasible to truck oil from Doba in Chad to Ngaoundere in Northern Cameroon and sending it by rail to the port of Douala. See World Bank Group and International Finance Corporation, "Chad-Cameroon Pipeline Development and Pipeline Project: Overview" (2006) online: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/09/19/000020953_20070919092837/Rendered/PDF/36569.pdf (accessed on 11 November 2013).

[13] *Ibid.*

[14] Olufemi Wusu, *supra* note 9 at 149.

pipelines from the Chad border right up to the marine terminal off the coast of Cameroon.[15]

The CCOPP is considered to be a conventional mid-scale project within the energy industry as it mainly involves two aspects: the field system and the export system. The plan of the project consists of the following components:[16]

In Chad:

- Three oil fields near Doba in southern Chad (Kome, Miandoum and Bolobo)
- Approximately 315 oil wells, with electric pumps (all pipes and line buried)
- Two collecting stations and one pumping station
- Central treatment centre (Kome), producing up to 225, 000 barrels per day
- Infrastructure: workers' camp, air-strip at Kome Office in N'Djamena

In Cameroon:

- Two pumping stations (Dompta, Belabo)
- Pressure reduction station (Kribi)
- Off-shore floating storage offloading, reached by 12 km pipeline
- Workers' camps at Dompta and Belabo
- Office in Douala

[15] TOTCO is owned by a consortium of three multinational oil companies (which owns 80%) and the government of Chad, which owns 20% of its equity shares. ExxonMobil, the project leader, owns 40 per cent of the private equity, PETRONAS 35 per cent and Chevron 25 per cent. See Edwin Mujih, *The Regulation of Multinational Companies Operating in Developing Countries: A Conceptual and Legal Framework* for Corporate Social Responsibility (Oxon: Ashgate Publishing Group, 2012).

[16] See Jane Guyer, *Briefing: The Chad-Cameroon Petroleum and Pipeline Development Project* (2002) 101 African Affairs 109.

Across both countries:

- 1, 070km of buried pipeline
- 613km of new renovated road
- A new bridge on the border, on the Mbere
- A telecommunications system

The project is intended to accomplish two main objectives. First, it will yield oil profits for the three oil TNCs involved in the project. Second, it will improve Chad's economy, political environment, and the quality of life of the Chadian people.[17] It is the estimation of the World Bank that the project would cause significant socio-economic benefits for both countries during its 25-year life span.[18] It is predicted that Chad would receive a cash flow of about $1.8 billion in royalties, income taxes and dividends; while Cameroon gets $535 million based on transit, pipeline tax and share of return on export over the course of the project.[19] Consequently, with the availability of oil revenues, both countries would experience substantial improvements in education, health, and basic infrastructure projects. According to the World Bank:

> the objectives of the project are to increase Government expenditures in Chad on poverty alleviation activities and to promote the economic growth of Chad and Cameroon through the private sector-led development of Chad's petroleum reserves and their export through Cameroon. The project, which is

[17] Centre for Energy Economics, Jackson School of Geosciences, *Chad-Cameroon Oil Pipeline*, online: University of Texas at Austin <http://www.beg.utexas.edu/energyecon/new-era/case_studies/Chad_Cameroon_Pipeline.pdf> (accessed 14 November 2013).

[18] See World Bank and International Finance Corporation, *Chad-Cameroon Petroleum Development and Pipeline Project: Overview*, WBGOR, Report No 36569 – TD, (2006) online: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/09/19/000020953_20070919092837/Rendered/PDF/36569.pdf (accessed 14 November 2013).

[19] *Ibid.*

> expected to substantially increase public revenues for Chad, would provide additional resources to alleviate poverty.[20]

Although touted by the World Bank and the oil TNCs as one of the best options for bringing development to both Chad and Cameroon, there are loud and widespread criticisms from environmentalists, human rights activists and civil societies. The two countries' human rights records are far from impressive. Even after the commencement of the project there have been several incidents in Chad concerning Presidential elections and the detaining of opposition leaders.[21] There has also been violence in the Doba Basin region where the oil fields are located.[22] Cameroon has a similar story, ranking as one of the most corrupt countries in the world.[23] Human rights activists are concerned that an influx of oil revenue will only worsen the problem, leaving the people with even less opportunities and socio-economic benefits from the government.[24]

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[20] World Bank Group, *Chad-Cameroon Petroleum Development and Pipeline*, WBGOR, Report No PID 5209, (1999) online: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/07/29/000094946_99031911045693/Rendered/PDF/multi0page.pdf (accessed 14 November 2013).

[21] For commentary on the human right perspectives on the project, see Amnesty International, "Contracting out of Human Rights: The Chad-Cameroon Pipeline Project" (London: Amnesty International UK, 2005).

[22] Paul Brown, "Chad Oil Pipeline under Attack for Harming the Poor", *The Guardian* (27 September 2002) online: http://www.theguardian.com/environment/2002/sep/27/internationalnews (accessed 14 November 2013).

[23] According to the 2013 Corruption Perception Index, Cameroon ranks 144 out of 175 nations while Chad ranks 163. See Transparency International, "Corruption Perception Index (2013)" online: http://cpi.transparency.org/cpi2013/results/ (accessed 28 March 2014)

[24] *Ibid.*

A. Risks and Challenges of the Project

i. Environmental and Social Impact of the Project

Considering the scale and cross-border nature of the project, many NGOs and interest groups expressed concerns about the imminent repercussions of the project especially on the environment and immediate host communities.[25] Of major concern is the pipeline route, which stretches across the indigenous land of the Balkan peoples of Chad interrupting the ecology of endangered animal species.[26] The Environmental Defence Forum (EDF) predicted:

> The 600-mile underground pipeline through Cameroon will pass through ecologically fragile rainforest areas…As a result; deforestation, wildlife poaching and the loss of farmland of local villages to the construction activities will create a destructive environmental legacy. The pipeline itself, even with state-of-the-art equipment, poses the danger of groundwater contamination and pollution of important regional river systems as crude oil containing heavy metals leaks into the environment.[27]

A particular cause of concern is the possibility of oil spills and pipeline leakages as the pipeline crosses seventeen main rivers and runs along the river Sanaga, which is one of Africa's most important river systems.[28] Any pipeline leakage, groundwater contamination and freshwater or marine pollution would seriously affect communities

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[25] Through a letter to the World Bank in 1998, eighty-six NGOs from twenty-eight countries clamoured for the suspension of the project in view of the negative social and environmental consequences it portended. See Ken Vincent, "Undoing Oil's Curse?: An Examination of the Chad-Cameroon Pipeline Project" in Alusine Jalloh and Toyin Falola, eds, *The United States and West Africa: Interactions and Relations* (New York: University of Rochester Press, 2008) at 426.

[26] Edwin Mujih, *supra* note 15 at 95.

[27] Environmental Defense Fund, "African Pipeline Would Threaten People and Rainforest", *EDF Letter* (November 2009) at 7 online: EDF http://www.edf.org/sites/default/files/170_Nov99.pdf (accessed 14 November 2013).

[28] Kenneth Walsh, "World Bank Funding of Chad/Cameroon Oil Project Summary" (17 March 1997) online: http://www.erdoel-tschad.de/contao/tl_files/Portal/edf-Kenneth-Walsh-WB-funding%20of%20TC.pdf (accessed 14 November 2013).

that rely on these water systems for their daily subsistence. Additional concerns were raised about forced resettlements of households around the oil wells in southern Chad. According to Kenneth Walsh of EDF, the Chadian government's lack of institutional capacity poses a challenge to adequate resettlement of the people physically and economically.[29]

In the wise words of Archbishop Desmond Tutu, "Africa cannot afford the environmental degradation of such a project. We need help to construct, not to destroy."[30] This line of concern was not only raised by dignitaries such as Tutu, foreign governments and missions expressed their concerns as well. The US Congress wrote a "protest letter" dated 25 May 1999, signed by 27 of its members to the President of the World Bank.[31] The Congressmen expressed their concerns about the civil and human rights record of Chad and Cameroon, and their lack of political will and administrative capacity to implement the necessary environmental protection measures for the project.[32]

Also, at the request of the Dutch Foreign Affairs Ministry, a working group of the Netherlands Commission for Environmental Impact Assessment conducted an

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[29] *Ibid.*

[30] Environmental Defense Fund, *supra* note 27.

[31] For a general read of the Congressmen's position, see United States House of Representative Subcommittee on Africa of the Committee on International Relations House of Representatives, Votes and Proceeding, 117 Leg, 2nd Sess, No 107-75 (18 April 2002) online: http://commdocs.house.gov/committees/intlrel/hfa78803.000/hfa78803_0.htm (accessed 15 November 2013) and also Korinna Horta, "Development Effectiveness and Lessons Learned: The Chad-Cameroon Oil Development & Pipeline Project" (Statement delivered before the US Senate Foreign Relations Committee, 12 July 2006) [unpublished].

[32] *Ibid.*

independent assessment of the project and published the report of its review in 1999.[33] According to the findings of this report, the project poses inimical risks and threats to the environment as well as the subsistence of the indigenous people. The oil pipeline traverses important rivers and sensitive rainforest vegetations that are home to the indigenous Bakola people of Cameroon, and this will negatively impact on land fertility and access to clean water for local farmers and cattle ranchers in the area.[34] More so, the offshore terminal was found to pose a threat to the ecologically diverse coastal region whose inhabitants largely depend on small-scale fishery and tourism. A single oil spill could destroy the regional economy and leave Cameroon with a net loss from this project.[35]

Indeed, these concerns appear to be valid and legitimate considering the stark deficiencies in the legal regimes of both countries to ensure adequate environmental management and monitoring. The capacity of Chad to contain the environmental demands of the project was extremely below par. Its National Plan for Sustainable Development deals largely with desertification and is not designed to account for potential petroleum developments.[36] Even though the government adopted an environmental framework law in 1998, it failed to follow up the framework law with implementation of decrees and regulations, such as rules and procedure on environmental

[33] See Commission for Environmental Impact Assessment, "Advisory Review of the Environmental Assessment of the Chad Export Project in Chad and Cameroon" (Utrecht: Commission for Environmental Impact Assessment, 1999).

[34] *Ibid.*

[35] Other concerns include massive migration into the project area which will occasion food scarcity and ethnic conflict in the region; the expectation of rise in sexually transmitted diseases such as HIV/AIDS in areas. surrounding the project facilities

[36] World Bank and International Finance Corporation, *supra* note 18 at 11.

monitoring and impact assessment, environmental quality standards, or disclosure and consultation regulations.[37]

Similarly, in Cameroon, the 1996 Environmental Management Law, which provides for an Environmental Assessment of the Project, is also fraught with deficiencies. It fails to define specific rules and procedures to govern the Project at the time of promulgation.[38] This law also lacked the necessary implementation rules and regulations, although a nucleus of environmental management capacity was being developed within the Ministry of Environment and Forests through the Permanent Secretariat for Environment. [39]

In a bid to ameliorate the social and environmental risks associated with the project, the World Bank mandated the consortium to conduct environmental impact assessment (EIA) in accordance with set guidelines. The EIA is expected to provide for measures through which the negative externalities of the project will be addressed. The World Bank provided a comprehensive guideline for the conduct of the EIA.[40] However, the first EIA which was delivered in June 1998 was met with severe criticisms by local and international NGOs, the Dutch government and other interest groups.[41] They rejected the EIA for lack of participation and consultation with the

[37] *Ibid.*

[38] *Ibid* at 12.

[39] *Ibid.*

[40] The EIA was required to be conducted in accordance with World Bank Operation Directives. See World Bank Group, *World Bank Operation Directives (OD) 4.01 on Environmental Assessment* at para 19.

[41] Edwin Mujih, *supra* note 15 at 99.

indigenous people of the oil-producing region with whom the World Bank guidelines required consultation.

Following the strictures against the first EIA, a second EIA was conducted. In an attempt to cater to the deficiencies in the first EIA, the second EIA introduced: the re-routing of the pipeline away from sensitive ecological settlements of the Bakola and Baka Pygmies of Cameroon; the introduction of an Indigenous Peoples Plan; an Oil Spill Response Plan; a health outreach program; an Environmental Monitoring Plan; a Compensation Plan; the development of Operation Integrity Management System, and a Revenue Management Plan for Chad.[42]

Notwithstanding the advancements in the second EIA, there were still real concerns about certain provisions in it. For example, the Oil Spill Response Plan (OSRP) was not designed to be site-specific. According to EDF, the acceptable standard of OSRP is site-specific EIA before the oil spill, and not after. Hence, EDF asked: "Why should Exxon, Shell and Elf be required to have site-specific oil spill response plans in place before going ahead with a project in the United States, but not in Africa?"[43] It is further advanced that the OSRP is severely underfunded to adequately address the occasion of an oil spill.[44] In consideration of the imminent environmental risks and impacts of the Project against the weak capacity of the Governments (of Chad and Cameroon) to address the impacts and monitor compliance with the Environment

[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid.*

Management Plan (EMP), the World Bank instituted a Petroleum Environment Capacity Enhancement Project.[45]

According to the World Bank Inspection Panel Report of 2008, the CCOPP has caused pollution of river water in localities surrounding the pipeline and has affected access to and quality of potable water for the inhabitants.[46] The Project has also led to reduced fish catch for fishermen as a result of the destruction of the natural reef offshore Kribi.[47] Since 2007 major oil spills have been recorded in the short years of CCOPP operation.[48] On 22 April 2010, about 5 barrels of crude oil spilled into the Atlantic Ocean at the marine terminal loading station, offshore Kribi in Cameroon.[49] According to COTCO, the spill occurred during the removal of residual crude oil at the terminal as a result of a storm. The oil spewed onto the terminal deck and effused into the Ocean.[50] It was reportedly contained and remediated by the consortium. However, the local communities and NGOs have expressed doubt and fear regarding the ability

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[45] The World Bank, *Implementation Completion and Result Report (IDA 3372) on a Credit in the Amount of SDR 3.4 Million ($5.9 Million Equivalent) to the Republic of Cameroon for a Petroleum Enhancement Capacity Enhancement Project,* World Bank Inspection Panel, ICR0000416 (2008) at 1 online: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/08/06/000333038_20080806023917/Rendered/PDF/ICR4160ICR0P041closed0August0402008.pdf (accessed 18 February 2014).

[46] *Ibid* at 16.

[47] *Ibid.*

[48] The World Bank, Media Release, "Accidental Oil Spill in Kribi, Cameroon" (23 January 2007) online: WBG http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:21191471~pagePK:146736~piPK:146830~theSitePK:258644,00.html (accessed 19 February 2014)

[49] This is the conservative figure declared by the COTCO as the government does not have the resources to conduct an independent testing and analysis of impacted sites.

[50] The World Bank, *supra* note 43.

and preparedness of COTCO to detect and manage such occurrences in the future.[51] Local fishermen claimed to have seen oil sheen about 12km away from the coast even though the Consortium claimed to have treated the impacted area with dispersant.[52]

According to Honore Ndoumbe Nkotto, the Coordinator of the Cameroon Foundation of Rationalized Actions and the Formation on the Environment (FOCARFE): "We can minimize this last incident but these numerous spills into the sea will have serious consequences in the long term. The destruction of marine species, the scarcity of fish, and water pollution will inevitably give a blow to the environment."[53] The incidents of oil spills demonstrate the inadequacy of the oil spill preparedness plan of the Cameroonian government.

B. The International Finance Corporation's Performance Standards on Environmental and Social Sustainability

Because the International Finance Corporation (IFC) is a co-financier of the CCOPP, the IFC has continued to monitor and assess the environmental and social impact of the Project.[54] This oversight role is based on the IFC's Policy and Performance Standards

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[51] Christiane Badgeley, "Oil Spill Near Kribi, Cameroon", (01 May 2010) online: Pipeline Dreams http://www.pipelinedreams.org/2010/05/oil-spill/ (accessed 19 February 2014).

[52] *Ibid.*

[53] CED, FOCARFE & RELUFA, Press Release, "Another Oil Leak on the Marine Terminal of the Chad-Cameroon Oil Pipeline" (27 April 2010) online: RELUFA http://www.relufa.org/documents/Pressreleaseoilspillapril2010.pdf (accessed 19 February 2014).

[54] The IFC independently invested $100 million in the CCOPP. It also offered a syndicated loan of another $100 million dollars to over 15 commercial banks to finance the Project. See International Finance Corporation, "International Finance Corporation Played a Leading Role in Facilitating the Oil Pipeline between Chad and Cameroon" IFC online: International Finance Corporation

on Environmental and Social Sustainability (Performance Standards), which is a leg of the IFC Sustainability Framework.[55] The Performance Standards describe IFC's commitment, roles and responsibility regarding environmental risks and social impact through the life of its investments. It requires its clients to apply the Performance Standards in all projects financed by the IFC such as the CCOPP.[56]

According to Principle 1 of the Performance Standards and the accompanying Guidance Note, the consortium is required to establish and maintain an Environmental and Social Assessment and Management System (ESMS) "appropriate to the nature and scale of the Project" and "commensurate to the environmental and social risk impacts" of the Project.[57] It is however baffling that for about 15 years after the commissioning of the CCOPP, the Basel Convention forms required to transport oil contaminated soil from K223 site, from Chad to the Bocom Facility in Douala for disposal, is still

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http://www.ifc.org/wps/wcm/connect/6f271e00487e8e09844ced51e3a7223f/ChadCamProjectOverview.pdf?MOD=AJPERES (accessed 06 February 2014).

[55] The Sustainability Framework of IFC sets the organization's approach to manage risk, and articulates its commitment to sustainable development. It entails the IFC's Policy and Performance Standards on Environmental and Social Sustainability and IFC's Access to Information Policy. See International Finance Corporation, "IFC Performance Standards on Environmental and Social Sustainability" (01 January 2012) at 2 online: http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES (accessed 06 February 2014).

[56] The Performance Standard consists of eight principles: Performance Standard 1: Assessment and Management of Environmental and Social Risk Impacts; Performance Standard 2: Labour and Working Conditions; Performance Standard 3: Resource Efficiency and Pollution Prevention; Performance Standard 4: Community Health, Safety, and Security; Performance Standard 5: Land Acquisition and Involuntary Resettlement; Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources; Performance Standard 7: Indigenous Peoples and Performance Standard 8: Cultural Heritage.

[57] International Finance Corporation, "IFC Performance Standards on Environmental and Social Sustainability" (01 January 2012) at 2 online: http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES (accessed 06 February 2014) at 6.

awaiting the Cameroonian government's approval.[58] It would be expected that, considering the transboundary nature of the Project, the ESMS would have pre-secured such governmental approvals through the instrumentality of the treaty between the countries for a timely disposal of oil contaminated soil and other related waste pursuant to the OSRP and in accordance with international best practices.

Recently, as a result of the unexpected decline in oil production levels in the Oil Field Development Area, which is due to the depleting reservoir conditions, an Infill Drilling Program was commissioned in the Kome and Belobo oil fields to address the production shortage.[59] This program, beginning in 2008, entails the drilling of additional oil wells to make a total of 450 oil wells for the CCOPP.[60] Thus, there is a need to assess the incremental impact of the additional drilling activities on land use and other ecological demands.

Unfortunately, since the World Bank has pulled out of the Project, the only independent assessor left is IFC.[61] The IFC has, however, been criticized for its overreliance on the project information provided by its Clients rather than gathering facts independently in its evaluation of the implementation of its Performance

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[58] D'Appolonia S.p.A., "Report of the External Monitoring Compliance Group - Chad Export Project", Site Visit (November – December 2012) at 31.

[59] Jacques Guerin and Celine Houdin, "Chad, The Challenge of Development: Policy Implication of the Chad - Cameroon Pipeline Project", North – South Institute Working Paper (23 December 2010) at 12 online: http://www.nsi-ins.ca/wp-content/uploads/2012/10/2010-Chad-The-Challenge-of-Development-Policy-Implications-of-the-Chad-Cameroon-Petroleum-Project.pdf (accessed 17 February 2014).

[60] *Ibid* at 13.

[61] The World Bank withdrew its involvement in the Chad-Cameroon Oil Pipeline Project, in 2008, for misappropriation of oil revenue by the Chadian government. See Xan Rice, "World Bank Cancels Pipeline Deals with Chad after Revenue Misspent", *The Guardian* (12 September 2008) online: The Guardian http://www.theguardian.com/world/2008/sep/12/worldbank.oil (accessed 12 February 2014).

Standards.[62] Even though IFC appointed D'Appolonia S.p.A., an Italian firm, as External Monitor, the problem is that the recommendations of the external monitor are often not implemented. For instance, in its 2012 External Compliance Monitoring Group Report, D'Appolonia had to repeat it recommendation regarding waste management and decommissioning facilities for the Kome Base camp.[63]

NGOs and civil societies have also raised serious concerns about the Performance Standards' approach to environmental and social risk assessment. According to a Joint Submission signed by 94 interest groups and environmental NGOs across the world, the Performance Standards are not applied to address the environmental and human rights implications of the Project on the local communities as they allow for lower standard of environmental and risk assessment insofar as justification is provided.[64] Hence they stated:

> We are concerned that IFC's current sustainability and risk management framework seeks primarily to minimize and manage risks that social and environmental concerns pose to *the project and to IFC's clients*, and does not fully take into account risks that projects may pose to individuals and communities likely to be affected.[65]
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> (Emphasis Added)

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[62] Memorandum from, Ann Perrault, Senior Attorney of the Centre for International Environmental Law and endorsed by 94 NGOs and civil societies (11 March 2010) at 2 online: http://bankwatch.org/documents/CSOsubmissionIFC_11Mar2010.pdf (accessed 12 February 2014) [The Memorandum].

[63] D'Appolonia S.p.A., "Report of the External Monitoring Compliance Group - Chad Export Project", Site Visit (November – December 2012) at 40.

[64] International Finance Corporation, "IFC Performance Standards on Environmental and Social Sustainability" (01 January 2012) 2 online: International Finance Corporation http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES (accessed 06 February 2014).

[65] The Memorandum, *supra* note 62 at 7.

Thus, in their evaluation, the interest of the IFC is to protect their investment as well as the interests of their clients rather than environmental protection and sustainable development of the local communities. Also, the Joint Submission criticized the Environmental and Social Review Procedure of IFC for its lack of due diligence and oversight. According to them:

> IFC's policy and practice do not provide the environmental and social due diligence required to support development that alleviates poverty and does not harm local communities. Provisions of IFC's Social and Environmental Sustainability Policy and the Environment and Social Review Procedure (ESRP) that relate to pre-appraisal, appraisal, and supervision of projects are fundamentally deficient in several respects. Moreover, inadequate implementation has undermined existing due diligence requirements[66]

In sum, the IFC Performance Standard appears to be rhetoric. It seems to be a political statement conjured by the body to *greenwash* its stake and involvement in the Project and other similar investments. However, the IFC Performance Standards are potential instruments for promoting environmental stewardship in Africa. For example, in May 2011, four NGOs – African Centre for Applied Forestry Research and Development (CAFRAD), Centre for the Environment and Development (CED), Cameroon Foundation for Environmental Streamlined Action and Training (FOCARFE) and Network for the Fight against Hunger (RELUFA) - filed a complaint with the Office of the Compliance Advisor/Ombudsman (CAO) of the IFC. They complained about the Cameroonian section of the Project as it relates to the operations of COTCO. Amongst their claims are, particularly, that the environmental risks of the Project have brought economic loss to the local fishermen as a result of its ecological impact on the aquatic

[66] *Ibid* at 2.

life in the Kribi area; and the disrupted access of the indigenous people of Bagyeli to some forest areas contrary to Principle 7 of the Performance Standards.[67]

III. Oil and Gas Exploration in Nigeria's Niger-Delta

A. Nigeria and Its Oil and Gas Industry: A Glance

Located in West Africa, Nigeria covers an area of 923, 768 sq/km bordering the Benin (773 km), Cameroon (1,690km), Chad (87km), Niger (1497km).[68] It is Africa's most populous nation with a population of 162, 470, 737[69], and the seventh most populous in the world.[70] Nigeria, as a political entity, is a federal republic with 36 states and a federal capital territory situated in Abuja. Presently, Nigeria contains considerable biodiversity as well as some very important tract of tropical forests.[71] Its diversity of natural ecosystems ranges from semi-arid savanna to montane forests and diverse coastal vegetation.[72] The Niger-Delta region of Nigeria contains the largest remaining tracts of mangroves in Africa – the third largest in the World.[73]

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[67] Pursuant to Principe 7 of the Performance Standard, Clients of the IFC should anticipate and avoid adverse impacts of projects on Indigenous Peoples or minimize harm and/or compensate where it is impossible to avoid the impacts.

[68] Central Intelligence Agency, *The World Factbook* online: CIA <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (accessed 3 March 2013)

[69] The World Bank, *Data*, online: WBG http://data.worldbank.org/indicator/SP.POP.TOTL?cid=GPD_1 (accessed 3 March 2013).

[70] *Ibid.*

[71] Yinka Omorogbe, *Oil and Gas Law in Nigeria: Simplified* (Michigan: Malthouse Press Ltd, 2003) at 46.

[72] *Ibid.*

[73] Yinka Omoregbe *supra* note 71 at 50.

On 15 January 1956, Shell D'arcy Petroleum (now known as Shell Petroleum Development Corporation) made the first commercial oil discovery in Oloibiri, Bayelsa State.[74] This discovery generated the "scramble for oil" which heralded the investment of more oil TNCs, particularly the Shell-BP which held sole concessions in major Nigerian oil fields at that time.[75] The end of the civil war in 1970 coincided with the hike in world oil price and Nigeria benefited from the windfall from its oil exportation[76], and since then Nigeria has continued to make huge 'petro-dollar' which now serves as the mainstay of its economy.[77] The oil and gas sector now accounts for 95% of Nigeria's foreign exchange earnings, 80% of government revenue, 50% of national gross domestic product (GDP), and oil remains Nigeria's major source of foreign direct investment.[78]

Nigeria ranks as Africa's largest producer of oil and the 8th largest oil exporter in the world.[79] By the end of the Third Quarter of 2012, Nigeria's proven oil reserve stood

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[74] This is Nigeria's first commercial oil discovery after 50 years of fruitless oil exploration in the country. After recording this breakthrough, Shell continued exploration and further discovered oil in twelve other areas in the Niger Delta by 1958. See P.O. Itsueli, "Environmental Pollution in Nigeria: An Appraisal of Corporate Social Responsibility for Victims of Oil Pollution in Nigeria" in Festus Emiri and Gowon Deinduomo, eds, *Law and Petroleum Industry in Nigeria: Current Challenges* (Lagos: Malthouse Press Ltd, 2009) at 108.

[75] Evaristus Oshionebo, 'Introduction' in *Enhancing CSR in Nigeria's Oil and Gas Producing Communities: A Contextual Analysis* (LLM Thesis, University of Alberta, 2002) [unpublished].

[76] See Nigerian National Petroleum Corporation, *History of the Nigerian Petroleum Industry*, online: NNPC http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx (accessed 3 March 2013).

[77] In 1971, Nigeria joined the Organization of Oil Producing Exporting Countries (OPEC) when it recorded remarkable proven reserve and production capacity, and it also established the Nigerian National Petroleum Corporation (NNPC) in 1977, a state-owned and controlled petroleum company. *Ibid.*

[78] Simon Warikiyei Amaduobogha, "Environmental Regulation of Foreign Direct Investment in the Oil and Gas Sector" in Emiri and Deinduomo, *supra* note 74 at 117.

[79] Nnena Ezeah, "Nigeria's Crude Production Peaks at About 2.68M bpd", *The Vanguard* (27 February 2012) online: Vanguard News: <http://www.vanguardngr.com/2012/02/nigerias-crude-

at 36.2 billion barrels with production capacity of 2.5 million barrels per day, while its associated and non-associated gas reserve stood at 183 trillion cubic feet.[80] The economic importance of the resource has redefined the power dialectics of the country**.** Political power and control of oil resources and revenues are concentrated in the central government despite the federal structure defined by the Constitution.[81] The over-centralization of power in the federal government is a legacy of military incursion into the political arena that was driven in part by the political economy of oil.[82] That said, it is noteworthy that the legality of the federal government's control of oil resources and revenues is hardly questionable as the Constitution and other subsidiary legislations including *the Petroleum Act, Exclusive Economic Zone Act* and *the Land Use Act 1978* clearly buttress this position.[83]

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production-peaks-at-about-2-68m-bpd/ (accessed 25 March 2013) and Tim Cocks, "Nigeria Oil Minister Urges Majors to Accept Higher Tax", *The Globe and Mail* (04 December 2012) online: The Globe and Mail <http://www.theglobeandmail.com/report-on-business/international-business/african-and-mideast-business/nigeria-oil-minister-urges-majors-to-accept-higher-tax/article5977306/> (accessed 25 March 2013).

[80] Kunle Kalejaye, "Nigeria's Oil Reserves Stands at 36.2BN barrels", *The Vanguard* (06 November 2012) online: Vanguard News <http://www.vanguardngr.com/2012/11/nigerias-oil-reserves-stands-at-36-2-bn-barrels/> (accessed 4 March 2013).

[81] See Kathryn Nwajiakwu-Dahou, "The Political Economy of Oil and 'Rebellion' in Nigeria's Niger-Delta" (2012) 39 Review of Africa Political Economy 295 at 297.

[82] Ibibia Worika, "Energy Development and Utilization in Africa" in Adrian J Bradbrook et al, eds, *The Law of Energy for Sustainable Development* (New York: Cambridge University Press, 2005) at 361.

[83] *Ibid* and Amina Laraba Wali, *Oil Wealth and Local Poverty: Exploitation and Neglect in the Niger-Delta* (New York: ProQuest LLC, 2008) at 17.

B. Transnational Oil Corporations and Nigeria's Oil

Nigeria's onshore oil exploration and production is carried out mainly in the Niger Delta region of the country. This region covers an area approximately 26, 000 sq/km representing 2.8% of Nigeria's total land mass.[84] It is ecologically rich and dynamic in biodiversity.[85] It is made up of Africa's largest wetlands and one of the largest deltas in the world.[86] The delta is a vast floodplain composed of four ecological zones of coastal barrier islands, mangroves, freshwater swamp forests and lowland forests.[87] The Nigerian mangrove (60% of which is in the Niger-Delta) is the 3rd largest in the world and the largest in Africa.[88] The freshwater swamp forest of the delta is the largest and the most heterogeneous of the ecological zones.[89] It consists of riverbank levees (which rarely flood and used mostly for agriculture) and back swamps (which are flooded most of the year).[90]

Sixteen rare plant species and three endemic plants with certain rare mammalian species have been identified in the region.[91] The essence of showing the environmental

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[84] Toyin Falola and Matthew M Heaton, *A History of Nigeria* (New York: Cambridge University Press, 2008) at 2.

[85] *Ibid.*

[86] Lisa Stevens, "The Illusion of Sustainable Development: How Nigeria's Environmental Laws Are Failing The Niger-Delta" (2012) 36 Vermont Law Review 387 and Kenneth Omeje, *High Stakes and Stakeholders: Oil Conflict and Security in Nigeria* (Hampshire: Ashgate Publishing Limited, 2006) at 31.

[87] *Ibid*.

[88] *Ibid.*

[89] Omeje, *supra* note 86 at 33.

[90] Rhuks Temitope, "The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India" (2010) 3 NUJS Law Review 423.

[91] See *Ibid;* Michael Amaetari, *The Coastal Niger-Delta: Environmental Development and Planning* (Indiana: Trafford Publishing, 2012) and Toyin Falola and Adam Paddock, eds, *Environment and Economics in Nigeria* (New York: Routledge, 2011).

asset of the Niger Delta region is to accentuate the significance of the campaign for the protection of the environment despite the economic gains of oil exploitation. In this day and age, when species are endangered and global biodiversity balance is an issue, it is important that regions such as the Niger Delta be protected from unrestricted destruction which would invariably affect the world's environmental balance.

The exploration and production of oil and gas are mainly carried out by oil TNCs in joint ventures (JVs) and production sharing contracts (PSCs) with the Federal Government of Nigeria **(**FGN**)** through the national oil company, the Nigerian National Petroleum Corporation **(**NNPC**).** Currently, the five major oil multinationals exploiting the major and marginal oil fields in Nigeria include Shell, ExxonMobil, Chevron, Total and Eni.[92] Shell operates in Nigeria through its subsidiaries – Shell Petroleum and Development Company of Nigeria Limited (SPDC) and the Shell Nigeria Exploration and Production Company Limited (SNEPCo). SPDC is the largest oil and gas company in Nigeria.[93] Its operations include a network of pipelines, nine gas plants, and two export terminals, with a production capacity of 1.1 million barrels per day in Nigeria.[94]

ExxonMobil is the second largest oil TNC in Nigeria operating both onshore and deepwater oil and gas projects.[95] It records averagely 800, 000 barrels per day.[96]

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[92] Others include Addax Petroleum (recently acquired by Sinopec of China), ConocoPhilips, Petrobras and StatoilHydro. See US Energy Information Agency, "Nigeria - Analysis" (16 October 2012), online: US EIA <http://www.eia.gov/countries/analysisbriefs/Nigeria/nigeria.pdf> (accessed 19 March 2013).

[93] Shell Nigeria, "Shell Interest in Nigeria" (April 2012), online: Shell Nigeria <http://s06.static-shell.com/content/dam/shell/static/nga/downloads/pdfs/briefing-notes/shell-interests-2012.pdf> (accessed 27 February 2012).

[94] *Ibid.*

[95] US Energy Information Agency, *supra* note 90 and Joe Brock and Emma Farge, "Exxon Warning Adds to Nigeria Oil Output Problems", *The Globe and Mail* (21 November 2012)

Following ExxonMobil is Chevron operating through its subsidiary Chevron Nigeria Limited.[97] It holds 40% of concessions under JV with NNPC.[98] As of 2011, Chevron's production capacity stood at 516, 000 barrels per day. It also holds interests in deepwater projects, particularly in Agbami – its largest deepwater discovery in Nigeria.[99] The country's fourth and fifth largest oil TNCs are Total and Eni, producing 179, 000 bbl/d and 96, 000 bbl/d, respectively.[100]

All stages of onshore oil exploration and production require the use of land for the activities.[101] This demand for land use therefore places undue pressure on the oil region. For example, SPDC exploits oil fields covering over 31, 103 sq/km in the Niger Delta – an area just about half of the whole region of 70, 000 sq/km.[102] It is interesting to note that the oil industry usually secures access to land in the region through the power of the Governor under the *Land Use Act* which empowers State Governors to revoke private

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online: The Globe and Mail <http://www.theglobeandmail.com/report-on-business/international-business/african-and-mideast-business/exxon-warning-adds-to-nigeria-oil-output-problems/article5531449/> (accessed 22 March 2012).

[96] *Ibid.*

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.*

[101] Acquisition of land remains a precondition for onshore oil operations as oil resources are embedded under the earth surface. See Jedrzej George Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Company and Village Communities* (Hamburg: LIT Verlag Münster, 2000) at 71.

[102] IUCN, *Oil Exploration in the Tropics: Guidelines for Environmental Protection* (Cambridge: The Burlington Press, 1991) at 5.

ownership of land for overriding public interest[103], which includes mining and oil-related activities.[104]

When oil prospecting firms explore the oil field to discover oil and gas reserves, vegetation is cleared to allow for the creation of 'seismic lines' during the requisite seismic operations.[105] The seismic lines created are not permanent and as such the vegetation in drylands and freshwater areas rejuvenates rapidly, but the mangrove forest does not regenerate with similar speed.[106] The trees in the mangroves can take up to 30 years to fully recover from line and root cuttings.[107] In addition, human settlement and aquatic life are sometimes affected by the blasts occasioned by the detonators used during the seismic operations.[108] These effects include noise and water pollution from the seismic blasts and chemical effluents into water courses during the seismic survey.[109]

Furthermore, when hydrocarbon traces are discovered, drilling of exploration wells follows. This begins by clearing the vegetation and building access roads and canals.[110] If there is no oil in commercial quantity upon drilling, the so-called 'dry hole' is plugged and abandoned.[111] If the field is to be commercially exploited, some of these

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[103] *Land Use Act*, Cap L5, 2004, s 28 (1).

[104] *Ibid* at ss 28 (1) (c) and 28 (3) (b).

[105] Kent Nnadozie, "Environmental Regulation of Oil and Gas Industry in Nigeria" in Beatrice Claytor and Kevin R. Gray, eds, *International Environmental Law and Policy in Africa* (The Netherlands: Kluwer Academic Publisher, 2003) at 103.

[106] IUCN, *supra* note 102; Rhuks Temitope, *supra* note 88.

[107] *Ibid* and Omeje, *supra* note 86 at 43.

[108] Wali, *supra* note 83 at 15.

[109] *Ibid.*

[110] IUCN, *supra* note 102.

[111] *Ibid* and Wali *supra* note 83.

appraisal wells may later be used as development wells for oil production.[112] In the production of oil, effluents such as oily residues, tank bottom sludge and obsolete chemicals are generated and disposed of.[113] If they are not safely disposed, they constitute high-pollution and health risk to the surrounding communities, and as such deplete the ecological set-up of the environment and contaminate fishing ponds and channels.[114] For instance, in *Shell v. Ambah,* dredging activities on Shell's property led to the destruction of property on the adjacent land belonging to the Wesewese family. Mud dredged from Shell's land reportedly covered and destroyed 16 fish ponds as well as various fish channels and fish lakes.[115]

Serious externalities accompany oil production and distribution in the country.[116] Oil spillage and gas flaring are a recurring decimal in Nigeria's oil and gas operation.[117] Available data shows that as much oil is spilled in Niger-Delta annually as were spilled during the Exxon Valdez disaster.[118] It is estimated that about 15 million barrels of oil

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[112] Kent Nnadozie, *supra* note 105 at 104.

[113] Omeje, *supra* note 86.

[114] Jedrzej George Frynas, *supra* note 101 at 158.

[115] *Ibid.*

[116] See United Nations Conference on Trade and Development, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (New Delhi: United Nations Publication, 2008) at 147.

[117] Some of the notable oil spillages in Nigeria include the Shell Petroleum Development Company's Forcados Terminal tank failure of 1978, which led to the spilling of more than 500,000 barrels. Another major oil spill, which also occurred in 1978, was the Escravos spill where about 300,000 barrels of crude oil were reportedy spilled into the environment. Another notable incident was the 1980 Texaco Funiwa-well 5 incident, in which about 400,000 barrels were spilled. See This Day, "Who Takes the Blame for Oil Pollution in the Niger Delta", *This Day* (05 February 2013) online: This Day Live http://www.thisdaylive.com/articles/who-takes-the-blame-for-oil-pollution-in-the-niger-delta-/138470/ (accessed 22 March 2013).

[118] Adam Nossiter, "Half of the World from the Gulf, A Spillage Scourge 5 Years Old", *NY Times* (17 June 2010) A1.

have been spewed into the environment since oil production commenced in 1958.[119] Data collected by the Department of Petroleum Resources (DPR) show that approximately 1.89 million barrels of oil were spilled in about 4, 647 incidents recorded in the Niger-Delta region between 1956 and 1976.[120] The United Nations Development Programme reported in 2011 that a total of 6, 817 oil spills were recorded between 1976 and 2001[121] and this is believed to have accounted for 3 million barrel of oil spilled into the environment. The Nigeria National Oil Spill Detection and Response Agency (NOSDRA), confirmed recently that as much as 2, 400 oil spills were recorded between 2006 and 2010 which were caused by sabotage, bunkering, poor infrastructure and operational failures.[122] According to Shell's account, about 201 cases of oil spill were recorded across the Niger-Delta alone in 2012.[123] Out of the 201 recent incidents, sabotage and theft are responsible for 75.4 percent of the spills, while operational reasons accounted for just about 20 percent.[124]

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[119] ThisDay, *supra* note 117.

[120] *Ibid*; Fidelis Allen, "The Enemy Within: Oil in the Niger Delta" (2012) 29 World Policy Journal 46 at 49.

[121] UN News Centre, *Cleaning up Nigerian Oil Pollution Could Take 30 Years and Cost Billions*, (04 August 2011) online : UN News Centre< http://www.un.org/apps/news/story.asp?NewsID=39232&Cr=pollution#.UWgyi7W-kUw> (accessed 7 April 2013) and Han van de Wiel, "Oil Pollution in Nigeria: Sabotage or Rust", *Down To Earth Magazine* (February 2013), online: Down To Earth Magazine <http://www.milieudefensie.nl/publicaties/down-to-earth-magazine/artikelen/oil-pollution-in-nigeria.-sabotage-or-rust> (accessed 4 April 2013).

[122] *Ibid.*

[123] See Shell Nigeria, "Oil Spill Data" online: Shell Nigeria <http://www.shell.com.ng/environment-society/environment-tpkg/oil-spills.html> (accessed 27 March 2013).

[124] *Ibid.* On oil spillage in the Niger Delta, see generally Ignatius Adeh, *Corruption and Environmental Law: The Case of the Niger Delta* (Hamburg & London: LIT Verlag Münster, 2010).

Another major environmental threat in Nigeria's oil industry is the flaring of associated gas. Nigeria is acclaimed to be a top flarer of gas in the world after Russia.[125] It is estimated that Nigeria flares an average of 1.4 billion cubic feet of associated gas per day, approximately 18 per cent of total gas produced.[126] Gas flaring is both an environmental challenge as well as an economic waste. According to a report by the NNPC, at the end of the first quarter of 2012, Chevron, ExxonMobil and Shell accounted for 67 percent of total gas flared, which is about $427 million in monetary terms.[127] This is an utter waste of resources that could be monetized or utilized for power generation in the country. Aside from the economic losses, gas flaring releases noxious gases such as nitrogen oxides benzene, toluene and xylene which are known causes of skin and abdominal cancer.[128]

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[125] Olusola Bello, "Nigeria Losses N99 BN to Gas Flaring in 6 Months", *Business Day* (04 October 2012) online: Business Day <http://businessdayonline.com/NG/index.php/news/76-hot-topic/45404-nigeria-loses-n99bn-to-gas-flare-in-6-months> (accessed 23 February 2013) and Wilson Akpan, "Corporate citizenship in the Nigerian petroleum industry: a beneficiary perspective" (2009) 45 Development Southern Africa 497 at 502-503.

[126] UN Office for the Coordination of Humanitarian Affairs, "Nigeria: Gas Flares Still A Burning Issue in the Niger Delta", Humanitarian News and Analysis, (08 March 2012) online: IRIN Africa http://www.irinnews.org/report/95034/NIGERIA-Gas-flares-still-a-burning-issue-in-the-Niger-Delta (accessed 23 March 2013) and *Ibid.*

[127] Bello, *supra* note 125.

[128] *Ibid.* Other environmental issues resulting from oil spillage and gas flaring are depletion of biodiversity, coastal and riverbank erosion, flooding, noise pollution, land degradation and loss of soil fertility. For more environmental impacts of oil exploration and production in Nigeria, see Tobias Holler et al, eds, *Fossil Fuels, Oil Companies and Indigenous People: Strategies of Multinational Companies, States, and Ethnic Minorities Impacts on Environment, Livelihoods and Cultural Change* (The Netherlands: Lit Verlag, 2007) at 69.

Conclusion

This chapter reveals the level of environmental lawlessness of the oil TNCs exploiting African oil fields, and it has done so by showing the pillage caused by TNCs in the Niger-Delta and the CCOPP. It has shown that the oil TNCs have disregarded international standards of practice, or chosen which standard to uphold. It seems to this writer that the TNCs in their oil exploitation in Africa are more concerned with the return on their investment than the interests of the local communities, particularly, their environmental welfare.

The oil TNCs have not only violated environmental laws and practices in these two cases, they have chosen to disregard the CER expectations of the communities as good corporate citizens. They have brought harm through environmental destruction and health challenges to their host communities. As seen in the CCOPP, the natural livelihood of the indigenous peoples of Bagyeli and Bakola were impinged through the impact of the Project on their natural avocations of hunting, fishing and farming.

CHAPTER THREE

ENVIRONMENTAL REGULATION OF OIL TNCS IN NIGERIA

I. Introduction

Since the reception of foreign direct investment by a host state is hinged upon the accretion of ongoing economic benefits and development, certain restrictions and regulations are being put in place by host states in order to continuously and accordingly maximize national objectives. For some countries, the foreign investor is required to operate through a locally incorporated subsidiary, as seen mostly in developing countries like Nigeria. Other requirements include the hiring of local employees and managers; imposition of export quota on goods manufactured by investor; and use of locally-sourced raw materials.[1] Host states exercise control over the activities of TNCs mainly in two forms or stages: entry and operation (which generates environmental externalities).

This chapter examines the environmental regime of Nigeria's oil and gas industry. First, the chapter reviews the regulatory framework of Nigeria's oil and gas industry as it relates to the environmental agencies of government and their enforcement mechanisms. This review will demonstrate the capacities and deficiencies in the operations of the agencies. Further, the environmental laws of Nigeria that bear on the operations of oil TNCs are analyzed in order to evaluate their effectiveness. Additionally, the role of NGOs and civil societies in regulating oil and gas activities in Nigeria will be demonstrated. Moreover, the regulatory challenges in Nigeria's environmental regulation and enforcement will be identified and briefly discussed.

[1] See M. Sornarajah, *The International Law on Foreign Investment* (New York: Cambridge University Press, 2010).

II. The Nigerian Regulatory Regime: Flaws and Gaps

Before 1988, Nigeria did not have any unified national policy on environment even though it promulgated certain environmental-protection statutes.[2] These statutes were only implemented by ministers of the Nigerian federal government in their individual areas of influence and concerns.[3] The country lacked a central regulatory institution for monitoring and enforcing environmental compliance until the 1988 illicit toxic-waste dump in Koko which marked the watershed in Nigeria's environmental consciousness.[4] As a result of the Koko incident, the Nigerian government commissioned and published a National Policy on the Environment in 1989, which was the first in Africa.[5] Also, in 1989, Nigeria signed the Basel Convention on Transboundary Movement of Hazardous Waste, and since then she has signed 12 out of the 14

[2] Environmental regulations were enacted in different contexts in pre-1988 Nigeria. For instance, the Criminal Code and the Noxious Act were enacted to control noise pollution and odour in the 1950's, in 1969 and 1974 the Water Courses Act and Refining Act were enacted to prohibit oil pollution of land and navigable waters in Nigeria. See also Gozie Ogbodo, "Environmental Protection in Nigeria: Two Decades after the Koko Incident" (2009) Annual Survey of International and Comparative Law at 1 and Kaniye Ebeku, "Oil and the Niger Delta People in International Law: Resource Rights" (2006) Environmental and Equity Issues 189.

[3] Gozie Ogbodo, *supra* note 2 at 2.

[4] In August 1988, 3, 800 tons of toxic wastes was dumped in Koko, Delta State of Nigeria by an Italian waste trader. When authorities discovered in June 1998 after receiving reports of local residents falling ill, the Nigerian government ordered Italy to retrieve the wastes from its shores. See generally, Sylvia Liu, "The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste" (1993) 8 Journal of Natural Resources and Environmental Law 121. See also Jennifer Clapp, *Toxic Exports: The Transfer of Hazardous Wastes from Rich to Poor Countries* (New York: Cornell University Press, 2001).

[5] Uchenna Jerome Orji, "An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria" (2012) 38 Commonwealth Law Bulletin 321 at 326.

international agreements and conventions in relation to environmental protection and sustainable development.[6]

Through this national policy, Nigeria committed itself to sustainable development and established the country's first central regulatory body responsible for the protection and development of the environment - the Federal Environmental Protection Agency (FEPA) through the FEPA Decree (now Act) of 1992.[7] FEPA could not deliver its mandate because of its weak compliance monitoring and enforcement strategy, and was eventually subsumed under the Federal Ministry of Environment.[8]

In 2007, the FEPA Act was repealed by the *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA Act).*[9] NESREA is charged with "the protection and development of the environment, biodiversity, conservation and sustainable development of Nigeria's natural resources [and]…

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[6] Vanguard, "Nigeria Ranked High in Implementation of Environmental Agreements", *Vanguard* (02 September 2013) online: http://www.vanguardngr.com/2013/09/nigeria-ranked-high-on-implementation-of-environmental-agreements/ (accessed 19 February 2014).

[7] FEPA was empowered to establish a national policy for environmental protection; environmental planning; data collection and publication; environmental monitoring; the establishment of environmental criteria, guidelines, specifications or standards; and generally, the power to develop and promote such processes, methods, devices and materials as may be useful or incidental in carrying out the purposes and provisions of this Decree. *See Federal Environmental Protection Act*, LFN 2004, Cap F 10, s. 4, as repealed by *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No. (25) 2007 94:92*. [NESREA Act]

[8] See Muhammed Tawfiq Ladan, "Review of NESREA Act 2007 and Regulations 2009 -2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria" (2012) 8 Law, Environment and Development Journal 116.

[9] *Ibid.* It was enacted and published in the Federal Republic of Nigeria Official Gazette No. 92, Vol. 94 of 31 July, 2007.

enforcement of environmental standards, regulations, rules, laws, policies and guidelines".[10] Today, the environmental regime in Nigeria is championed by NESREA.

A. Oversight Agencies and Monitoring Institutions

i. National Environmental Standards and Regulations Enforcement Agency (NESREA)

NESREA is the centralized agency of government chartered to protect the environment by enforcing environmental statutes and making further regulations to preserve the Nigerian environment.[11] Like FEPA, it is a parastatal within the Federal Ministry of Environment, Housing and Urban Development. This agency is a creation of the NESREA Act. It has the mandate to monitor compliance with environmental regulations of both federal and state governments, and issue requisite permits and licenses.[12] It is also within NESREA's mandate to enforce compliance with international agreements, protocols, conventions and treaties on the environment.[13]

Unfortunately, the powers and duties of this agency of government are categorically ousted in the oil and gas industry – a sector that constitutes the greatest environmental threats to Nigeria.[14] Several provisions in the NESREA Act exclude the

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[10] *NESREA Act*, s. 2.

[11] So far NESREA has made about thirteen regulations as a guideline in different sectors of the economy.

[12] *NESREA Act*, ss 1 & 2.

[13] *Ibid* at s 7.

[14] Lisa Stevens, "The Illusion of Sustainable Development: How Nigeria's Environmental Laws are Failing the Niger-Delta" (2012) 36 Vermont Law Review 387 at 395 and Victor Odoeme, "Corporate Accountability in the Oil and Gas Sector: Coping with Uncertainties" (2013) 39 Commonwealth Law Bulletin 741 at 758.

oversight authority of NESREA in the oil and gas industry.[15] For instance, sections 7 and 8 under Part 2 of the Act, while providing for the functions and powers of NESREA, stipulate a total of eleven exceptions to the oversight powers of the agency in relation to oil and gas sector with the inclusion of the phrase: "other than in the oil and gas industry".

Also, sections 24, 29 and 30 create additional exceptions for the oil and gas industry.[16] Section 29, for instance, obliges NESREA to co-operate with other government agencies for the removal of any pollutant discharged into the Nigerian environment and to enforce application of best technology and practices except in the oil and gas industry. It is evident that NESREA is, by design, barred from enforcing or promulgating hazardous waste regulations in the oil and gas industry. It is also precluded from monitoring, researching, auditing, assessing or surveying the environmental practices in the oil and gas industry. This constitutes a major drawback in the pursuit of a resilient environmental regime in Nigeria as the greatest threat to the Nigerian environment has been exempted from the regulatory oversight of NESREA.

Arguably, the application of the NESREA Act can be invoked in oil-related pollution pursuant to the provisions of its section 27. According to that section, it is unlawful to discharge hazardous substances in harmful quantities into air or upon the land and waters of Nigeria or adjoining shorelines, except when permitted by any law. Since oil-related wastes have dangerous impact on health and ecology, they qualify as hazardous and, thus, come within the scope of section 27 of NESREA Act. However, the

[15] *Ibid* at 397. See, *NESREA Act*, ss 7 (g), (h), (j), (k), (l) & 8 (g), (k), (l), (m), (n), (s).

[16] *Ibid.*

challenge here will be the determination of the quantity that will be considered as harmful and as such unlawful. As argued by Oshionebo, the lack of administrative capacity and knowledge gap of NESREA personnel may cause them to permit a really harmful quantity of hazardous waste as safe to be discharged.[17] Also, the prohibition is not absolute. If a substance discharge is permitted under any other law, the discharge of such hazardous substance is a fair game. This level of deference expressed by NESREA Act seems counterintuitive for a statute designed to protect the environment.

ii. Department of Petroleum Resources

The Department of Petroleum Resources (DPR) is an arm of the Nigerian National Petroleum Corporation (NNPC). Pursuant to the Petroleum (Drilling and Production) Regulation of 1969, the DPR is empowered by law to issue licenses and permits to companies operating in the oil industry (upstream and downstream), provided they meet prescribed requirements.[18]

Similar to the regime under the FEPA Act, the Minister of Petroleum Resources, through the DPR, is now solely responsible for making regulations and ensuring conformance with applicable laws and regulations (including environmental regulations) in line with good oil production practices and standards for the oil and gas industry.[19] The DPR may effect compliance with environmental standards, for instance, by suspending or

[17] Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press Incorporated, 2009) at 57.

[18] Petroleum (Drilling and Production) Regulations 1969, Legal Notice 69 of 1969, Reg. 25.

[19] *Petroleum Act*, LFN 2004, Cap P10 s. 9 (1). These regulatory powers are deemed to be exercisable by the Director of the Department of Petroleum Resources. See *Nigerian National Petroleum Corporation Act*, LFN 2004, Cap N 123, s 10 (2).

revoking the license of an erring operator.[20] Commentators and academic writers have criticized this framework as defective in principle as it negates the precepts of independent oversight. It is perceived that this enforcement mechanism certainly lacks integrity because the DPR and the oil corporations are essentially in business partnership for the growth and development of the oil industry.

iii. National Oil Spill Detection and Response Agency

The National Oil Spill Detection and Response Agency (NOSDRA) was established in 2006 by the *NOSDRA Act* as a parastatal under the Federal Ministry of Environment, Housing and Urban Development.[21] It is responsible for detection, clean up and remediation of sites impacted by oil spill across Nigeria in a timely and effective manner. The agency is also charged with the responsibility of coordinating the implementation of the National Oil Spill Contingency Plan for Nigeria. This is pursuant to Nigeria's obligation under the international convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) 1990, to which Nigeria is a signatory.

However, since the inception of the NOSDRA, Nigeria has recorded more incidents of reckless oil spill with little or no technical capacity to detect or remedy the impact in a timely manner as prescribed by the NOSDRA Act. For instance, the Bonga oil spill that occurred on Shell's offshore field in 2011 is classified by experts as the largest oil spill in Nigeria since 1988, with about 1.68 million gallons of oil spewed into

[20] *Petroleum Act,* LFN 2004, Cap P10 s. 8 (1) (f).

[21] Ambisisi Ambituuni, Jaime Amezaga & Engobo Emeseh, "Analysis of Safety and Environmental Regulations for Downstream Petroleum Industry Operations in Nigeria: Problem and Prospects" (2014) 9 Environmental Development at 52.

the Atlantic Ocean.[22] This spill has consequently affected the aquatic life of the Bonga community, and the community was left uncompensated till January 2014 when NOSDRA awarded the sum of $6.5 billion against Shell.[23] Perhaps the lack of technical capacity and access to information account for the ongoing amendment of the NOSDRA Act in the National Assembly seeking to dissolve NOSDRA and replace it with National Oil Pollution Management Agency with higher responsibility to cover other forms of pollution in the downstream and upstream sectors of oil exploration, production and distribution.[24]

B. Statutes and Subsidiary Regulations

Nigeria has a considerable number of statutes and regulations aimed at environmental management and protection, but only a handful directly bear on the oil and gas industry.[25] The Nigerian constitution, pursuant to section 20, expressly provides for the protection of the environment. According to the provision: "The State shall protect and improve the environment and safeguard the water, air and land; forest and wild life of Nigeria."[26] It articulates the responsibility of the Nigerian government to protect the

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[22] The Telegraph, "Shell oil spill off Nigeria likely the worst in a decade", *The Telegraph* (22 December, 2011) online: The Telegraph http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8974141/Shell-oil-spill-off-Nigeria-likely-worst-in-a-decade.html (accessed 08 February 2014).See also, Ignatius Adeh, *Corruption and environmental law* (Berlin: The Deutsche Nationalbibliothek, 2010) at 12.

[23] Michael Eboh, "Nigeria: Shell Faults NIMASA, NOSDREA on N1.84 Trillion Fine", *Vanguard* (05 February 2014) online: All Africa http://allafrica.com/stories/201402050282.html (accessed 10 February 2014).

[24] Ambisisi Ambituuni, Jaime Amezaga & Engobo Emeseh, *supra* note 21 at 52.

[25] Evaristus Oshionebo, *supra* note 17 at 51; Fidelis Allen, "The Enemy Within: Oil in the Niger Delta" (2012) 29 World Policy Journal 46 at 51.

[26] *Constitution of the Federal Republic of Nigeria*, LFN 2004, Cap 62 s. 20.

environment and conserve its biodiversity. However, this provision of the constitution is only aspirational and cannot be enforced because it is contained under Section II of the Constitution (the section that provides for the social and economic rights which are not justiciable in the Nigerian courts). In view of this legal setback, environmental protection cannot be pursued through this constitutional avenue. Other statutory means can thereby be explored.

i. Criminal Code[27]

The Nigerian criminal code seems to present legal opportunities that could be explored in enforcing compliance with environmental standards in Nigeria. Even though it was enacted in 1916, its environmental enforcement mechanisms appear to still be relevant to the regulation of TNCs in the oil and gas industry.[28] Section 234 (e) of the Code prohibits the deliberate obstruction of navigable waters with imprisonment of up to two years for any person liable for such an act. Also, section 245 provides for an imprisonment term of up to six months for anyone who corrupts the water of any spring, stream, well, tank, reservoir, or place making it unfit for its normal use. Anyone who pollutes the atmosphere by making it noxious to human health would be liable under section 247.

Indeed, these sanctions tend to cater to externalities such as air and water pollution occasioned by oil and gas exploitation and production, but these provisions might not be useful in the oil and gas industry for practical reasons. Criminal actions

[27] *Criminal Code Act*, LFN 1990, Cap 77.

[28] Stevens, *supra* note 14 at 398.

under these provisions can only be brought against a natural person by the state[29], when in fact the perpetrators of environmental harm in the oil and gas industry are usually corporate entities. The doctrine of piercing the corporate veil ought to be adopted in order to hold the corporate managers of these oil TNCs liable for the criminal oil pollution, but under the Nigerian criminal jurisprudence, the doctrine of corporate criminal responsibility is yet underdeveloped especially for crimes of personal violence or crimes punishable by imprisonment.[30] More so, criminal actions against corporate directors and managers are unlikely considering the paternalistic attitude of the Nigerian courts and prosecutors.[31] Generally, foreign direct investment of oil TNCs is accorded priority over environmental protection in Nigeria. Thus, the prosecution lacks the motivation to initiate such actions against the corporate managers of oil TNCs in Nigeria. Moreover, the punishment provided for by the Criminal Code is not sufficient to deter perpetrators of environmental degradation as the sentences are too short compared to the gravity of these offences.

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[29] See Cyprian Okonkwo and Michael E Naish, *Okonkwo and Naish on Criminal Law in Nigeria* (Ibadan, Nigeria: Spectrum Books Limited, 2010) and Bob Osamor, *Fundamentals of Criminal Procedure in Nigeria* (Abuja: Dee-Sage Nigeria, 2004).

[30] Corporate criminal liability has only been upheld in a few cases: *R v Zik Press*, [1974] WACA 12, where a corporation was found guilty of contravening section 51 (1) of the Criminal Code; *Mandilas & Karaberris v COP*, [1958] FSC 20, where a corporation was held guilty of stealing by conversion under section 390 and 383 of the Criminal Code. But there are no precedents in finding corporations liable under the Criminal Code for environmental crimes in Nigeria. See generally Emem Chioma and Prince Amadi, "A New Dawn of Corporate Criminal Liability in the United Kingdom: Lessons for Nigeria" (2012) 2 African Journal of Law and Criminology 86 at 89.

[31] Victor Odoeme, *supra* note 14 at 764. See also Olubayo Oluduro, "Environmental Rights: A Case Study of the 1999 Constitution of the Federal Republic of Nigeria" (2010) 4 Malawi L.J. 267.

ii. Petroleum Act[32]

Though it is not an environmental statute strictly speaking, the *Petroleum Act* makes comprehensive regulations for environmental practices in the general operation of the oil and gas industry. It empowers the Minister of Petroleum Resources to make regulations for the prevention and remediation of water pollution, atmospheric pollution, and other environmental damages occasioned during oil exploration and production.[33] Accordingly, the Minister has made the Petroleum (Drilling and Production) Regulations (PDPR) 1969[34] and the Petroleum Refining Regulations (PRR) 1974.[35]

These regulations mandate oil licensees to take all precautionary steps to avoid unreasonable environmental degradation and to respond promptly in the event of pollution.[36] Regulation 36 of the PDPR 1969 aims to establish good practices in the oil industry, but some of the terms appear vague as the determination of what 'good oilfield practices' means is left to the wide discretion of the Director of the DPR and cannot be easily ascertained. The PDPR, for instance, fails to stipulate what amounts to 'all practicable precautions' or 'prompt steps' to be taken by oil corporations under Regulation 25 of the PDPR. The Regulations have also failed to empower the DPR to demand compensation or cleanup. Further, the PRR prohibits the disposal of residue,

[32] *Petroleum Act,* LFN 2004, Cap P10. This Act provides for the exploration of petroleum from territorial waters and the continental shelf of Nigeria and vests the ownership of all on-shore and off-shore revenue from petroleum resources in the Federal Government. It is organized into five sections: Oil Exploration Licenses, Oil Prospecting Licenses; Oil Mining Licenses; Rights of Pre-Emption; Repeals; and Transitional and Saving Provisions.

[33] Oshionebo, *supra* note 17.

[34] Legal Notice 69 of 1969.

[35] Legal Notice 45 of 1974 and Stevens, *supra* note 14 at 398.

[36] Legal Notice 45 0f 1974, Reg 43 (1).

sludge, rust and similar matter from tanks which may have contained leaded petroleum products except in accordance with good refining practices approved by the Director of Petroleum Resources. The penalty for contravening these Regulations, that is, a fine of N100 or six months imprisonment has been criticized as derisory and "grossly inadequate" to deter environmental violation.[37] Moreover, although the DPR has power to revoke oil licences for non-compliance with environmental standards, it appears unlikely that the DPR would revoke a licence since its paramount interest is to develop the oil and gas industry.

iii. The Associated Gas Re-Injection Act[38]

Following Nigeria's oil boom of the 1970s, flaring of associated gas hiked with its oil and gas production.[39] As a response, the *Associated Re-Injection Act* was enacted to compel oil corporations to refrain from flaring associated gas from oil drilling and re-inject same.[40] The Act stipulated 1 January 1984 as the terminal date for gas flaring in Nigeria, but due to the non-conformance of oil TNCs the effective date has been extended at different times.[41] The Associated Gas Re-Injection (Continued Flaring of

[37] Uchenna Jerome Orji, *supra* note 5 at 326.

[38] *Associate Gas Re-Injection Act*, Cap A25, LFN 2004.

[39] See generally, A. Anomohanran, "Determination of Greenhouse Gas Emission Resulting from Gas Flaring Activities in Niger Delta" (2012) 45 Energy Policy 666 and C.N. Nwankwo and D.O. Ogagarue, "Effects of Gas Flaring on Surface and Groundwater in Delta State Nigeria" (2011) 3 Journal of Geology and Mining Research 131–136.

[40] *Ibid* at s 3 (1) and Soala Ariweriokuma, *The Political Economy of Oil and Gas in Africa: The Case of Nigeria* (Oxford: Routledge, 2009).

[41] Oshionebo, *supra* note 17 at 53.

Gas) Regulations of 1984[42] were issued to establish conditions under which companies could be granted a permit to continue flaring gas by the Minister.[43] This permit is granted in relation to an oil field rather than to the operator of the oil field. As such, an oil corporation may hold a gas flaring permit for one oil field and be penalized for flaring associated gas in another field which a flaring permit is not issued for.[44]

Official reports from the DPR show that the number of flaring permits that have been issued to oil corporations negates the intent and purpose of enacting the Act.[45] Although different deadlines have been set for the cessation of gas flaring in Nigeria, oil corporations have chosen to consider the fines and levies charged for flaring associated gas as bearable cost of doing business. Hence, they refuse to comply as it proves to be more economical to flare gas and pay the fine than to invest in re-injection facilities.[46]

iv. Environmental Guidelines and Standards for the Petroleum Industry in Nigeria[47]

The DPR, in 1981, issued the Environmental Guidelines and Standards for the Petroleum Industry (EGASPIN). In 2002, the DPR revised the EGASPIN. The EGASPIN now sets out comprehensive standards for the upstream and downstream operations in the oil and gas industry.[48] It provides for an industry-wide standards and guidelines for

[42] Statutory Instrument 43 of 1984, Reg. 1. These regulations were made pursuant to ss. 3 and 5 of the *Associated Gas Re-Injection Act,* LFN 2004, Cap A 25.

[43] *Ibid* at s 3 (2) (a) & (b).

[44] *Ibid.*

[45] Stevens *supra* note 14 at 401.

[46] Oshionebo, *supra* note 17 at 54 and Ariweriokuma *supra* note 40.

[47] *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria*, rev. ed. 2002 (Lagos: Department of Petroleum Resources, 2002).

[48] Oshionebo, *supra* note 17 at 55.

pollution prevention, abatement, remediation, management, wastes control, compliance monitoring and sustainable decommissioning of the oil and gas facilities.[49]

The EGASPIN prescribes environmental obligations for oil corporations at every stage of their operations: institution of an environmental management system; appointment of a compliance officer who is a representative of the management; conduct of periodical environmental audits and reviews by a certified auditor; self monitoring of compliance with certain provisions of the Guidelines and report of the monitoring exercise to be submitted to the DPR.[50] The verification of the reports of the self-monitoring process are certainly challenging as DPR lacks the scientific capacity to check the veracity of these reports.

v. Environmental Impact Assessment Act[51]

The *Environmental Impact Assessment Act* creates the Mandatory Study List which enunciates certain projects that require environmental impact assessment (EIA) such as "petroleum" and "waste treatment disposal" projects.[52] Thus, all oil and gas projects require EIA that evaluates the potential environmental impacts of the project and disclose available measures to address them. This assessment report is to be submitted and vetted by the Federal Ministry of Environment that would receive inputs and comments from civil societies and the general public.[53]

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[49] *Ibid.*

[50] *Ibid.*

[51] *Environmental Impact Assessment Act*, LFN 2004, Cap E12.

[52] *Ibid* at s 25 (1).

[53] *Ibid* at s 25(2).

It is important to recognize the core elements of public participation in the regime of the Act, which gives opportunity to host communities and NGOs to scrutinize a proposed project.[54] However, the high level of illiteracy of host communities poses a challenge to public scrutiny of EIA by members of such communities, and the leadership of the communities may be compromised and end up welcoming such projects as a measure of development at the expense of the likely environmental consequences.

Also, the EIA Act failed to grant a right of action to members of the general public by way of public interest litigation or citizens' suit.[55] This has greatly impinged on citizen participation in environmental governance in Nigeria. In *Oronto Douglas v. Shell Petroleum Development Company,*[56] the plaintiff alleged that the Liquefied Natural Gas project of the defendants had not met the mandatory provisions of the EIA Act that requires environmental impact assessment for such projects. The plaintiff alleged further that the project could not lawfully commence without an EIA carried out with public participation, as prescribed by the EIA Act. The court in striking out the suit held that "the plaintiff has shown no *prima facie* evidence that his right was affected nor any direct injury was caused to him or that he suffered anything at all more than the generality of the people".[57]

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[54] See Yinka Omorogbe, "The Legal Framework for Public Participation in Decision-Making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless" in Donald N Zillman, Alastair Lucas & George R Pring, eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002) at 549.

[55] Uchenna J. Orji, *supra* note 5 at 336. See also, Rhuks T. Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia Pacific* (New York: Routledge, 2013).

[56] *Oronto Douglas v. Shell Petroleum Development Company,* [1992] 2 NWLR 466.

[57] *Ibid.* It is however important to note that the Fundamental Rights (Enforcement Procedure) Rules, 2009 now seeks to afford improved access to judicial remedies for persons whose rights,

Furthermore, the exceptions granted under the Act create a loophole for the oil TNCs to bye-pass the EIA procedure.[58] Moreover, the idea of EIA, though a universal minimum standard, is only conditioned for nascent projects when the environmental crises complained of in Nigeria are majorly constituted by aging and dilapidated facilities.[59]

vi. Case Law

Although the environmental provision under the Nigerian Constitution cannot be enforced in Nigerian courts, litigants have ingeniously explored the mechanism of constitutional right to life which is enforceable against individuals and corporate entities. This mechanism has remained promising for environmental enforcement in Nigeria as litigants have been able to establish the linkages between the enjoyment of a clean and safe environment and their constitutional right to life.

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including environmental rights are violated or threatened. The Rules are applicable to all rights in the Constitution of Nigeria and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. See Emeka Polycarp Amaechi, "Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, In Ensuring Access to Justice for Victims of Environmental Degradation" (2010) 6:3 Law, Environment and Development Journal 320.

[58] The EIA Act allows a project to dispense with an environmental assessment where: (i) the President of Nigeria or the Federal Government Protection Council determines that a project is of minimal environmental impact (ii) the project is to be executed in a state of emergency in the nation whereby the government has out in place temporary measures (iii) in the opinion of the FME, the project is in the best interest of public health and safety. See *Environmental Impact Assessment Act,* LFN 2004, Cap. E12, s. 15 (1) and Oshionebo *supra* note 17 at 59.

[59] Stevens, *supra* note 14.

In *Jonah Gbemre v. Shell Petroleum Development Corp.,*[60] the petitioner claimed that the flaring of associated gas by the respondent in his community constituted a violation of his fundamental human right to life. The court upheld the petitioner's position and held that the petitioner's constitutionally-guaranteed right to life included the "right to a clean, poison-free, pollution-free and healthy environment."[61] *Gbemre's* case is a good example of judicial activism through which the court can be said to adopt the communitarian concept of good corporate citizenship by holding that continuing gas flaring constitutes gross health, environmental and human rights abuse, and awarding compensation to victims. However, commentators are of the view that this decision might not stand if tested on appeal as the line of decided cases tend to favour corporate economic concerns over environmental protection in Nigeria.[62]

III. NGOs and Civil Societies as Regulators

In recent decades, the significance of civil society groups such as environmental and human rights advocacy groups has been phenomenal. Since the 1990's, the remarkable rate of NGOs' participation in consultative processes of the United Nations as well as other intergovernmental organizations has accentuated the vantage ground they occupy in the promotion of corporate responsibility and accountability.[63]Indeed, the UN has,

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[60] *Jonah Gbemre v. Shell Petroleum Development Corp.,* (14 November 2005), Benin City FHC/B/CS/53/05.

[61] [2005] AHRLR 151 at 154.

[62] Stevens, *supra* note 14 at 403 and Ebeku, *supra* note 2 at 241.

[63] For example, in 1948 there were only forty-one consultative groups accredited by the UN to participate in consultative processes. By 1998, there were more than 1,500 organizations with varying degrees of participation and access to the consultative processes. See P.J. Simmons, "Learning to Live" *Foreign Policy* 112 (1 May 1998) 82.

historically, collaborated with NGOs and other civil society groups to design and implement certain programs including emergency relief responses, election monitoring, human rights and human development initiatives.[64] NGOs have been recognized under Article 71 of the UN Charter since 1945.[65]

More recently, the increasing influence and uncontrollability of TNCs, coupled with the decline in the regulatory grip of governments over globalization of trade have raised a new sense of motivation for NGOs to target their advocacy at TNCs in order to check on their excesses in the social, political and economic space.[66] With the spread of information technology and the expansion of media outlets, NGOs have leveraged their research capacity, grassroot involvement, knowledge base and political actions - such as public campaigns, lobbying and boycotts - to serve regulatory ends.[67] Indeed, civil society groups have assumed a pivotal role to act as "a countervailing force to corporate power and excesses by imposing regulation through social pressure rather than legislation".[68] For example, in 1995, Shell's decision to dump its 14,500 tonne North Sea oil platform into the Atlantic Ocean had to be reversed due to Greenpeace's protests and

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[64] Barbara Gemmill and Abimbola Bamidele-Izu, "The Role of NGOs and Civil Society" (2002) 77 Global Environmental Governance: Options and Opportunities 5.

[65] By virtue of Article 71 of the UN Charter, the UN Economic and Social Council is directed' to make suitable arrangement for consultation with non-governmental organizations which are concerned with matters within its competence.'

[66] See Evaristus Oshionebo, "Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry" (2007) 15 Afr. J. Int'l & Comp. L. 107 at 112.

[67] See Jem Bendell and David Murphy, "Towards Civil Regulation: NGOs and the Politics of Corporate Environmentalism" in Peter Utting, ed, *The Greening of Business in Developing Countries: Rhetoric, Reality and Prospects* (New York: Zed Books Ltd, 2002) and also A.S. Greene, *Civil Society and Multiple Repositories of Power,* 75 Chi-Kent L. Rev (2000) 477.

[68] John Sayer, "Confrontation, Cooperation and Co-optation: NGO Advocacy and Corporations" in Barbara Rugendyke, ed, *NGOs as Advocates for Development in a Globalising World* (New York: Routledge, 2007) at 133.

economic boycott in Europe. The media coverage and live transmission of the stand-off between activists and the UK forces erupted public awareness and solidarity. In fact, the action resulted in economic loss for Shell as customers boycotted Shell's gas service stations in Germany recording 50 percent drop in sales.[69] This action epitomized the strength of NGO activism to enforce social standards and ethics on TNCs as Shell had to reconsider its position and then decided to dismantle and recycle the oil platform rather than dumping same into the ocean.

Also, in January 2013, Friends of the Earth Netherlands (an international environmental NGO) with four Nigerian farmers from the Niger-Delta claimed damages against Shell for oil spillages between 2004 and 2007 in Goi, Ogoniland, Oruma and Ikot Ada Udo in the oil-producing region of Nigeria. As a result of these spillages that were never remediated, the economic sustenance and livelihood of the villagers were terribly affected. The court held Shell liable for the spillages that occurred between 2006 and 2007 and ordered payment of compensation to the plaintiffs.[70] This challenge made by Friends of the Earth marks a remarkable turning point in the jurisprudence of foreign direct liability of TNCs because it does not only obviate the challenge of *forum non conveniens*, but also impresses the possibility of parent company liability for wrongs

[69] See David Vogel, *The Market for Virtue: The Potentials and Limits of Corporate Social Responsibility* (Washington, DC: The Brookings Institution, 2006) at 51; Nathaniel Nash, "Oil Companies Face Boycott Over Sinking of Rig", *NY Times* (17 June 1995) online: http://www.nytimes.com/1995/06/17/world/oil-companies-face-boycott-over-sinking-of-rig.html (accessed 18 February 2014).

[70] *Friday Akpan v. Royal Dutch Shell* (30 January 2013), The Hague C/09/337050 / HA ZA 09-1580 (District Court) at para 5.1. See also BBC, "Shell in Nigeria: Dutch Court to Rule in Pollution Case" 30 January 2013 online at: http://www.bbc.co.uk/news/world-africa-21254890 (accessed 22 November 2013) and Milieudefensie, "Friends of the Earth Netherlands: Nigerian and Milieudefensie Appeal in Shell Case", (02 May 2013) online: Friends of the Earth http://www.foei.org/en/blog/2013/05/02/friends-of-the-earth-netherlands-nigerians-and-milieudefensie-appeal-in-shell-case (accessed 04 December 2013).

committed abroad by subsidiaries. Commentators have also considered the activism of NGOs suing TNCs in their home country as a way of drawing local attention to the complicity and irresponsibility committed by the TNCs abroad, which may have effect on their home patronage.[71]

Considering the long string of instances where civil society groups have recorded regulatory success, it is undeniable that social pressure and sanctions employed by NGOs have contributed to the filling of the regulatory gap with regard to TNCs. NGOs have been able to play this critical role because of the nature and structure of their organization. Civil society groups are independent of both government and business in the articulation of their campaign.[72] As Evaristus Oshionebo pointed out, they are in fact too diverse to be susceptible to capture, or any other form of *chill*, by business.[73] While TNCs have the capacity to 'greenwash' the public to believe their business practices as socially responsible through advertising campaign and ineffective corporate sustainability codes, their manipulative strategies are not likely to waver the stance of civil society

[71] For an analysis of the trends and implication of the judgment in the Shell case, see Allen & Overy, "The Shell Nigeria Cases: An Important Precedent for Transnational Liability Claims", (07 February 2013) online at: http://www.allenovery.com/publications/en-gb/Pages/The-Shell-Nigeria-cases----an-important-precedent-for-transnational-liability-claims.aspx (accessed 04 December 2013). Other notable examples of civil societies' activism yielding corporate shift in behavior include, Nike's decision to set minimum labour standards for workers in its sweatshops across the world following the 1990's scandal about the poor working condition and low wages paid in its Asian factories. Considering the civil society pressure and the propensity to lose sales, other apparel lines such as Gap, Levi Strauss and Adidas followed suit by assuming responsibility and setting Western-like standards across their foreign factories. Another current sensational campaign of interest is the Friend of the Earth's international petition addressed at Shell to clean up oil leaked in Nigeria's Niger-Delta region following the 2011 UNEP report that states that the countering and cleaning up of oil spillage in Ogoniland will span over 25 years at a cost over $1 billion.

[72] Oshionebo *supra* note 66 at 112.

[73] *Ibid.*

groups. This is true because of their independent fact-checking resources and access to information.

Another effective instrument at the exclusive reserve of the civil society, particularly the consumer group, is the 'power of resistance' or 'action through consumption'.[74] This power is exercised in reaction to public awareness and campaigns exposing the condemned acts of social irresponsibility or human rights violation perpetrated by a targeted TNC. The 1991 NIKE scandal involving labour exploitation in its Asian factories instantiates the power of consumer action. A report on the sub-par working condition and child labour (working for less than 11 cents per hour) published by Jeff Ballinger brought the situation into the public domain and it became an international issue. The activism generated a negative consumer consciousness that hurt NIKE sales. Consequently, NIKE had to change its production practices in order to appease Western consumers.[75] Cynthia Williams highlights the effectiveness of civil society groups activism by stating that NGOs

> are changing the social context in which companies operate…are changing the way companies think about their strategic challenges,…and are changing the norms of appropriate industry action with respect to important questions such as environmental

[74] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham: Edward Elgar Publishing Limited, 2011) at 242.

[75] See Naomi Klein, *No logo: Taking Aim at the Brand Bullies* (London: Radon House LLC, 2000); Steven Greenhouse, "Nike Shoe Plant in Vietnam is Called Unsafe for Workers", *NY Times* (08 November 1997) online: New York Times http://www.nytimes.com/1997/11/08/business/nike-shoe-plant-in-vietnam-is-called-unsafe-for-workers.html?pagewanted=all&src=pm (accessed 04 December 2013) and Max Nisen, "How NIKE Solved Its Sweatshop Problem", *Business Insider* (09 May 2013) online Business Insider: http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5 (accessed 04 December 2013).

> protection, security arrangement for pipelines and plants, and financial arrangement with host countries[76]

It is, however, useful to note that the regulatory success attained within the realm of corporate accountability of TNCs cannot be attributed solely to civil society groups. Authors have pointed out that factors other than civil society activism may come into play contemporaneously to bring about the desirable regulatory effect.[77] In essence, the efforts of NGOs and other civil society groups is only a part of the equation that creates the obtainable regulatory outcomes.

Further, the collaborative role NGOs currently play by setting social and environmental standards for business becomes concerning when NGOs delve into the arena of preparing compliance reports on behalf of corporations. Recently, NGOs are increasingly becoming project partners and consultants to TNCs even in areas of core business practices. For example, the Amnesty Business Group (a division of Amnesty International) is created to consult for TNCs, such as Rio Tinto, BP and Shell, with regard to incorporating the principles of UN Declaration of Human Rights into their core business codes.[78] This trend may attenuate the independence and oversight role of NGOs when they resign their umpire status to become team mates with TNCs. Such situation seems to raise the question of who will watch the watchdog.[79]

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[76] C.A. Williams, "Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry" (2004) 36 N.Y.U J. Int'l L & Pol. 457 at 461.

[77] Claude Ake, *Democracy and Development in Africa* (Washington, DC: Brookings Institution, 1996) at 42 and Oshionebo *supra* note 17 at 99.

[78] Simon Zadek, *The Civil Corporation* (London: Earthscan, 2007)

[79] John Sayer, "Risk and rewards: NGOs Engaging the Corporate Sector" in Barbara Rugendyke, ed, *NGOs as Advocates for Development in a Globalizing World* (New York: Routledge, 2007) at 132.

Of concern are the peculiar limitations menacing civil society groups operating in the developing countries, where the brunt of regulatory failure is borne the most. By way of approach, the NGOs in Nigeria, particularly in the oil producing region lack the sophistication to be proactive.[80] Instead of channeling their efforts into proffering legal and policy alternatives, they would rather resort to mass mobilization, protests and litigation after the fact.[81] Also, they suffer from lack of coordination and ethnic differences tend to come in the way of pursuing their common objectives vis a vis other ethnic groups. Another significant limitation is the violent and uncivil means adopted by certain sections of the civil society in registering their agitation. For example, ethnic militia outfits in the Niger Delta, in their acclaimed struggle for self determination and resource control, have continued to perpetrate nefarious activities such as oil bunkering, kidnapping and vandalization of oil installations (which has continued to account for a large quantity of oil spillage in the region).[82]

In Nigeria, the activities of NGOs can be recognized as a relevant factor that influences government (re)actions and corporate strategies. The influence of pressure groups have continued to shape the polity of the Nigerian state especially as it relates to environmental governance and human rights. For instance, during the Ogoni crisis in Nigeria, the publicity and sponsored campaign against the human rights violations of Shell in Nigeria by international human rights NGOs served as a compelling force for

[80] Oshionebo *supra* note 17 at 102.

[81] *Ibid.*

[82] See Paul Okumagba, "Ethnic Militias and Criminality in the Niger-Delta" (2009) 3 African Research Review (an in-depth expose on the rise and operation ethnic militia in the Niger Delta and across Nigeria) and Judith B. Asuni, "Blood Oil in the Niger Delta", Special Report, United States Institute of Peace online: http://www.usip.org/sites/default/files/blood_oil_nigerdelta.pdf (accessed 06 December 2013).

Shell to reconsider its corporate codes and human rights policies.[83] These campaigns and public mobilization have raised the consciousness of the people and also challenged the Nigerian government to take concrete steps in its human rights protection mechanisms. NGOs have continued to pioneer the struggle against corporate and governmental abuses through legal means. For example, in 2005, in the case of *SERAC v. Nigeria*[84], the Social and Economic Rights Action Centre (SERAC), on behalf of the Ogoni people, challenged the Nigerian government for its violation of the environmental as well as other socio-economic rights of the people by aiding and abetting the degradation and pollution of the land and water courses in the exploration of oil by NNPC and Shell Corporation in the area. The African Commission on Human and Peoples' Rights (the Commission) found the Nigerian government liable for breach of several guaranteed rights under the African Charter. This is a groundbreaking case in African human rights jurisprudence as it gave the Commission the opportunity to elaborate on the responsibilities of a government under Article 24 of African Charter on Human and Peoples' Rights.

IV. The Petroleum Industry Bill

Based on the recommendations of the Lukman Report of 2008[85], the Petroleum Industry Bill (PIB) was crafted to revamp the regulatory and institutional frameworks of the Nigerian oil and gas industry. The PIB was presented to the National Assembly by the

[83] Oshionebo, *supra* note 17 at 100.

[84] For a critique of the case, see Chirwa Danwood, "Toward Revitalizing Economic, Social and Cultural Rights in Africa: Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria" (2002) 10 Human Rights Brief 14.

[85] The Lukman Report is the product of the deliberations of the Oil and Gas Sector Reform Implementation Committee, originally constituted in April, 2000 under the chairmanship of Dr Rilwanu Lukman.

President of the Federal Republic of Nigeria as an Executive Bill on 18 July 2012.[86] Among the eleven stated objectives of the bill is to "protect health, safety and the environment in the course of petroleum operation".[87]

In the arena of environmental governance, the PIB proposes some key institutional changes while affirming certain environmental principles. If the Bill is passed into law in its present form, the current DPR will be scrapped and replaced with the Upstream Petroleum Inspectorate (UPI)[88] and the Downstream Petroleum Regulatory Agency (DPRA)[89]. The UPI shall issue, ensure and enforce compliance with the terms and conditions of all upstream leases, licenses, permits and authorizations, including standards for all upstream plants, installations and facilities pertaining to and in line with national and applicable environmental standards.[90] It is the UPI that will now issue licenses, permits or authorizations regarding seismic and drilling activities on all fields. Meanwhile, the DPRA shall be a body corporate functioning as a technical and commercial regulator of the downstream sector of the oil and gas industry as specified by

[86] Adepetun Caxton-Martin Agbor & Segun, "The Petroleum Industry Bill 2012 (PIB): A Synopsis", 10 August 2012 online: ACAS http://www.acas-law.com/newsletter/The%20Petroleum%20Industry%20Bill%202012%20(PIB)%20-%20A%20Synopsis%20by%20ACAS-LAW%20(10%20August%202012).pdf (accessed 07 January 2014).

[87] See O.K. Edu, "Corporate Social Responsibility: The Case of Multinational Oil Companies in the Niger Delta of Nigeria" (2011) 23 Sri Lanka J. Int'l L. 125.

[88] Nigeria, *An Act to establish the legal and regulatory framework, institutions and regulatory authorities for the Nigerian petroleum industry, to establish guidelines for the operation of the upstream and downstream sectors, and for purposes connected with the same*, 7th Sess, 7th Nat Ass, Abuja, ss. 9 and 10. [PIB]

[89] *Ibid* at ss 43 – 72.

[90] *Ibid* at ss 13 - 42.

the Minister.[91] It will promote the sustainable infrastructural development of the downstream sector and the maintenance of technical standards.[92] Both Inspectorates will have their individual Special Investigation Units.

In relation to the perennial flaring of associated gas, the PIB under section 275 provides that:

> [n]atural gas shall not be flared or vented after a date ('the flare-out date') to be prescribed by the Minister in regulations made pursuant to this Part, in any oil and gas production operation, block or field, onshore or offshore, or gas facility such as, processing or treatment plant, with the exception of permits granted under ... this Act.[93]

It, thus, appears that gas could still be flared under certain conditions just as permissible under the extant regime. It is appalling that there is yet no firm date for cessation of gas flaring under the PIB, and such stipulation is still left to the whims of the Minister of Petroleum Resources. Further, the PIB provides that:

> [t]he oil and gas operators with flared gas resources shall within six months of the commencement of this Act categorize all of their flared gas resources (daily flare quantity, reserve, location, composition) and submit this data along with gas utilization plans to the Inspectorate for the gas they intend to utilize before the flare out date as stated in section 275 of this Act.[94]

In essence, the PIB also requires gas utilization plan from oil and gas operators, and where deemed justifiable, the Minister has the power to issue a gas flaring permit of not more than 100 days where the operator is just starting up, or as a result of equipment failure, shut down or flaring necessitated by safety practices.

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[91] *Ibid* at s 43.

[92] *Ibid* at s 44.

[93] *Ibid* at s 275.

[94] *Ibid* at *s* 276 (1).

The Federal Ministry of Environment bears the primary responsibility of monitoring and enforcing environmental standards but the UPI, DRPA and the Minister are vested with regulatory power over all aspects of health, safety and environmental matters in the oil and gas industry. All operators in the industry are obliged to adopt the precautionary approach to environmental issues; they are required to develop and use environmentally-friendly technologies; and compliance with environmental guidelines and standards remain binding on all companies in the Industry.[95]

V. Factors Impeding Environmental Regulation in the Oil and Gas Industry in Nigeria

i. Conflict and Overlap of Regulatory Powers

In Nigeria, agencies exercising environmental oversight and regulatory powers are known to have overlapping and duplicating functions.[96] At the federal level, for example, there are conflicting mandates between the Federal Ministry of Environment (NESREA and NOSDRA) and the DPR with regards to regulation of the oil and gas industry. The FME is required by law to collaborate with other government agencies for protection of the environment and conservation of natural resources, but the level and nature of the collaboration are not clearly stated. Perhaps, this explains the conscious relegation of NESREA's power and functions as not applicable in the oil and gas industry.

[95] *Ibid* at ss 289 – 294.

[96] See E. Emeseh, "Mainstreaming Enforcement for the Victims of Environmental Pollution: Towards Effective Allocation of Legislative Competence under a Federal Constitution" (2012) 14 Environ Law Review 184 – 198.

This form of duplicity leads to rivalry, jealousy and gross inefficiency.[97] It is "too expensive, bureaucratic and time wasting."[98] It causes unhealthy, inconsistent, inter-organizational relationship that does not enhance enforcement of environmental regulations.[99] For instance, the UNEP (2011) Report found DPR's interpretation of the EGASPIN inconsistent with NOSDRA's.[100] This inconsistency has been exploited by oil TNCs to stop remediation of sites impacted by oil spill before they are fully restored.[101]

I. Corruption and Administrative Gap

Corruption remains the bane of governance (political or environmental) in Nigeria. The lucrative nature of the oil and gas industry has generally enhanced the culture of "rent seeking" and "elite capture" in the country.[102] As a result, the regulatory agencies have been captured by actors in the oil and gas industry. Thus, the monitoring and enforcement of environmental regulations are greatly challenged because of the manipulations and interference of the actors that benefit from the weakened regulatory

[97] Vincent Obia, "Police/NSCDC Clash: Between Jurisdiction and Accountability" *ThisDay* (07 April 2013) online: This Day http://www.thisdaylive.com/articles/police-nscdc-clash-between-jurisdiction-and-accountability/144226/ (accessed 19 February 2013).

[98] C.O. Eneh, "Managing Nigeria's Environment: The Unresolved Issues" (2011) 4 J. Environ. Sci & Technol. 250 – 263.

[99] Ambisisi Ambutuuni et al, *supra* note 21.

[100] See United Nations Environment Programme, *Environmental Assessment of Ogoniland* (Nairobi: United Nations Environment Programme, 2011).

[101] Fidelis Allen, "The Enemy Within: Oil in the Niger Delta" (2012) 29 World Policy Journal 46 at 49.

[102] Halvor Mehlum, Karl Moene and Ragnar Tovik, "Cursed By Resources or Institutions?" (2006) 29 *The World Economy* 1117 – 1131 and Humphreys Macartan, Jeffry Sachs and Joseph Stiglitz, "Escaping the Resource Curse" (New York: Columbia University Press, 2007).

system.[103] For example, in 2012, the NNPC reportedly awarded a pipeline protection contract of about $44 million to a syndicate of armed militia.[104] It is believed to be a way to curb pipeline vandalization by ethnic militia groups and, as a result, forestall oil spill resulting from sabotage. This is, however, a clear case of governance deficit to see the government relegating the powers of state security forces and contracting with militia groups that are known as the vandals.

Further, there is a high level of technical inefficiency and knowledge gap in these agencies. They are underfunded and lack technical capacity to monitor environmental infractions in the industry. They do not have funds to recruit enough trained manpower; to set up offices across the nation and equip them with necessary equipment.[105] Indeed, environmental inspection by these agencies entails mere collection of pollution reports from the oil TNCs rather than conducting independent field inspection and analysis.[106]

II. Paternalism and Lack of Autonomy

Considering the economic returns generated from oil trade in the country, the government is oriented not to 'over-regulate' the industry so as not to perturb oil TNCs or cause them to divest their stakes in the country. This regulatory chill is said to be responsible for the delay in the enactment of the PIB that is geared towards fiscal and regulatory reforms in

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[103] F.C. Onuoha, "Poverty Pipeline Vandalization/Explosion and Human Security: Integrating Disaster Management into Poverty Reduction in Nigeria" (2007) 16 Afr. Secur. Rev. 99 -115.

[104] John Ameh, "Reps Query $5.6 Billion Pipelines Protection Contract", *The Punch* (28 March 2013) online: The Punch http://www.punchng.com/news/reps-query-n5-6bn-nnpc-pipelines-protection-contracts/ (accessed 19 February 2014).

[105]See I. M. Aprioku, "Oil-Spill Disasters and the Rural Hazards-Cape of Eastern Nigeria" (2003) 34 Geoforum 99 -112.

[106] Oshionebo, *supra* note 17 at 72.

the industry. This orientation cuts across all levels and organs of the government, including the judiciary. It has, indeed, coloured the line of jurisprudence on environmental claims in Nigeria.

Additionally, the regulatory agencies are not autonomous in their operations. They are structured to be agents or privies of the executive arm of government; a position that makes them subservient or vulnerable to intimidation from government officials or influential elites in the society.[107] For example, NESREA which is the supreme environmental body in the country is a department of the Federal Ministry of Environment. In effect, it is financially and logistically dependent on the Federal Minister of Environment in different ways.

III. Contractual Protection of FDI through Stabilization Clauses

As a form of protection, investment contracts between host states and TNCs are crafted to shield foreign investors from unfavourable changes in the legal and fiscal regimes through the inclusion of stabilization clauses.[108] These stabilization clauses could be incorporated in the text of an investment contract or an independent statute.[109]

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[107] Norwegian Organization for Development Cooperation, Good Governance in Nigeria: A Study in Political Economy and Donor Support by Dr. Inge Amundsen, ed (Oslo: Chr Michelsen Institute, 2010).

[108] For a critique of the nature, effect and validity of stabilization clauses, see Evaristus Oshionebo, "Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries" (2010) 10 Asper Review International Business and Trade Law 1. See also, Emeka J Nna, "Anchoring Stabilizing Clauses in International Petroleum Contracts" (2008) 42 Int'l Law. 1333

[109] For example, Ghana's *Mineral and Mining Act* provides that:

> the holder of the mining lease will not, for a period not exceeding fifteen years from the date of the agreement, (a) be adversely affected by a new enactment, order, instrument or other action made under a new

Generally, stabilization clauses vary in type and form: freezing clause and economic equilibrium clause. The economic equilibrium clause secures the interest of the investor by enabling the investor to claim compensation against the host country where a foreign investor is negatively affected by changes in the legal and fiscal regime in the country. As for freezing clauses, it is required that the legal and fiscal regime in force at the time of executing the investment contract would govern the project during the life of such project, and that such laws would not be amended to negatively impact the going concern of the relevant foreign investors.[110]

The extent to which stabilization clauses affect the regulation of oil TNCs in Nigeria is unclear given that oil contracts signed by the Nigerian government are not disclosed to the public. However, stabilization clauses could contribute to regulatory chill in the realm of environmental governance in host developing countries.[111] It must, however, be noted that in the recent case of *Niger Delta Development Commission v. Nigeria Liquefied Natural Gas Company Ltd*[112], the court found a stabilization clause in

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> enactment or changes to an enactment, order, instrument that existed at the time of the stability agreement, or other action taken under these that have the effect or purport to have the effect of imposing obligations upon the holder or applicant of the mining lease.

[110] S. Leader, "Human Rights Risks, and New Strategies for Global Investment" (2006) 9(3) Journal of International Economic Law 667. Additional examples of freezing stabilization clauses can be found under Article 30(1) and (2) of the Chad-Cameroon Pipeline Contract and Article 34.4 in the Consortium-Chad Convention for the Development of Oil Fields and the Host Government Agreement between Turkey and the Consortium led by British Petroleum in 2000.

[111] See Evaristus Oshionebo, "Fiscal Regimes for Natural Resource Extraction: Implications for Africa's Development" in Francis Botchway, ed, *Natural Resource Investment and Africa's Development* (Cheltenham, UK: Edward Elgar Publishing, 2011) 200 at 222.

[112] *Niger Delta Development Commission v. Nigeria Liquefied Natural Gas Company Ltd* (11 July 2007), Port Harcourt FHC/PH/CS/313/2005 (Federal High Court). For the fact and analysis of the case, see Bayo Adaralegbe, "Stabilizing Fiscal Regime in Long Term Contracts: Recent Development in Nigeria" (2008) 3 Journal of World Energy Law & Business 239.

the *Nigeria LNG Act* unconstitutional as it fetters the legislative sovereignty of the National Assembly. According to the court:

> …However the provision on New Laws under Schedule II paragraph 3, I find and hold is against the tenets of the Rule of Law …. This particular provision is very wide and not consistent with the tenets of the constitutional provision which allows the National Assembly to make laws for the good of all people of this country …. I sincerely hope that the legislation per National Assembly will look at that paragraph of the Second Schedule of Nigeria LNG to ensure conformity as this Court can only interpret/expound, not change the law.[113]

Conclusion

From the analysis, it is clear that the Nigerian regulatory landscape is replete with environmental laws and institutions, but they can at best bark and not bite. The regulatory institutions are faced with inadequate funding, lack of autonomy, conflicting mandates, corruption and technical inefficiency. With these inadequacies, it is practically impossible to attain sound environmental governance in the Nigerian oil and gas industry. Also, the laws governing the realm are outdated, and the sanctions for violations of the laws are too meager and derisory to effect environmental compliance in the industry.

[113] *Niger Delta Development Commission v. Nigeria Liquefied Natural Gas Company Ltd* (11 July 2007), Port Harcourt FHC/PH/CS/313/2005 (Federal High Court) at 9.

CHAPTER FOUR

REGULATION OF TNCS UNDER HOME STATE LAW AND INTERNATIONAL LAW

I. Introduction

Since TNCs are legally created under the laws of a host state, and their externalities are directly borne by local communities in the host state, it remains its primary obligation to regulate TNCs that operate within its territory. Having examined and identified the flaws and gaps of the regulatory framework of Nigeria as a host state in the previous chapter, it would be a salutary venture to explore other frameworks that could complement the host state's capability to regulate the TNCs operating within its borders.

This chapter propagates the overarching objective of this study: exploring options and avenues for regulating TNCs. In this chapter, the instruments for regulating TNCs in their home states will be examined, particularly tort-based foreign direct liability actions in the Netherlands, United Kingdom, United States and Canada. Further, the substantive and procedural impediments in transnational tort-based actions will be demonstrated. Additionally, this chapter will review major instruments by multilateral and supranational organizations that seek to attain corporate environmental responsibility in transnational enterprise.

II. Home State Regulation

In the realm of international law, there exist a range of justifications available to a home state in the exercise of its control over the conduct of TNCs bearing its nationality.[1]

[1] To determine the nationality of a TNC, there are three factors established under public international law: the place of incorporation, the place from which the corporation is primarily

These principles include: the territorial principle; the nationality principle, the universality principle and the passive personality principle. The territorial principle is perhaps the most common basis upon which countries dispense their criminal justice administration. Based on the territorial principle, the criminal laws of a nation can be enforced across the physical territorial boundaries of the state. This principle is hinged on "the ideas of state sovereignty and of the exclusive jurisdiction of one particular state over each crime."[2] Thus, in *Schooner Exchange v. McFaddon*[3], Chief Justice Marshall stated:

> The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction.[4]

The principle has been interpreted to permit the exercise of criminal jurisdiction over an act of complicity which partly occurs in a particular state whereas the principal constituent of the offence was perpetrated in another state.[5]

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controlled, and the nationality of the owners or those exercising control over the corporation. Meanwhile, the domestic considerations of states differ. In 'common law' jurisdictions, "the place of incorporation" test is favoured while in 'civil law' states, "the place of control" test or "the real seat" theory is preferred. See Jennifer Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006) at 147.

[2] For a general overview of the territorial principle, see Wendell Berge, "Criminal Jurisdiction and the Territorial Principle" (1932) 30 Michigan Law Review 238 at 240. See also Matthew Goode, "The Tortured Tale of Criminal Jurisdiction" (1997) 21 Melb. U. L. Rev. 412; Patrick Borchers, "The Conflict of Laws and Boumediene v. Bush" (2009) 42 Creighton L. Rev. 9.

[3] *Schooner Exchange v. McFaddon*, 11 U.S. 7 Cranch 116 (1812).

[4] *Ibid*.

[5] John Ruggie, *Clarifying the Concepts of 'Sphere of Influence' and 'Complicity': Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNHRCOR, 2008, UN Doc A/HRC/8/16 1 at 8.

The nationality principle is rooted in the competence of any state to regulate the conduct of its nationals anywhere in the world. Under the nationality principle, states reserve the power to enact laws to sanction the conduct of both natural and corporate persons bearing its nationality anywhere in the world. As for corporations, the nationality is determined based on the place of its incorporation rather than nationality of its owner.[6] Under the universal jurisdiction principle, the jurisdiction of any country with respect to certain class of offences is universal. As such, a country may assume criminal jurisdiction over a person regardless of the nationality of such person with respect to 'universal crimes' such as genocide, war crime and piracy.[7] With regards to passive personality principle, a state regulates certain foreign conduct that constitutes threat to its foreign operations or government interest. This principle is invoked by a nation to apply criminal sanctions over an act committed outside its territorial boundaries by a foreign national where the victim of the act is its national. This principle has been mainly applied to certain kinds of conduct such as terrorism.[8]

Aside the legal devices that form the basis of home states' regulatory interest, there are other factors that motivate nations to regulate extra-territorial conduct of their nationals – natural or corporate persons. Countries that endeavour to regulate the conducts of their TNCs abroad seek to protect or defend certain interests. For instance, a country may impose enforceable standard of conduct on its TNCs so as to prevent any political embarrassment which the misconduct of its TNC may bring to the government

[6] *Case concerning Barcelona Traction Light and Power Co. (Belgium v Spain),* [1970] ICJ Rep 7.

[7] Universal jurisdiction is mostly exercised in respect of egregious crimes such as crimes against humanity. See *Rome Statute of International Criminal Court*, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) [*Rome Statute*].

[8] See Curtis Bradley, "Universal Jurisdiction and US Law" (2001) U. Chi Legal F 323.

and the country. Also, a country may consider the economic repercussion of the misconduct of TNCs as well as the development objectives of the nation.[9]

A. Transnational Tort-Based Claims in Home States

i. United States

One of the most important statutes explored in pursuing accountability of TNCs regarding their extra-territorial conducts is the Alien Tort Statute (ATS) of the United States. By virtue of S. 1350 of the ATS, "the district court shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"[10] Thus, the ATS confers jurisdiction on US federal court in respect of claims by aliens for tortuous violations of 'the law of nations'. Accordingly, three conditions are prescribed in order to assume jurisdiction: (1) an alien sues, (2) for a tort (3) committed in violation of the law of nations or a treaty of the United States.[11]

For the first time, the application of the ATS was extended to corporations in the 1997 case of *John Doe 1 v Unocal*[12]. In this case, a group of Burmese farmers alleged that Unocal, a Californian energy corporation, was complicit in a range of human rights violations including rape, torture, forced relocation, forced labour and murder in the

[9] Jennifer Zerk, *supra* note 1at 152.

[10] 28 USC 1350.

[11] *Ibid*.

[12] *John Doe 1 v Unocal*, 963 F. Supp. 880 (CD Cal. 1997); No. 93 Civ. 9878, 1996 WL 194298 (S.D.N.Y. Apr. 22, 1996).

southern Burma Yandana gas pipeline.[13] Since the decision in *Unocal* paved the way for action against corporations, there have been robust attempts by alien plaintiffs to institute many more cases against TNCs based on ATS including oil TNCs. In *Aguinda v Texaco Inc.*[14], the plaintiffs filed a class action law suit on behalf of the inhabitants of the Ecuadorian Amazon against the defendants for environmental contamination and pollution in Peru and Ecuador. Also, in *Presbyterian Church of Sudan v. Talisman Energy Inc.*[15], the defendant oil TNC was alleged to have aided and abetted the Sudanese Government in a campaign of genocide and torture against non-Muslim African people in Southern Sudan in order to expand their oil exploration in the region.[16]

In April 2013, the US Supreme Court severely limits extraterritorial claims brought under the ATS in the high profile case of *Kiobel v Royal Dutch Petroleum*[17]. The court in *Kiobel*, relying overwhelmingly on *Morrison v. National Australia Bank*[18],

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[13] For the fact of the case, see *John Doe 1 v Unocal Corp.*, 2002 US App. LEXIS 19263 (9th Cir. 2002) 14193-5.

[14] *Aguinda v Texaco Inc*, 303 E3d 470, 476 (2d Cir. 2002).

[15] *Presbyterian Church of Sudan v. Talisman Energy Inc*, 131 S.Ct. 79 (2010).

[16] *Presbyterian Church of Sudan v. Talisman Energy Inc*,244 E Supp. 2d 289, 305 (S.D.N.Y. 2003). Other actions brought against TNCs under the ATS include: *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (ND Cal 2008) (for complicity in relation to protests in the Niger-Delta region of Nigeria); *Sarei v. Rio Tinto PLC*, 550 F. 3d 822 (9th Cir. 2008) (plaintiffs alleging that a private mining enterprise had cooperated with the government of Papua New Guinea to displace villages, cause environmental damage, and commit other abuses and war crimes); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2001), remanded to No. 97 Civ. 2858, 2005 WL 287397 (S.D.N.Y.Feb 3, 2005), rev'd and remanded, 448 F.3d 176 (2d Cir. 2006), cert. denied, 549 U.S. 1282 (2007) (plaintiffs alleging that the defendants violated the law of nations by knowingly purchasing property illegally seized by the Egyptian government on the basis of religious discrimination, but the court opined that religious discrimination does not constitute a violation, unless the actor is acting under color of law or is a state official); *Abdullahi v. Pfizer* , 562 F. 3d 163 (2d Cir. 2009) (holding that case against Pfizer alleging non-consensual medical experimentation on children in Northern Nigeria could be based under the ATS).

[17] *Kiobel v Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013).

[18] *Morrison v. National Australia Bank,* 130 S. Ct. 2869.

extends the application of the presumption against extraterritoriality to ATS.[19] In effect, no suits could be brought to the US courts under the ATS except the factual background has sufficient territorial ties to the US so as to rebut the presumption against territoriality.

In this case, the plaintiffs, who are Nigerians resident in the US, brought a class action accusing Shell of complicity in gross human rights violations by the Nigerian government against environmental activists from Ogoni land. The US Court of Appeals for the Second Circuit dismissed the claim on grounds that the law of nations does not recognize corporate liability. On appeal to the US Supreme Court, a *certiorari* was granted to determine the liability of a corporation under the law of nations. Upon hearing oral arguments, the court ordered the parties to file supplemental briefs to address whether and when the ATS applies to violations of law of nations outside the US. The court, in affirming the Court of Appeals' dismissal, refrained from determining the question of corporate liability, but held that the facts of the case could not sustain extraterritorial application of the ATS. In essence, the ATS will not apply to facts where all relevant conduct occurred outside the US without touching and concerning the United States' interest with sufficient force. According to Chief Justice Roberts:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial

[19] The presumption against territoriality is a canon of interpretation that captures the intent of the Congress in the application of the statute within the US. The US Supreme Court has, on 14 January 2014, reaffirmed its *Kiobel* decision in *Daimler AG v. Bauman*, where it unanimously rejected the attempt of twenty-two Argentinian plaintiffs to sue Daimler, a German automaker, in California Federal District Court for alleged complicity in the deaths, kidnappings, torture and wrongful detention of its employees during the "Dirty War" of Argentina. The court held that the lawsuit involving "foreign plaintiffs suing a foreign defendant based on a foreign conduct" cannot be heard in a US court as much as no "relevant conduct" occurred in the US to overcome the *Kiobel* presumption. See *Daimler AG v. Bauman,* (2014) 571 US ____; 644 F. 3d 909, reversed.

> application. ... Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[20]

This landmark decision has received criticisms from different circles for its effect on transnational justice hitherto accessed by foreign nationals against TNCs in American courts.[21] It has been observed that the Supreme Court has left the question of applicability of the ATS to corporations unanswered, although the court hinted that "[C]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."[22] Also, the court failed to propose the test to determine when and how to rebut the presumption against extraterritoriality. Thus, the court has left potential litigants guessing and testing their cause of action against the presumption on a trial and error basis. This constitutes a big step backward in the pursuit of TNCs accountability.

ii. The Netherlands

Article 6: 162 of the *Dutch Civil Code* generally provides for the tortuous liability of a parent company for misconducts of its subsidiary, but it is not intended to apply in an

[20] *Kiobel v Royal Dutch Petroleum,* 133 S.Ct. 1659 (2013) at para 1669.

[21] For a critique of the *Kiobel* , see generally Matteo M Winkler, "What Remains of the Alien Tort Statute after Kiobel" (2013) 39 N.C.J. Int'l L. & Com. Reg. 171; Alison Bensimon, "Corporate Liability under the Alien Tort Statute: Can Corporations Have Their Cake and Eat It Too" (2013) 10 Loy. U. Chi. Int'l L. Rev. 199; Yihe Yang, "Corporate Civil Liability under the Alien Tort Statute: The Practical Implications from Kiobel" 2013 40 W. St. U. L. Rev. 195and Anthony J. Colangelo, "The Alien Tort Statute and the Law of Nations in Kiobel and Beyond" (2013) 44 Geo. J. Int'l L. 1329.

[22] *Kiobel v Royal Dutch Petroleum, supra* note 25.

extraterritorial context.[23] In pursuing foreign direct liability of a parent company, Article 3: 305a of the *Dutch Civil Code* has proven salutary. By that provision, an interest group such as a foundation or association can bring extraterritorial claims, on behalf of foreign plaintiffs, by way of representative action. According to that provision: "A foundation or association with full legal capacity that, according to its articles of association, has the objective to protect specific interests, may bring to court a legal claim that intends to protect similar interests of other persons".[24]

This provision was invoked in the five connected cases regarding Shell's liability for oil spills that occurred in 2004, 2005, 2006 and 2007, in Nigeria. In 2008, Milieudefensie, the Dutch branch of Friends of the Earth, collaborated with the Nigerian plaintiffs to bring the claims according to the Dutch civil procedural law. In four of the cases brought by Oguru, Efanga and Dooh, the plaintiffs alleged Shell's responsibility for four oil leakages that caused sustained environmental damage in their villages. Since Nigerian law of tort was applied in the case because the alleged damage was sustained in Nigeria, Shell was not found liable for negligence because it was found to have taken due precaution to prevent sabotage. Hence, the four cases were dismissed.

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[23] Liesbeth F.H. Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (The Hague, Netherlands: Eleven International Publishing, 2012) at 337.

[24] *Civil Code of the Netherlands*, 3A, 2002, 11, art 305a. In addition to the provision of Article 3:305a, the Dutch Code of Civil Procedure provides for tacit choice of forum (forum necessitatis). According to Article 9b: "When Article 2 up to and including 8 indicate that the Dutch courts have no jurisdiction, then they nevertheless have if:…(b) a civil case outside the Netherlands appears to be impossible…". In essence, where they statutorily lack jurisdiction, Dutch courts can assume jurisdiction in civil matters as a matter of necessity because declining jurisdiction will amount to denial of justice. The forum of necessity doctrine has been adopted in other many jurisdictions including Germany, Mexico, Switzerland, Russia, South Africa and some provinces in Canada. For the intellectual history and application of the doctrine to transnational corporate wrongs, see Chilenye Nwapi, "Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor" (2014) 30:78 Utrecht Journal of International and European Law 24-43.

But in the fifth case regarding the two oil spills near Ikot Ada Udo village, Shell Nigeria was found to have breached its duty of care, and thus liable for tort of negligence. It was determined that Shell did not take reasonable precaution to prevent sabotage in the Ikot Ada resulting to spills in 2006 and 2007 as the overground valves of an abandoned well were opened by the saboteurs with a simple wrench. According to the court, the sabotage could have been prevented by Shell by installing a concrete plug. Hence, Shell was found liable in January 2013 and the Nigerian plaintiff, Friday Akpan, is to be awarded damages against Shell Nigeria.[25]

iii. The United Kingdom

Similarly, in the UK, foreign direct liability of parent companies has been tested to a certain extent.[26] In *Trafigura*, 30,000 Ivorians brought a group action against Trafigura Beheer BV in the UK, for shipping and dumping untreated chemical waste in Cote d'Ivoire knowing that the waste is corrosive and toxic to the health of the local residents of Abidjan. The plaintiffs claimed damages for the alleged nuisance and negligence of Trafigura. On its part, Trafigura denied liability for the personal injuries claimed by the plaintiffs, arguing that it had subcontracted the disposal to a local Ivorian company, Tommy, and it was not aware that Tommy would dispose of the waste

[25] Ivana Sekularac and Anthony Deutsch, "Dutch Court Says Shell Responsible for Nigeria Spill", *The Reuters* (30 January 2013) online: The Reuters http://www.reuters.com/article/2013/01/30/us-shell-nigeria-lawsuit-idUSBRE90S16X20130130 (accessed 06 February 2013).

[26] See *Guerroro v. Monterrico Metals*, [2010] EWHC 160 (QB); *AK Investments v Kyrgyz Mobil Tel*, [2011] UKPC 7. See also *Connelly v RTZ*, [1998] AC 854 and *Lubbe v Cape Plc*, [2000] 1 WLR 1545.

inappropriately. At the end, the case was settled for about $50 million as payout to the defendants.[27]

More recently, in the Shell-Bodo case, a class action was brought in the UK, on behalf of the Bodo Community, against both Shell PLC and Shell Nigeria for damage caused by two massive oil leaks of about 500,000 barrels in the Niger Delta in 2008. It is reported that claimants have agreed to drop their claims against Shell PLC in return for Shell Nigeria's admission of liability.[28] However, attempts to negotiate settlement have been unsuccessful.[29]

iv. Canada

It is interesting to see the doctrine of foreign direct liability creeping into the jurisprudence of Canadian courts. In the precedent-setting case of *Choc v. Hudbay Minerals Inc.*[30], the Ontario Superior Court of Justice has warmed up to holding Canadian corporations with foreign subsidiaries responsible for the misconduct of their

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[27] The legal aftermath for Trafigura resulted in another criminal action in Netherlands against the company, the Ship's captain and a London-based official of the company. They were accused of attempting to dispose toxic waste in Netherlands cheaply by concealing the harm; and forwarding the waste to Cote d'Ivoire for disposal. The Trafigura official was sentenced to a provisional jail sentence of 6 months and a €25,000 fine for his role in the scandal. See Liesbeth F.H. Enneking, *supra* note 10 at 337

[28] Leigh Day, *11,000 Nigerians Sue Shell in London Courts*, online: Leigh Day http://www.leighday.co.uk/News/2012/March-2012/11,000-Nigerians-sue-Shell-in-London-Courts (accessed 5 March 2014).

[29] Vanguard, "Oil Spills: Bodo Residents Reject Shell Settlement" *Vanguard* (14 September 2013) online: Vanguard Nigeria http://www.vanguardngr.com/2013/09/oil-spills-bodo-residents-reject-shell-settlement/ (accessed 5 March 2014).

[30] *Choc v. Hudbay Minerals Inc*, 2013 ONSC 1414. Other cases preceding *Hudbay* include, *Piedra v. Copper Mesa Mining Corp*, [2010] ONSC 2421; *Anvil Mining Ltd. v. Association canadienne contre l'impunte,* [2012] QCCA 217 and *Bil'In (Village Council) v. Green Park International Inc.* [2009] QCCS 4151.

subsidiaries abroad. Although the merits of the plaintiffs' claims will ultimately be determined at trial, the pre-trial motions filed by the defendant-corporation to dismiss the case were determined in favour of the plaintiffs who were Guatemalans.

The plaintiffs, in this case, are indigenous Maya Q'eqchi' people from El Estor, Guatemala. They filed three connected actions against Hudbay and its two subsidiaries: Compañía Guatemalteca de Níquel (CGN) and HMI Nickel Inc. The substance of their claims touches on its Fenix mining project where the security personnel allegedly committed atrocities including murder and gang rape. Hudbay filed three preliminary motions: a motion to strike out the claims for not disclosing a reasonable cause of action pursuant to Rule 21.01 (1) (b) of the Ontario Rules of Civil Procedure (Rule 21); a motion to strike out one of the claims as statute-barred by the *Limitation Act*; and if the Rule 21 Motion failed, a motion by CGN to have the claims against it stayed or dismissed on the grounds that the court lacks jurisdiction over the Guatemalan subsidiary. The three motions were unsuccessful, and the case proceeds to trial.

In dismissing the motions, the court considered submissions from Amnesty International Canada (Amnesty) as an Intervener. Amnesty made submissions on issue of law regarding the international norms and standards regarding duty of care. Following Amnesty's findings, the court held that: "international norms, authorities and standards [...] support the view that a duty of care may exist in circumstances where a company's subsidiary is alleged to be involved in gross human rights abuses,"[31] and that:

> [T]ransnational corporations can owe a duty of care to those who may be harmed by the activities of subsidiaries, particularly

[31] *Ibid* at para 32.

> where the business is operating in conflict-affected or high-risk areas, such as Guatemala…[32]

Further, in its submission, Amnesty justified its position by making reference to certain international instruments such as the Voluntary Principles on Security and Human Rights, the OECD Guidelines for Multinational Enterprises, the United Nations Global Compact, the United Nations' Protect, Respect and Remedy: Framework for Business and Human Rights, the Guiding Principles on Business and Human Rights. It also found authority in Canadian domestic precedents recognizing "that a parent company may be directly liable for its own negligent conduct with respect to managing or failing to properly manage the actions of its subsidiaries."[33]

On 22 July 2013, the court struck out the preliminary objections pleaded in the motions, and indicated the likelihood of the merits of the case. This is an impressive development in the realm of accountability of TNCs even though it does not border on environmental claims. It signals a positive change in judicial attitude in Canada at a time when American courts are severely limiting the chances of bringing claims under the ATS.

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[32] *Ibid.*

[33] The principle of direct parent liability has been upheld in Canadian cases such as: *United Canadian Malt Ltd v. Outboard Marine Corp of Canada*, 2000 ONSC 1554, 48 O.R. (3d) 352; *Dreco Energy Services Ltd. v Wenzel Downhole Tools Ltd*., 2008 ABQB 419, [2008] A.J. No. 758.

B. Procedural and Substantive Impediments in Transnational Tort-Based Claims

The regime of legislation providing the jurisdictional basis for transnational tort-based claims features certain hurdles and obstacles procedurally and substantively. Under the ATS, where there is no treaty ratified by the United States, a successful plaintiff must establish that the tort complained of or the rights violated are accepted norms of customary international law. This standard was set in *Sosa v. Alvarez-Machain*[34] where the court held that the ATS only confers jurisdiction to US courts in respect of private claims for violation of recognized and accepted norms with a 'definite content and acceptance amongst nations'.[35] This standard has been applied in subsequent cases involving the ATS.[36]

Another potential substantive hurdle is the 'state action' requirement.[37] To bring a private actor liable under the ATS, the plaintiff will have to establish the connection between the defendant's act of abuse and a foreign government or its agent committing the alleged violation.[38] Indeed, a good number of cases successfully brought under the

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[34] *Sosa v. Alvarez-Machain,* 542 US 692 (2004).

[35] *Ibid.*

[36] For instance, in *Rodolfo Ullonoa Flores and other v. Southern Peru Copper Corp.,* 414 F. (3d) 233 (US Ct App. 2d Cir. 2003) (the court held that the plaintiffs had failed to establish that a 'right to life' or 'right to health' established under international customary law nor there is protection against the *intra*national pollution); and also in *Wiwa*, the district court held that the claim based on the right to peaceful assembly does not meet the *sosa* standard of the ATS.

[37] See Curtis Bradley, "State Action and Corporate Human Rights Liability" (2010) 85 Notre Dame L Rev 1823.

[38] Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press Incorporated, 2009) at 203. However, in cases where international law recognizes the liability of private actors, state action is not required in bringing such claims under the ATS. See Curtis Bradley, *supra* note 37.

ATS have been based on allegations of complicity, whereas more cases have been dismissed by the courts for lack of state action requirement in the factual background of the alleged violation even where such act constitutes violation of customary international law.[39] According to Oshionebo, it may be argued that the distinction between torts that are directly committed by non-state actors and those committed in association with state actors might suggest to TNCs that they may elude responsibility in so far as the violation was perpetrated alone.[40]

It remains uncertain in the jurisprudence of ATS whether the plaintiff is required to establish that the defendant possessed the knowledge of or intention to cause the resultant violation of the laws of nations.[41] It has always been required by the court in ATS litigation that the plaintiff proves the state of mind of the defendant.[42] In *South African Apartheid Litigation*[43], the opinion of the district court tends to favour a knowledge test in determining the *mens rea* requirement. Thus, it held that the defendant has 'to know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations.'[44] Meanwhile, in *Talisman*, the court swayed in favour of intent in determining the *mens rea* requirement.

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[39] *Ibid.*

[40] *Ibid.*

[41] Alice de Jonge, *Transnational Corporation and International Law: Accountability in the Global Business Environment* (Cheltenham, UK: Edward Elgar, 2011) at 104.

[42] Compare *Presbyterian Church of Sudan v. Talisman*, 582 F. 3d 244 (2d Cir. 2009) (intent standard) with *Doe v Unocal* 395 F. 3d 932 (9th Cir. 2002) (knowing assistance standard); *Ibid.*

[43] *South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

[44] *Ibid* at 262.

Moreover, the jurisprudence of the US Court of Appeals for the Second Circuit in the recent case of *Kiobel v. Royal Dutch Petroleum,*[45] constitutes a setback in the pursuit of accountability of TNCs under the ATS. According to the court's majority opinion: 'the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law [and therefore, under the ATS]'.[46] Hence, corporations are not considered to be subject to liability under the ATS. This view was supported by the holding of the Nuremberg judgment that 'crimes against international law are committed by men, not by abstract entities'.[47] This position of law remains unresolved and open-ended in view of *Kiobel* since the US Supreme Court was able to determine the case without having to address the issue of applicability of the ATS to corporations. Yet, a legislative action by the Congress may offer a categorical answer accordingly.

i. Forum Non Conveniens

The doctrine of *forum non conveniens* remains a prominent access-denying obstacle in the prospect of a potential claimant suing a TNC outside the host state.[48] Indeed, there are different reasons informing the choice of a venue by a prospective claimant in a trial

[45] *Ibid.*

[46] *Ibid* at para 6.

[47] Alice de Jonge, *supra* note 41 at 106.

[48] The doctrine of *forum non-conveniens* is an inheritance of the common law. Essentially, it is invoked in search for a more appropriate forum for trial, where the bundle of rights claimed by a litigant can be enforced in more than one jurisdiction. Thus, the doctrine is applied by courts seised of a matter to decline jurisdiction because the interest of justice is better served where such matter is heard in another forum See Ronald A Brand & Scott Jablonski, *Forum Non Conveniens: History, Global Practice and the Future under the Hague Convention on Choice of Court Agreement* (New York: Oxford University Press, 2007).

against a TNC. For example, a litigant may choose to purse a legal claim in the home state of the TNC (based on the theory of 'parent company liability') if the operation of the TNC has been wound up in the particular host state where the cause of action arose.[49] Other reasons for choosing a foreign forum include the possibility of claiming a higher sum for damages;[50] avoidance of delay and impartiality in the local court systems; and the opportunity of accessing justice with the aid of international NGOs and public interest lawyers.

In the US, the doctrine of *forum non conveniens* was first adopted in the 1932 case of *Canada Malting v Paterson Steamship Ltd.*[51] Today, the doctrine is generally applied in consistence with the approach set out by the US Supreme Court in *Gulf Oil Corp. v Gilbert.*[52] According to the court in that case, in order to invoke the doctrine of *forum non conveniens* in a trial, the court must determine whether an alternative forum is adequate to hear the claims of the plaintiff. If such an adequate forum is found, then the

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[49] Jennifer Zack, *supra* note 38 at 106.

[50] This reason has made the US and UK a top destination for litigants from the low-income economies such as Nigeria, India, Ecuador and Argentina. See Friedrich K. Juenger, "Forum Shopping, Domestic and International" (1989) 63 Tul. L. Rev. 533 at 562 (citing a case brought in the United States in which two orphaned daughters of an English couple killed in a McDonnell Douglas airplane received over 40 times the maximum amount recoverable under the Warsaw Convention limits on damages for international airline accidents). Moreover, certain jurisdictions, such as Bay City, Texas, are renowned for providing extremely high damage awards. See Kimberly Jade Norwood, "Shopping for a Venue: The Need for More Limits on Choice" (1996) 50 U. Miami L. Rev. 267 at 278 (noting that Bay City, Texas has been "likened by some attorneys to the fabled City of Gold because of the large personal injury damages awarded there").

[51] *Canada Malting v Paterson Steamship Ltd,* 285 US 413 (1932).

[52] *Gulf Oil Corp. v Gilbert,* 330 US 501 (1947). This is a domestic case that has found its effects on transnational claims. In this case, a Virginia plaintiff sued a Pennsylvania corporation in the federal district court of New York for negligence which resulted in the destruction of a warehouse in Virginia.

court must decide whether or not to stay the proceedings after considering certain public and private interest factors.[53]

In relation to the ATS, the court has continued to favour the holding of *forum non-conveniens* to dismiss claims against TNCs by foreign plaintiffs where there is a more appropriate forum for the plaintiff's litigation. In *Flores v. Southern Peru Copper Corporation*[54], the plaintiffs brought a claim against the defendant corporation for knowingly causing loss of life in, and severe injury to the health of the people of Ilo, Peru through egregious environmental pollution. The court found that Peru was the more appropriate forum for the plaintiff's claim, and as a result dismissed the claim.[55] However, some ATS cases have withstood the *forum non-conveniens* challenge.[56]

It is however interesting to note that the doctrine of *forum non-conveniens* has been obviated in the UK courts by the Brussels Convention treaty obligations and, now, Brussels I Regulation. In *Owusu v. Jackson,*[57] the European Court of Justice confirmed that the treaty obligations stipulated under Article 2 of the Convention preclude the courts

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[53] *Ibid*; Jennifer Zack, *supra* note 1 at 120 and Alice de Jonge *supra* note 41 at 111. The factors have been summarized by Fawcett thus: "The private factors included: relative ease of access to sources of proof, availability and cost of obtaining witnesses, possibility of view of the premises, and all other practical problems that make a trial easy, expeditious, and inexpensive. The public factors included: administrative difficulties from court congestion, local interest in having localized controversies decided at home; interest in applying familiar law, avoidance of unnecessary problems in conflicts of laws or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty". See James Fawcett, ed, *Declining Jurisdiction in Private International Law* (Gloucestershire, UK: Claredon Press, 1995) at 403. See also Donald Carney, "Forum Non Convenience in the United States and Canada" (1997) 3 Buffalo Journal of International Law at 117.

[54] *Flores v. Southern Peru Copper Corporation,* 253 F. Supp. 2d 510, S44 (FD NY 2002).

[55] *Ibid.*

[56] For example, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y 2000); *Estate of Rodriguez v. Drummond Co*., 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

[57] *Owusu v. Jackson,* [2005] 2 WLR 942, [2005] 2 All ER (Comm) 577.

of a Contracting state-party from staying a proceeding or dismissing action on the basis of *forum non-convenience*.[58] This marked a watershed in the jurisprudence of the court in adjudicating transnational tort-based claims in the UK, and removes a significant hurdle for claimants seeking transnational justice in UK courts.[59]

ii. Sovereign Immunity and Act of State Doctrine

Based on the equality of states principle under international law, the doctrine of sovereign immunity stipulates that a state, its agencies and privies are generally immune from courts of another state.[60] This principle is extended to state-owned corporations and enterprises through the 'restrictive approach' to foreign sovereign immunity as enacted under the *American Foreign Sovereign Immunities Act, 1976;* UK's *State Immunity Act, 1978;* Australia's *Foreign States Immunities Act, 1985 and* Canada's *State Immunity Act, 1985*.[61] This protection offered by the sovereign immunity doctrine serves as a shield in

[58] *Ibid.* Similarly, the court have found a more appropriate jurisdiction other than the US in *Estate of Winston Cabello v.Armando-Fernanedez Larios,* 157 F. Supp. 2d 1345 (SD Fla 2001) 1359; *Sarei v. Rio Tinto* 221 F. Supp. 2d 1116 (CD Cal 2002); *Doe v. The Gap,* No-CV-01-0031, 2001 WL 1842389 (DN Mar 1 Nov 6, CD Cal 2001) 22

[59] However, claims against corporate defendants that do not have their central administration or principal place of business within any of the EU States are not governed by the Brussels Convention regime. The domestic rules on international civil jurisdiction would be enforced. See Liesbeth Enneking, *supra* note10 at 299. Elsewhere in Australia, the approach is quite different. In pleading forum non-conveniens, a plaintiff would have to persuade the court that the Australian court is clearly not an appropriate forum. In essence, a possibility of getting a claim thrown out of an Australian court on the basis of *forum non-conveniens* is highly limited. See *Voth v. Manildra Flour Mills,* [1990] HCA 55, 171 CLR 538; *Renault v. Zhang,* [2002] HCA 515, 210 CLR 491.

[60] Jennifer Zack, *supra* note 1 at 111. It is, however, noteworthy that pursuant to Canada's State Immunity Act amendment of 2012, a foreign state is not immune from jurisdiction of a court for its commercial activities; death and property damage that occur in Canada; and its support of terrorism. See *State Immunity Act,* RSC 1985, c S-18, ss 5, 6, and 6.1.

[61] In addition to the domestic efforts of promulgating immunities Acts, the Council of Europe adopted a European Convention on State Immunity and an Additional Protocol that became effective in June 1976.

most ATS claims especially against state-owned TNCs, state agencies, current or former heads of state, or other instrumentalities acting in pursuance of state policy.[62]

The legitimacy of public acts of a foreign sovereign entity carried out within its own territory has also been declared as not open for judicial enquiry by the US courts.[63] This is hinged on the constitutional doctrine of separation of powers since the pronouncements of the courts may bear on the foreign policy objectives of the United States, which is in the domain of the executive and the Congress.[64] This has implications on the jurisdiction of the court in relation to the operation of the ATS. According to the court in *Sarei v Rio Tinto*:

> [P]laintiffs have not cited and the court has not found, *a single case in which a court permitted a lawsuit to proceed in the face of an expression of concern such as that communicated by the State Department here.* This is probably because to do so would have the potential to embarrass the executive branch in the conduct of its foreign relations and 'the major underpinning of the act of state doctrine is … [to]' foreclose' such a possibility[65]
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> (Emphasis Added)

The idea of the court seeking the US State Department's brief before assuming jurisdiction seems to attenuate the judicial independence of the court. It is safe to say that

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[62] Before 2003, the judicial attitude of the US Courts has favoured the corporations directly and indirectly owned by a foreign state as enunciated under FSIA. For the exceptions created by the courts regarding immunity, see *Dole Food Co. v. Patrickson,* 538 US 468 (2003) and *Burnett v. Al Baraka Inv. and Dev. Corp.,* 349 F. Supp. 2d 765 (US District Court SD New York 2005).

[63] See *Banco Nacional de Cuba v. Sabbatino*, 376 US 398 (1964).

[64] See Brad Kieserman, "Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act" (1999) 48 Catholic University Law Review 881.

[65] *Sarei v Rio Tinto*, 221 F. Supp 2d 1116, 1192 (CD Cal. 2002).

a matter may not go to trial if it does not serve the political interest of the government of the day.[66]

iii. Political Question and Comity Doctrines

Additional jurisdiction-denying obstacles are the principles of comity and the doctrine of political question. Similar to the 'act of state' doctrine, the political question doctrine is preoccupied with non-interference with the political affairs and foreign policy of the state. This was pleaded in *Iwanowa v. Ford Motor Co.*[67]. In that case, the plaintiff brought a claim on her own behalf and on behalf of others who were compelled to work for Ford in the Nazi Germany during the Second World War. The court dismissed the claim on the grounds of political question because the post-war treaties, entered into by the German government, have dealt with compensation for the victims of Nazi persecution. On a related note, the principle of comity also constitutes an obstacle in bringing transnational tort claims in the US. By virtue of the principle of international comity, it is expedient and reasonable for a court to decline jurisdiction where the laws and interest of a foreign state is in issue before it.[68] However, the district court in

[66] Contrarily, the court did not consider requesting the US State Department brief in *Talisman* case because the alleged acts of genocide, war crimes, torture and enslavement were universally condemned.

[67] In this case, the defendant corporation was sued for allegedly using forced labour and slaves in Nazi Germany in the Second World War. The case was dismissed, amongst other reasons, on political question ground. See *Iwanowa v. Ford Motor Co*., F. Supp. 2d 424 (DNJ 1999).

[68] According to the Supreme Court in *British Airways Bd. v Laker Airways Ltd*., 1984 E.C.C. 36, 41 (Eng C.A.):

> "Comity" in a legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy or goodwill, upon the other. But it is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to

Talisman rejected the defendant's motion for dismissal on the grounds of comity doctrine. In arguing the case, the Canadian government raised concern about the impact of the suit on its foreign policy of constructive engagement with Sudan. The court found an insufficient nexus between Canada's foreign policy and the particulars of the claims against the defendant. According to the court, the substance of the suit is to determine 'whether Talisman acted outside the bounds of customary international law while doing business in Sudan' and not to fetter the Canadian foreign policy.[69]

III. International Regulatory Measures

A. UN Global Compact

Pursuant to the declaration of Kofi Annan at the 1999 World Economic Forum in Davos, Switzerland, the United Nations, in 2000, entered the corporate responsibility realm by launching the United Nations Global Compact (GC).[70] This initiative entails the process of formally committing to assessing, defining, implementing, measuring and communicating a corporate sustainability strategy based on the Global Compact and its

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> international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

[69] *Presbyterian Church of Sudan v Talisman Energy Inc.*, 2005 WL 2082846, 1 (SD NY 30 August 2005). See also *Libman v The Queen* [1985] 2 SCR 178, where the Supreme Court of Canada held that all counts of fraud, which the accused was charged for, could be tried in Canada even though some aspects of the offence took place outside Canada. According to the court, the requirement of comity doctrine could not oust the jurisdiction of the Canadian court in the instant case.

[70] For a general overview, see Andreas Rasche, Sandra Waddock & Malcom McIntosh, "The United Nations Global Compact: Retrospect and Prospect" (2013) 52 Business Society 6 -30; Georg Kell, "After the Signature: A Guide to Engagement in the United Nations Global Compact" (2012) The Global Compact (UN, Global Compact Office) and Evaristus Oshionebo, "The United Nation's Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities" (2007) 19 Florida Journal of International Law 1-38.

ten universal principles in the areas of human rights, labour standards, the environment and anti-corruption.[71]

The GC is the world's largest corporate responsibility initiative with over 7, 000 corporate signatories and 2, 300 non-business participants (as of April 2012).[72] As a voluntary initiative, it sets to promote sustainable development and good corporate citizenship in order to ensure that markets, commerce, technology and finance advance in ways that benefit economies and societies across the world.[73] One of the four pillars of the GC is the Environment and pursuant to this, the Caring for Climate action platform was launched in 2007 to address the role of business in addressing climate change. It provides a framework for business leaders to advance practical solutions and to help shape public policy as well as public attitudes.[74]

By virtue of Principle 7 of the Compact, business is expected to adopt a precautionary approach to environmental issues. This is a sheer resonance of the precautionary principle which constitutes the cornerstone of the Kyoto Protocol. In essence, business should systematically apply risk assessment (i.e. hazard identification,

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[71] *Ibid*.

[72] Andreas Rasche, Sandra Waddock & Malcom McIntosh, *supra* note 70 at 7.

[73] As noted by Gilbert, Rasche & Waddock, there are four main forms of initiatives: principle based initiatives (e.g. OECD Guidelines for Multinational Enterprises), certification initiatives (Social Accountability 800 and ISO 14001), reporting initiatives (e.g. Global Reporting Initiatives) and process-based initiatives (e.g. ISO 26000). The UN Global Compact is an example of a principle-based initiative. See D. U. Gilbert, A. Rasche & S. Waddock, "Accountability in a Global Economy: The Emergence of International Accountability Standard" (2011) 21 Business Ethics Quarterly 21 at 31.

[74] See Andreas Rasche & Georg Kell, *The United Nations Global Compact: Achievements, Trends and Challenges* (Cambridge: Cambridge University Press, 2010) and Sheryl A Law Fung Hung-gay & Jot Yau, *Socially Responsible Investment in a Global Environment* (London: Edward Elgar Publishing, 2010).

hazard characterization, appraisal of exposure and risk characterization), risk management and risk communication.[75] These measures should be taken even where there is no scientific certainty that the action would occasion a negative environmental impact in so far as there are threats of serious or irreversible damage. It is interesting to see that the core principles that inform international treaties and conventions globally governing international environmental law and policy today and binding on national governments have been ingeniously introduced into business models as a voluntary action initiative through the UN Global Compact. This has equally amplified the legitimacy of CER principles with the multi-stakeholder platform created by the GC through the UN systems.

The GC has, however, been criticized on different fronts. Due to its hortatory nature, the GC does not have any binding force nor reflect any element of regulatory texture against which compliance can be measured and enforced.[76] In other words, the initiative represents a weak strategy for pursuing accountability as it neither imposes real, verifiable obligations on its participants nor sanction program shirkers in a timely manner. This weakness has made commentators call for the conversion of the GC into a regulatory instrument so as to accomplish enforcement and accountability.[77]

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[75]Sheryl A Law Fung Hung-gay & Jot Yau, *ibid* at 120.

[76] Andreas Rasche, Sandra Waddock & Malcom McIntosh, *supra* note 70 at 9 and Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham, UK: Edward Elgar Publishing Limited, 2011) at 225; Bennie L, Bernhagen P & Mitchell NJ, "The Logic of Transnational Action: The Good Corporation and the Global Compact" (2007) 55 Political Studies 733 and Perkins R & Neumayer E, "Geographic Variations in Early Diffusion of Corporate Voluntary Standards: Comparing ISO 14001 and the Global Compact" (2010) 42 Environment and Planning 347.

[77]See Deva Surya, "Global Compact: A Critique of the UN's "Public-Private" Partnership for Promoting Corporate Citizenship" (2006) 34 Syracuse Journal of International Law and

Another shortcoming of this initiative is that, even though participants are required to submit a Communication on Progress (COP), the reporting requirement fails to define social and environmental indicators to be evaluated in preparing such a report. In essence, the reporting framework that ought to serve as 'integrity measures' has proved ineffectual and does not provide for external verification of such reports. Furthermore, the GC has been criticized to be a 'blue-wash' tool for corporations. Civil society groups and critics have raised concerns that the participating corporations are exploiting the legitimacy and goodwill of the UN to enhance their public image when, indeed, their corporate behaviour is not in agreement with the spirit and letters of the GC.[78]

B. Norms on the Responsibilities of Multinational Enterprises

In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights unanimously approved the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (the Norms).[79] It is a manifest of 36 specific international human rights instruments taking up the human

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Commerce and J. Nolan, "The United Nations Global Compact with Business: Hindering or Helping the Protection of Human Right?"(2005) 24 University of Queensland Law Journal 445.

[78] Alice de Jonge, *supra* note 41 at 32 and Andreas Rasche, Sandra Waddock & Malcolm McIntosh, *supra* note 70 at 7.

[79] *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, E/CN.4/Sub.2/2003/12 (2003) [Draft Norms]. The final draft of the Norms is based on the three critical reports of the Sessional Working Group: July 24, 1995 Report, July 2, 1996 Report and June 10, 1998 Report. For an in-depth historical background and perspectives on the Norms, see Larry Cata Backer, "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" (2005) 37 Colombia Human Rights Law Review 101.

rights obligations considered most relevant to companies, and applying them directly to TNCs and other business enterprises, 'within their respective spheres of activity and influence'.[80]

These obligations are imposed on the TNCs under Articles 2 – 14 of the Norms. Norm 1 generally professes the primary responsibility of the state for the promotion and protection of human rights within their territorial boundaries.[81] It also asserts the authority of states over TNCs and other business enterprises in securing the fulfillment and respect of human rights within their territory. In relation to environmental protection, Norm 14 stipulates that:

> Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development[82]

The Norms represent the most recent comprehensive and prescriptive attempt to regulate the activities of TNCs internationally through the mechanics of human rights obligations and responsibilities. They are a set of "authoritative recommendations" that seeks to guide corporate conduct in a socially and politically responsible manner. Indeed, they are not new obligations under the corpus of international human rights law; they only reinforce and restate the declarations that have been expressed in respect of human

[80] Draft Norms at para 4; Alice de Jonge *supra* note 41 at 35 and Oshionebo *supra* note 38 at 131.

[81] Draft Norms at para. 1.

[82] *Ibid* at para. 14.

rights responsibilities of business enterprises under instruments such as the OECD Guidelines and the UN Global Compact.[83]

Although they are yet to be formally adopted as a treaty, the Norms are the first supranational document that imposes direct and binding social responsibility on TNCs under international law by an international body, the UN Sub-Commission.[84] The Norms address the deficiencies in previous normative instruments by fashioning out an implementation plan for its provisions[85]; a compliance reporting system[86]; and by extending the responsibilities to all contractual relationships and partnerships entered into by TNCs.[87] The reach of the Norms is as a result wider and extended not only to TNCs but also their suppliers, subcontractors, licensees, distributors and all natural and legal persons with whom they enter into contract or agreement. Thus, the Norms would regulate the affairs of every entity involved in the operations of the TNCs within or outside their sphere of influence. For example, private military firms and security outfits engaged by oil TNCs to secure their installations and workers in the developing countries are under the regime of the Norms.

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[83] Caroline F Hillemanns, "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights" (2003) 4 German Law Journal 1065 at 1069. See also, Larissa van den Herik and Jernej Letnar Cernic, "Regulating Corporations under International Law" (2010) 8 J. Int'l Crim. Just. 725 at 735.

[84] See David Weissbrodt & Muria Kruger, "Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (2003) 97 Am. J. Int'l L. 901at 903.

[85] Under the general provisions of implementation of the Norms, TNCs are required to "adopt, disseminate and implement internal rules of operations in compliance with the Norms". See Draft Norms at para. 15.

[86] *Ibid* at para. 16.

[87] *Ibid* at para. 15.

Further, the Norms also provide for a regime of sanctions and enforcement. According to the Norms, victims of corporate abuse and human rights violations by business entities will be entitled to awards of reparation, restitution, compensation and rehabilitation.[88] In otherwords, communities and individuals that have been adversely affected by the externalities of TNCs by failing to comply with the Norms shall be entitled to remedies.

The Norms have, however, been met with effective criticisms amongst academia, civil societies and even within the UN system. Chiefly, the status and force of the Norms have been put to question as they do not have any legal status under international law, strictly speaking. Even though the Norms have been adopted by the UN Sub-Commission, they still do not have the status of a convention as they are yet to be adopted by the UN General Assembly. Indeed, in 2006, the Special Representative of the Secretary General of the UN found in his Interim Report that the Norms are mere "restatement of international legal principles applicable to companies" because they do not have any legal basis in international law to impose obligations on private actors as TNCs. According to him:

> What the Norms have done…is to take existing State-based human rights instruments and simply assert that many of their provisions are now binding on corporations as well. But that reason itself has little authoritative basis in international law – hard, soft or otherwise[89]

[88] *Ibid* at para. 18.

[89] John Ruggie, *Interim Report of the Special Representative of the Secretary General in Business and Human Right*, UNSRSGOR, 2006 UN Doc E/CN. 4/2006/97 para 26.

However, Oshionebo has warned not to be dismissive of the Norms solely because of its current lack of legal status or force under international law.[90] He identified the prospective opportunities that the Norms offer as a barometer for socially responsible corporate conduct as well as other reflexive functions the Norms may serve.[91] Concerns have also been expressed regarding the latent conflict between the regulatory philosophy of the Norms and the UN Global Compact. Since the Norms provide for obligatory and binding legal standards of corporate conduct, it appears that the Global Compact's hortatory approach may occasion its loss of relevance and deference in the realm of international corporate accountability.[92] Nonetheless, the UN Global Compact can effectively offer its persuasive form of influence while the Norms assert its authority as a binding instrument under international law.[93]

C. OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (the Guidelines) is recognized as one of the foremost voluntary codes of corporate conduct across the world.[94] The Guidelines originally emanated as a response to the wave of expropriation and nationalization of foreign TNCs by newly independent states where they operated in the

[90] Evaristus Oshionebo, *supra* note 38 at 133.

[91] For an analysis of the prospect and opportunities offered by the Norms, see Oshionebo, *supra* note 35 at 134.

[92] Even though the two instruments: Global Compact and the Norms share diverse regulatory approaches, both can still effectively deliver their mandates jointly and severally. *Ibid* at 135.

[93] *Ibid* at 136.

[94] OECD, ed, *Environment and the OECD Guidelines for Multinational Enterprises: Corporate Tools and Approaches* (Paris: OECD Publishing, 2005) at 9.

1970s.[95] According to Muchlinski, the Guidelines can be traced to the quest of US for an alternative regulatory framework to the UN Economic and Social Council's Code of Conduct for Transnational Corporations, which set binding standards.[96]

The Guidelines were adopted in 1976 and were updated for the fifth time in 2011. They represent a multilaterally endorsed non-binding code of corporate conduct addressed to TNCs operating in the 44 adhering countries and to be applied to their foreign business operations.[97] The Guidelines enunciate voluntary principles and standards for responsible business conducts in areas of human rights, child labour, disclosure of information, taxation, labour relations, consumer protection, anti-corruption and environment.

According to the Guidelines, TNCs should provide an internal framework to enable the control of their environmental impact and integration of environmental considerations in their business operations.[98] Pursuant to this objective, TNCs, in order to build public confidence, are to collect and evaluate adequate information in respect of the environmental, health and safety impact of their operations in a timely manner.[99] They are expected to engage in active and transparent consultation with stakeholders affected

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[95] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham, UK: Edward Elgar Publishing Limited, 2011) at 5 and 47.

[96] Peter Muchlinski, *Multinational Enterprise and the Law*, 2nd ed (New York: Oxford University Press, 2007) at 118.

[97] The Guidelines was first published in 1976 and is reproduced in 15 ILM (1976) 961 – 980. The current version (at the time of writing) is 25 May 2011 and can be accessed at http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed 12 December 2013).

[98] See OECD, ed, *Environment and the OECD Guidelines for Multinational Enterprises: Corporate Tools and Approaches* (Paris: OECD Publishing, 2005); Oshionebo *supra* note 35 at 137.

[99] *Ibid.*

by the impacts of their activities with a view to building a relationship grounded in mutual trust and understanding.[100] Further, TNCs are to implement their environmental management system in accordance with the precautionary principle by taking measures to outrightly avoid environmental pillage or by choosing the less environmentally harmful activity where the scientific certainty of the irreversible environmental threat of such activity is not discovered in due time.[101] Also, TNCs are to train and improve staff awareness in relation to conformance with the environmental management systems as well as their roles and responsibilities in curtailing the environmental externalities of business operation.[102]

Since the 2000 revision, the Guidelines have introduced a dispute resolution mechanism through the establishment of the National Contact Points (NCP). The NCPs are responsible for promotion of the observance of the Guidelines. They handle enquiries regarding the Guidelines; assist in investigation and clarifications that may be required in the operation of the Guidelines; resolve queries and disputes that may arise under it; collect information on national experiences with the Guidelines; and report annually to the OECD Investment Committee. The Investment Committee oversees the affairs of the NCPs.

The Guidelines purport to 'supplement' the applicable law and 'to complement and reinforce' codes of conduct and other efforts to implement responsible business conduct. The Guidelines have, however, been met with criticisms. First, the Guidelines

[100] OECD, *supra* note 94 at 10.

[101] *Ibid.*

[102] *Ibid.*

have been suspected to be OECD's attempt to discourage the imposition of binding international regulation on TNCs since the central focus of the OCED is to advance the economic interest of its member states, and by implication the interest of TNCs based in members states. Hence, Oshionebo states that the Guidelines:

> are a pre-emptive attempt by the developed countries to undercut the clamour by developing countries (which has waned considerably in recent years), organized labour, and NGOs for the international regulation of TNCs and thus to prevent stringent international regulation[103]

Second, the Guidelines have been regarded as another non-binding instrument externally imposed on TNCs to subvert the purpose of self-regulation while neglecting the vexing issue of accountability of corporations under international law.[104] The Guidelines, in pith and substance, are a form of recommendations that do not carry any force of obligation. As such, they do not offer any concrete mechanism for enforcement and compliance monitoring of the Guidelines notwithstanding the Investment Committee and the NCPs.[105]

Third, another weakness in the Guidelines is its adoption of a relativist approach. The Guidelines urge TNCs to comply with the core principles and standards within the context of the extant legal framework in their host countries.[106] In essence, TNCs are encouraged to apply double standard in their operations insofar as it is not in flagrant

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[103] Oshionebo *supra* note 38 at 139.

[104] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham, UK: Edward Elgar Publishing Limited, 2011) at 227 and J. Dine, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005) at 237.

[105] See James Salzman, "Labour Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development" (2000) 21 Mich. J. Int'l L. 790.

[106] For a discussion of the merits and demerits of the universalist and relativist approaches in relation to the Guidelines, see Oshionebo *supra* note 35 at 139.

violation of the laws of their host country. This is concerning because it defeats the essence of pursuing accountability of TNCs in developing host states where their laws are lax and administrative capacity is weak.[107]

D. International Code of Ethics for Canadian Business

Following the public outrage regarding the complicity of Shell and the Nigerian government in the extrajudicial killing of Ken Saro-Wiwa and the Ogoni nine in 1996, the Canadian Foreign Affairs Minister Lloyd Axworthy withdrew the Canadian High Commissioner in Nigeria. This unfortunate occurrence piqued the Minister and, as a result, he inaugurated stakeholder consultation with actors from civil society groups and industry with the objective of fashioning a corporate code of conduct for Canadian businesses in their offshore business operations.

In September 1997, the stakeholders sanctioned a "made-in-Canada" code of corporate conduct, namely, the International Code of Ethics for Canadian Business (ICECB), which represents a national response to an international concern about the externalities and complicity of TNCs beyond the shores of Canada. The ICECB prescribes standard of behavior and corporate practice in four core areas: Community Participation and Environmental Protection; Human Rights; Business Conduct; and Employee Rights, Health & Safety.

The ICECB has been criticized for its ambiguous and vague language. The interpretation of the terms and provisions of the Code is left to the discretion of the signatory corporation. For example, Section 3.2. of the Code states that: "We will not be

[107] *Ibid.*

complicit in human rights abuses". The Code fails to define what amounts to complicity and does not further explain the steps to be taken in order to refrain from complicity. In essence, the mode of implementation of the Code's principle is within the province of the corporation; this may engender variation in approaches so as to serve individual business ends of signatories.

Also, the ICECB lacks an administering authority chartered to monitor compliance and enforcement of the Code. As a result, there is no way to determine the current number of signatories to the ICECB or find out which corporation is not complying with its commitment under the ICECB. This undermines the attempt of the government and other stakeholders to modulate the corporate conduct of Canadian businesses offshore so as not to negatively affect the diplomatic image of the country especially in politically unstable countries such as Colombia and Ecuador.[108] Just as in other voluntary initiatives, the ICECB is a voluntary, non-binding instrument that does not carry any force of regulation. It cannot be enforced against a signatory where its operation offends against the spirit and letters of the ICECB.

It has further been argued that the body of assessor of compliance level under the ICECB should feature diverse experts in ICECB's different areas of concerns so as to attain integrity and credibility in the administration of the ICECB. Efforts should also be made to design a methodology of assessment that is rigorous enough to establish international standards of compliance. It should not set a lower bar of corporate

[108] For an assessment of the performance of the four main signatories to the Code: Enbridge, Nexen, EnCana and Talisman, see Michael H Rea, "The International Code of Ethics for Canadian Business: An Audit Format Compliance Review", *Corporate Knight Magazine* (5 May 2003) 1, online: http://www2.ohchr.org/english/issues/globalization/business/docs/nexen1.pdf (accessed 04 December 2013).

behaviour and business conduct vis a vis leading voluntary initiatives in the international realm. However, the Corporate Responsibility team at the Department of Foreign Affairs and International Trade at Ottawa tend to be leaning more towards the implementation of OECD Guidelines for Multinationals more recently over the advancement of the ICECB.[109]

Conclusion

I have argued in this chapter that the opportunities presented by tort litigation in the Netherlands, UK, US and Canada are worth exploring. The jurisprudence in these home states has given hope, at different times, to foreign litigants to hold TNCs accountable for their environmental infractions in host states, such as Nigeria. However, it needs to be pointed out that litigants have had limited chances to obtain final judgment of their cases as many of these cases are settled out of court. In effect, the jurisprudence on transnational tort-based litigation has yet to fully develop.

Also, the various international attempts at regulating the conduct of TNCs in their operations are rhetorical. They lack the force to compel their compliance. It appears that they are being taken advantage of by some of the industry players as tools for *greenwashin*g their operation and leveraging their public image and social acceptance.

[109] *Ibid.*

CONCLUSION

This thesis has mainly explored the options, opportunities, and challenges under national and supranational regimes so as to evaluate the efficacy of the extant environmental regulations and enforcement mechanisms available to regulate the conduct of oil TNCs. It advocates for the imposition of corporate environmental responsibility in the operation of oil TNCs in Sub-Sahara Africa through diverse regulatory sources.

Chapter one of this thesis analyzed and established the communitarian paradigm of corporate governance as the theoretical basis of corporate social and environmental responsibility in today's business. In the analysis, the chapter demonstrated how the core essence of CER has been expressed through different models of the paradigm: Single Constituency Theory, Catholic Social Thought and Corporate Citizenship. Further, the evolution and development of the concepts of CER was examined in this chapter so as to formulate the relevance of the concept to business especially transnational corporations. It then examined the nature, structure and form of TNCs in the current global social, political and economic landscape. This examination then established the regulatory void in which TNCs operate and the need to assert binding regulatory control over TNCs in order to checkmate their economic tyranny and environmental lawlessness. These discussions laid the foundation for subsequent analysis of oil TNCs and the environment throughout the thesis.

In chapter two, I demonstrated the environmental and social risks posed by oil TNCs in Sub-Saharan Africa in the conduct of their oil and gas exploration. This demonstration was effected by undertaking two case studies. Firstly, I demonstrated environmental liability of the oil TNCs in the Chad-Cameroon Oil and Pipeline Project.

In the case study, I was able to show the environmental culpability of oil TNCs involved in the project. Because the governments of Chad and Cameroon lack the regulatory and administrative capacity to regulate the environmental aspects of the project, the oil TNCs operate in a regulatory vacuum in Chad and Cameroon. The only guiding principles are offered by the World Bank Group and the International Finance Corporation, who are both financiers of the project. The agencies prescribed the 'soft' laws by way of environmental guidelines, policies and best practices initiatives. I was able to demonstrate the flaws in these frameworks as not sufficient or efficient to regulate the environmental risks of the project. Secondly, I demonstrated the environmental liability of oil TNCs operating in the notorious Niger Delta. I re-examined the perennial environmental crisis in the region resulting from the oil and gas activities of the TNCs. I was able to show, in the chapter, the environmental impact and health consequences of oil exploration and production by the TNCs, such as oil spillage and gas flaring which are the main instruments of environmental destruction in the region.

Furthermore, I was able to evaluate in chapter three the extant environmental regime in Nigeria, and I showed that the regulations and enforcement mechanisms are weak, corrupt and poorly funded. In my analysis, I reviewed the regulatory agencies of government exercising control and oversight in the oil and gas sector. The main challenges besetting these agencies include, overlap and duplicity of duties which results into rivalry and lack of coordination; administrative gap and systemic corruption; the paternalist orientation of the government as well as lack of autonomy; and also the subtle regulatory chill caused by stabilization clauses in bilateral treaties and investment laws. Further, I demonstrated the effectiveness of the civil societies and NGOs in the regulatory

scheme. In this chapter I showed the significance of NGOs as veritable instrument for effecting positive change and conformance in the behavior of oil TNCs.

Finally, in chapter four, I examined other options available in the home states of the oil TNCs as well as international efforts to regulate TNCs' operations. Chapter four considered the phenomenon of transnational civil litigation in courts of home countries such as the Netherlands, UK, US and Canada. The jurisprudence of these countries is examined with regards to their disposition to the communitarian perception of the corporation in transnational contexts.

In the Netherlands, the court seemed to have welcomed the ingenuity of civil societies to pursue transnational claims under the Dutch civil code, thereby circumventing the obstacle of *forum non-conveniens* and locus standi. Even though four out of the five claims were dismissed in *Friday Akpan's case*, it is encouraging that the court granted the Nigerian plaintiffs audience in a civil law jurisdiction and applied the law of the place where the injury was sustained. Meanwhile, in the UK, following its obligations under the Brussels Convention and Brussels I Regulation there is no impediment regarding jurisdiction or forum. As such foreign direct liability claims have been brought in the UK courts by foreign litigant as in the *Shell-Bodo case*. The US, however, has seriously limited the chances of foreign plaintiffs claiming against TNCs under the ATS in US courts by virtue of its recent decision in *Kiobel.* Now, foreign plaintiffs need to show that their cause of action touches and concerns the interest of the United States in order to negate the presumption against extraterritoriality. Also, in Canada, the Ontario Superior Court of Justice has shown warm disposition towards foreign direct liability of TNCs as shown in *Hudbay Minerals.* This show of judicial

activism is impressive on the side of Canada at a time when the US is going in an opposite direction in its jurisprudence.

Moreover, international instruments and multilateral codes of corporate conduct are examined in chapter four. These instruments have been critiqued as being 'soft', unenforceable and as tools for 'greenwashing' by TNCs. The instruments, generally, speaking lack an enforcement and compliance system to give them the necessary regulatory stature. Also, the non-recognition of corporations as subjects of international law remains a fundamental challenge in the pursuit of environmental accountability of oil TNCs in Africa and beyond.

BIBLIOGRAPHY

LEGISLATION

Statutes

Alien Tort Statute, 28 USC 1350.

Associated Gas Re-Injection Act, LFN 2004, Cap A 25.

Civil Code of the Netherlands, 3A, 2002, 11.

Companies' Act 2006 (UK), c 46.

Constitution of the Federal Republic of Nigeria, LFN 2004, Cap 62.

Criminal Code Act, LFN 1990, Cap 77.

Environmental Impact Assessment Act, LFN 2004, Cap E12.

Federal Environmental Protection Act, LFN 2004, Cap F 10.

Land Use Act, Cap L5, 2004.

Nigerian National Petroleum Corporation Act, LFN 2004, Cap N 123.

Petroleum Act, LFN 2004, Cap P10.

State Immunity Act, RSC 1985, c S-18.

Superfund Amendments and Reauthorization Act, 42 USC 9601.

Regulations

Petroleum (Drilling and Production) Regulations 1969,Legal Notice 45 of 1974, Reg 43.

Petroleum (Drilling and Production) Regulations 1969, Legal Notice 69 of 1969, Reg. 25.

Statutory Instrument 43 of 1984, Reg. 1.

Order

Environmental Guidelines and Standards for the Petroleum Industry in Nigeria, rev. ed. 2002 (Lagos: Department of Petroleum Resources, 2002).

Bill

Nigeria, *An Act To Establish The Legal And Regulatory Framework, Institutions And Regulatory Authorities For The Nigerian Petroleum Industry, To Establish Guidelines For The Operation Of The Upstream And Downstream Sectors, And For Purposes Connected With The Same***,** 7th Sess, 7th Nat Ass, Abuja.

JURISPRUDENCE

Abdullahi v. Pfizer , 562 F. 3d 163 (2d Cir. 2009).

Aguinda v Texaco Inc, 303 E3d 470, 476 (2d Cir. 2002).

Anvil Mining Ltd. v. Association canadienne contre l'impunte, [2012] QCCA 217

Banco Nacional de Cuba v. Sabbatino, 376 US 398 (1964).

BCE Inc. v 1976 Debentureholders, 2008 3 SCR 560.

Bigio v. Coca-Cola Co., 239 F.3d 440, 448 (2d Cir. 2001), remanded to No. 97 Civ. 2858, 2005 WL 287397 (S.D.N.Y.Feb 3, 2005), rev'd and remanded, 448 F.3d 176 (2d Cir. 2006), cert. denied, 549 U.S. 1282 (2007)

Bil'In (Village Council) v. Green Park International Inc., 2009 QCCS 4151.

Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y 2000).

Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080 (ND Cal 2008).

British Airways Bd. v Laker Airways Ltd., 1984 E.C.C. 36, 41 (Eng C.A.)

Burnett v. Al Baraka Inv. and Dev. Corp., 349 F. Supp. 2d 765 (US District Court SD New York 2005).

Canada Malting v Paterson Steamship Ltd, 285 US 413 (1932).

Case concerning Barcelona Traction Light and Power Co. (Belgium v Spain), [1970] ICJ Rep 7.

Casurina Limited Partnership v Rio Algom Ltd, 2004 181 ONCA 19, 40 BLR (3d) 112.

Choc v. Hudbay Minerals Inc, [2013] ONSC 1414.

Dodge v Ford Motor Co., 170 NW 668 (Mich 1919).

Doe v Unocal 395 F. 3d 932 (9th Cir. 2002).

Dole Food Co. v. Patrickson, 538 US 468 (2003)

Dreco Energy Services Ltd. v Wenzel Downhole Tools Ltd., 2008 ABQB 419, [2008] A.J. No. 758.

Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

Estate of Winston Cabello v. Armando-Fernanedez Larios, 157 F. Supp. 2d 1345 (SD Fla 2001).

Flores v. Southern Peru Copper Corporation, 253 F. Supp. 2d 510, S44 (FD NY 2002).

Friday Akpan v. Royal Dutch Shell (30 January 2013), The Hague C/09/337050 / HA ZA 09-1580 (District Court).

Gazit (1997) Inc v Centrefund Realty Corp, [2000] ONSC 3070, 8 BLR (3d) 81.

Gulf Oil Corp. v Gilbert, 330 US 501 (1947).

Hudbay Mineral Inc. v CGN, [2013] ONSC 1414.

Iwanowa v. Ford Motor Co., F. Supp. 2d 424 (DNJ 1999).

John Doe 1 v Unocal Corp., 2002 US App. LEXIS 19263 (9th Cir. 2002) 14193-5.

Jonah Gbemre v. Shell Petroleum Development Corp, (14 November 2005), Benin City FHC/B/CS/53/05.

Kiobel v Royal Dutch Petroleum, 133 S.Ct. 1659 (2013).

Libman v The Queen [1985] 2 SCR 178

Mandilas & Karaberris v COP, [1958] FSC 20.

Morrison v. National Australia Bank, 130 S. Ct. 2869

Niger Delta Development Commission v. Nigeria Liquefied Natural Gas Company Ltd (11 July 2007), Port Harcourt FHC/PH/CS/313/2005 (Federal High Court).

Oronto Douglas v. Shell Petroleum Development Company, [1992] 2 NWLR 466.

Owusu v. Jackson, [2005] 2 WLR 942, [2005] 2 All ER (Comm) 577.

Pacifica Papers Inc v Johnstone, [2001] BCSC 1069.

Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] SCC 68, 3 SCR 461.

Piedra v. Copper Mesa Mining Corp, [2010] ONSC 2421

Presbyterian Church of Sudan v Talisman Energy Inc., 2005 WL 2082846, 1 (SD NY 30 August 2005)

Presbyterian Church of Sudan v. Talisman Energy Inc, 131 S.Ct. 79 (2010).

R v Zik Press, [1974] WACA 12.

Renault v. Zhang, [2002] HCA 515, 210 CLR 491.

Rodolfo Ullonoa Flores and other v. Southern Peru Copper Corp., 414 F. (3d) 233 (US Ct App. 2d Cir. 2003.

Sarei v. Rio Tinto PLC, 550 F. 3d 822 (9th Cir. 2008).

Schooner Exchange v. McFaddon, 11 U.S. 7 Cranch 116 (1812).

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria, [2005] AHRLR 151.

Sosa v. Alvarez-Machain, 542 US 692 (2004).

South African Apartheid Litigation, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

Teck Corp. v. Millar, [1972] 33 D.L.R. (3d) 288 (B.C.S.C.).

United Canadian Malt Ltd v. Outboard Marine Corp of Canada, [2000] ONSC 1554, 48 O.R. (3d) 352

Voth v. Manildra Flour Mills, [1990] HCA 55, 171 CLR 538

SECONDARY SOURCES

ARTICLES

Adaralegbe, Bayo. "Stabilizing Fiscal Regime in Long Term Contracts: Recent Development in Nigeria" (2008) 3 Journal of World Energy Law & Business 239.

Agyeman, J. "Constructing Environmental (In)justice: Transatlantic Tales" (2002) 11 Environmental Politics 632

Akpan, Wilson. "Corporate Citizenship in the Nigerian Petroleum Industry: A Beneficiary Perspective" (2009) 45 Development Southern Africa 497.

Allen, Fidelis. "The Enemy Within: Oil in the Niger Delta" (2012) 29 World Policy Journal 46.

Amaechi, Emeka Polycarp. "Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, In Ensuring Access to Justice for Victims of Environmental Degradation" (2010) 6:3 Law, Environment and Development Journal 320.

Ambituuni, Ambisisi, Jaime Amezaga & Engobo Emeseh. "Analysis of Safety and Environmental Regulations for Downstream Petroleum Industry Operations in Nigeria: Problem and Prospects" (2014) 9 Environmental Development 43.

Ames, Orrin K. II. "Closely Held Corporations: An Intersection of Business, Law, and Ethics" (2013) 43 Cumb. L. Rev. 171.

Anomohanran, A. "Determination of Greenhouse Gas Emission Resulting from Gas Flaring Activities in Niger Delta" (2012) 45 Energy Policy 666.

Aprioku, IM. "Oil-Spill Disasters and the Rural Hazards-Cape of Eastern Nigeria" (2003) 34 Geoforum 99 -112.

Backer, Larry Cata. "Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law" (2005) 37 Colombia Human Rights Law Review 101.

_____ "Ideologies of Globalization and Sovereign Debt: Cuba and IMF" (2006) 24 Penn State International Law 497.

Banarjee, Bobby S. "Corporate Environmentalism: the Construct and its Measurement" (2012) 55 Journal of Business Research 177.

Bennie, Lynn, Patrick Bernhagen & Neil Mitchell J. "The Logic of Transnational Action: The Good Corporation and the Global Compact" (2007) 55 Political Studies 733.

Bensimon, Alison. "Corporate Liability under the Alien Tort Statute: Can Corporations Have Their Cake and Eat It Too" (2013) 10 Loy. U. Chi. Int'l L. Rev. 199.

Berge, Wendell. "Criminal Jurisdiction and the Territorial Principle" (1932) 30 Michigan Law Review 238.

Berle, Adolph. "Corporate Powers as Powers in Trust" (1931) 44 Harv. L. Rev. 1049.

Bisconti, Anthony. “The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land” (2009) 42 Loy. L. A. L. Rev. 782

Blair, Margaret & Lynn Stout. “Team Production Theory of Corporate Law” (1999) 24 J. Corp. L. 779.

Bone, Jeffrey. “Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought” (2011) 24 Can. J. L. & Jurisprudence 277 at 295.

Borchers, Patrick. “The Conflict of Laws and Boumediene v. Bush” (2009) 42 Creighton L. Rev. 9.

Bradford, William. “Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights” (2012) 26 Notre Dame J.L. Ethics & Pub. Pol'y at 146.

Bradley, Curtis. “Universal Jurisdiction and US Law” (2001) U. Chi Legal F 323.

Bradley, Sarah P. "BCE Inc. v. 1976 Debentureholders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance, and Good Corporate Citizenship?" (2010) 41 Ottawa L Rev 325.

Bullard, J & GS Johnson. “Environmental Justice: Grassroots Activism and its Impact on Public Policy Decision Making” (2000) 56 Journal of Social Issues 578

Calliess, Gralf-Peter. “Transnational Corporations Revisited” (2011) 18 Ind. J. Global Legal Stud. 602.

Carney, Donald. “Forum Non-Conveniens in the United States and Canada” (1997) 3 Buffalo Journal of International Law 117.

Carroll, Archie B & Kareem M Shabana. "The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice" (2010) 12 International Journal of Management Reviews 85.

Cash, Audrey. “Corporate Social Responsibility and Petroleum Development in Sub-Sahara Africa: The Case of Chad” (2012) 37 Resources Policy 144.

Cherry, Miriam A & Judd F. Snierson. “Beyond Profits: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster” (2011) 85 Tul. L. Rev. 983.

Chioma, Emem and Prince Amadi. “A New Dawn of Corporate Criminal Liability in the United Kingdom: Lessons for Nigeria” (2012) 2 African Journal of Law and Criminology 86.

Christmann, Petra. “Multinational Companies and the Natural Environment: Determinants of Global Environmental Policy Standardization” (2004) 47 Academy Management Journal 747.

Clark, GL & ERW Knight. “Implications of the UK Companies Act 2006 for Institutional Investors and the Market for Corporate Social Responsibility” (2009)11 U. Pa. J. Bus. L. 259.

Colangelo, Anthony J. “The Alien Tort Statute and the Law of Nations in Kiobel and Beyond” (2013) 44 Geo. J. Int'l L. 1329.

Danwood, Chirwa. “Toward Revitalizing Economic, Social and Cultural Rights in Africa: Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria” (2002) 10 Human Rights Brief 14.

de Jonge, Alice. “Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum” (2011) 7 Critical Perspectives on International Business 66.

Dean, Dwane H. “Consumer Perception of Corporate Donations: Effect of Company Reputation for Social Responsibility and Type of Donation” (2003) 32 Journal of Advertising 91.

Deva, Surya. “Global Compact: A Critique of the UN’s “Public-Private” Partnership for Promoting Corporate Citizenship” (2006) 34 Syracuse Journal of International Law and Commerce 107 – 151.

Dodd, E. Merrick, Jr. “For Whom Are Corporate Managers Trustees?” (1932) 45 Harvard Law Review 1145.

Doh, JP & TR Guay. “Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective” (2006) 43 Journal of Management Studies 47.

Dummet, Kel. “Drivers for Corporate Environmental Responsibility (CER)” (2006) 8 Environment, Development and Sustainability 378.

Ebeku, Kaniye. “Oil and the Niger Delta People in International Law: Resource Rights” (2006) Environmental and Equity Issues 189.

Edu, OK. “Corporate Social Responsibility: The Case of Multinational Oil Companies in the Niger Delta of Nigeria” (2011) 23 Sri Lanka J. Int'l L. 125.

Ehrlich, Craig. “Is Business Ethics Necessary?” (2005) 4 Depaul Bus. & Com. L.J. 55.

Emeseh, E. “Mainstreaming Enforcement for the Victims of Environmental Pollution: Towards Effective Allocation of Legislative Competence under a Federal Constitution” (2012) 14 Environ Law Review 184 – 198.

Eneh, CO. “Managing Nigeria's Environment: The Unresolved Issues” (2011) 4 J. Environ. Sci & Technol. 250 – 263.

Fadel, Mohammad. "BCE and the Long Shadow of American Corporate Law" (2009) 48 Can Bus L.J. 190.

Fisch, Jill. “Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy” (2006) 31 J Corp L 637.

Garrod, GD. “The Non-Use Benefits of Enhancing Forest Biodiversity: A Contingent Ranking Study” (1997) 21 Ecological Economics 45.

Gemmill, Barbara and Abimbola Bamidele-Izu. “The Role of NGOs and Civil Society” (2002) 77 Global Environmental Governance: Options and Opportunities 5.

Gilbert, DU, A. Rasche & S. Waddock. “Accountability in a Global Economy: The Emergence of International Accountability Standard” (2011) 21 Business Ethics Quarterly 21.

Goode, Matthew. “The Tortured Tale of Criminal Jurisdiction” (1997) 21 Melb. U. L. Rev. 412

Greene, AS. “Civil Society and Multiple Repositories of Power*”* (2000) 75 Chi-Kent L. Rev 477.

Gunningham, Neil, Robert A Kagan & Dorothy Thornton. "Social License and Environmental Protection: Why Businesses Go Beyond Compliance" (2004) 29 Law & Soc Inquiry 307.

Guyer, Jane. “Briefing: The Chad-Cameroon Petroleum and Pipeline Development Project” (2002) 101 African Affairs 109.

Harper, Virginia Ho. “Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide” (2012) 36 J. Corp. L. 59.

Hart, Stuart L. “A Natural Resource-Based View of the Firm” (1995) 20 Academy of Management Review 986

_____ “Beyond Greening: Strategies for a Sustainable World” (1997) 1 Harvard Business Review 66.

Hillemanns, Caroline F. “UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights” (2003) 4 German Law Journal 1065.

Hiu, Sylvia. “The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste” (1993) 8 Journal of Natural Resources and Environmental Law 121.

Jackson, Katherine V. “Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis” (2011) 7 Hastings Bus. L.J. 336.

Juenger, Friedrich K. “Forum Shopping, Domestic and International” (1989) 63 Tul. L. Rev. 553.

Keay, Andrew. “Moving towards Stakeholderism?: Statutes, Enlightened Shareholder Value, and all that: Much Ado about Little” (2011) 22 European Business Law Review 1 – 49.

_____ “Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?” (2010) 7:3 European Company and Financial Law Review 369

Khanna, Mahdu & William Rose Q. Anton. “Corporate Environmental Management: Regulatory and Market-Based Incentives” (2002) 78 Land Economics 539.

Kieserman, Brad. “Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act” (1999) 48 Catholic University Law Review 881.

Kojucharov, Nikola. “Poverty, Petroleum & Policy Intervention: Lessons from Chad-Cameroon Pipeline” (2007) 34 Review of African Political Economy 477.

Kusku, F. “From Necessity to Responsibility: Evidence for Corporate Environmental Citizenship Activities from a Developing Country’s Perspective” (2007) 14 Corporate Social Responsibility Environmental Management 74.

Ladan, Muhammed Tawfiq. “Review of NESREA Act 2007 and Regulations 2009 -2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria” (2012) 8 Law, Environment and Development Journal 116.

Lang, JC & AC Ho. “Environmentalism and the Multinational Corporation: A Viewpoint-Part II” (2000) 57 The International Journal of Environmental Studies 373.

Leader, S. “Human Rights Risks, and New Strategies for Global Investment” (2006) 9(3) Journal of International Economic Law 667.

Liao, Carol. “The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise” (2013) 9 McGill Int'l J. Sust. Dev. L. & Pol'y 53.

McCrea, Hannah. “Germany’s “Take Back” Approach to Waste Management: Is There a Legal Basis for Adoption in the United States?” (2011) 23 Geo Int’l Envt’l L Rev 513.

Mehlum, Halvor, Karl Moene & Ragnar Tovik. “Cursed By Resources or Institutions?” (2006) 29 *The World Economy* 1117 – 1131.

Millon, David. “New Game Plan or Business As Usual - a Critique of the Team Production Model of Corporate Law” (2000) 86 Va. L. Rev. 1001.

_____ “Shareholder Social Responsibility” (2013) 36 Seattle U. L. Rev. 911 at 913

_____ “Two Models of Corporate Social Responsibility” (2011) 46 Wake Forest L. Rev. 523 at 526.

Naughton, Michael. “The Corporation as a Community of Work: Understanding the Firm within the Catholic Social Tradition” (2006) 4 Ave Maria L. Rev. 33.

Nna, Emeka J. “Anchoring Stabilizing Clauses in International Petroleum Contracts” (2008) 42 Int'l Law. 1333

Nolan, Justin. “The United Nations Global Compact with Business: Hindering or Helping the Protection of Human Right?”(2005) 24 University of Queensland Law Journal 445.

Norwood, Kimberly Jade. “Shopping for a Venue: The Need for More Limits on Choice” (1996) 50 U. Miami L. Rev. 267.

Nwajiakwu-Dahou, Kathryn. “The Political Economy of Oil and ‘Rebellion’ in Nigeria’s Niger-Delta” (2012) 39 Review of Africa Political Economy 295.

Nwankwo, CN and DO Ogagarue. “Effects of Gas Flaring on Surface and Groundwater in Delta State Nigeria” (2011) 3 Journal of Geology and Mining Research 131–136.

Nwapi, Chilenye. “Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor” (2014) 30:78 Utrecht Journal of International and European Law 24-43.

Odoeme, Victor. “Corporate Accountability in the Oil and Gas Sector: Coping with Uncertainties” (2013) 39 Commonwealth Law Bulletin 741.

Ogbodo, Gozie. “Environmental Protection in Nigeria: Two Decades after the Koko Incident” (2009) Annual Survey of International and Comparative Law 1.

Okumagba, Paul. “Ethnic Militias and Criminality in the Niger-Delta” (2009) 3 African Research Review 315.

Oluduro, Olubayo. “Environmental Rights: A Case Study of the 1999 Constitution of the Federal Republic of Nigeria” (2010) 4 Malawi L.J. 267.

Onuoha, FC. “Poverty Pipeline Vandalization/Explosion and Human Security: Integrating Disaster Management into Poverty Reduction in Nigeria” (2007) 16 Afr. Secur. Rev. 99 -115.

Orji, Uchenna Jerome. “An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria” (2012) 38 Commonwealth Law Bulletin 321.

Oshionebo, Evaristus. “Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries” (2010) 10 Asper Review International Business and Trade Law 1.

_____ “The United Nation’s Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities” (2007) 19 Florida Journal of International Law 1-38.

_____ “Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry” (2007) 15 Afr. J. Int'l & Comp. L. 107.

Papagiannakis, Giorgios & Lioukas Spyros. “Values, Attitudes and Perceptions of Managers as Predictors of Corporate Environmental Responsiveness” (2012) 100 Journal of Environmental Management 41.

Pattberg, Phillip & Johannes Stripple. “Beyond the Public and Private Divide: Remapping the Transitional Climate Governance in the 21st Century” (2008) 8 International Environmental Agreements: Politics, Law and Economics 367.

Perkins, R & E. Neumayer. “Geographic Variations in Early Diffusion of Corporate Voluntary Standards: Comparing ISO 14001 and the Global Compact” (2010) 42 Environment and Planning 347.

Priyadarshini, K & OK Gupta. “Compliance to Environmental Regulations: the Indian Context” (2003) 2 International Journal of Business and Economics 26.

Quigley, William. “Catholic Social Thought and the Amorality of Large Corporations: Time to Abolish Corporate Personhood” (2004) 5 Loy. J. Pub. Int. L. 109.

Rahim, Mia Mahmude. “Raising Corporate Social Responsibility: the Legitimacy Approach” (2012) 9 Macquarie J. Bus. L. 111.

Rasche, Andreas, Sandra Waddock & Malcom McIntosh. “The United Nations Global Compact: Retrospect and Prospect” (2013) 52 Business Society 6 -30.

Rhuks, Temitope. “The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India” (2010) 3 NUJS Law Review 423.

Ripken, Susanna K. “Corporations are People too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle” (2009) 15 Fordham J. Corp. & Fin. L. 97.

Russell, Gerald J. “Catholic Social Thought and the Large Multinational Corporation” (2007) 46 J. Cath. Leg. Stud. 107.

Salzman, James. “Labour Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development” (2000) 21 Mich. J. Int’l L. 790.

Sawhney, A. “Greening Indian Businesses for the World Market” (2004) 46 Asian Economic Review 413.

Schoefar, Evan & Francisco Grenalos. “Environmentalism, Globalization and National Economies, 1980 - 2000” (2006) 85 Social Forces 965.

Sichinava, Merab & Evgeniya V Vidishcheva. “Transnational Corporations: History, Evaluation, Modern Trends” (2011) 12 European Researcher 1626.

Sindhi, Sumita & Niraj Kumar. “Corporate Environmental Responsibility – Transitional and Evolving” (2012) 23 Management of Environmental Quality: An International Journal 642.

Smith, Gordon D. “The Shareholder’s Primacy Norm” (1998) 23 J. Corp. L. 290.

Stabile, Susan J. “Catholic Vision of the Corporation” (2006) 4 Seattle J. Soc. Just. 186.

Standley, Nathan. “Lessons Learned from the Capitulation of the Constituency Statute” (2012) 4 Elon Law Review 209.

Stevens, Lisa. “The Illusion of Sustainable Development: How Nigeria’s Environmental Laws Are Failing the Niger-Delta” (2012) 36 Vermont Law Review 387.

Stout, Lynn. “Bad and Not-So-Bad Arguments for Shareholder Primacy” (2002) 75 South California Law Review 1189.

van den Herik, Larissa & Jernej Letnar Cernic. “Regulating Corporations under International Law” (2010) 8 J. Int'l Crim. Just. 725.

VanDuzer, J Anthony. "BCE v. 1976Debentureholders: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision since *Peoples*" (2009) 43 UBC L Rev 205.

Velasco, Julian. “Shareholder’s Ownership and Primacy” (2010) 897 U. Ill. L. Rev. 897.

Vogel, David. “Private Global Business Regulation” (2008) 11 Annual Review of Political Science 261.

Waitzer, Edward & Johnny Jaswal. "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47 Osgoode Hall LJ 439.

Weissbrodt, David & Muria Kruger. “Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (2003) 97 Am. J. Int’l L. 901.

Williams, CA. “Civil Society Initiatives and “Soft Law” in the Oil and Gas Industry” (2004) 36 N.Y.U J. Int’l L & Pol. 457.

Winkler, Matteo M. “What Remains of the Alien Tort Statute after Kiobel” (2013) 39 N.C.J. Int'l L. & Com. Reg. 171.

Yang Yihe. “Corporate Civil Liability under the Alien Tort Statute: The Practical Implications from Kiobel” 2013 40 W. St. U. L. Rev. 195.

Yates, Douglas. “The Scramble for African Oil” (2006) 13 South African Journal of International Affairs 11-31.

ARTICLE IN BOOKS

Amaduobogha, Simon Warikiyei. "Environmental Regulation of Foreign Direct Investment in the Oil and Gas Sector" in Festus Emiri and Gowon Deinduomo, eds, *Law and Petroleum Industry in Nigeria: Current Challenges* (Lagos: Malthouse Press Ltd, 2009).

Armstrong, David & Julie Gilson. "Introduction: Civil Society and Global Governance" in David Armstrong et al, eds, *International Governance: The Role of Non-State Actors in Global and Regional Regulatory Frameworks* (London: Routledge, 2011).

Bendell, Jem & David Murphy. "Towards Civil Regulation: NGOs and the Politics of Corporate Environmentalism" in Peter Utting, ed, *The Greening of Business in Developing Countries: Rhetoric, Reality and Prospects* (New York: Zed Books Ltd, 2002).

Birkinshaw, Julian. "Multinational Corporate Strategy and Organization: An Internal Market Perspective" in N. Hood and S. Young, eds, *The Globalization of Multinational Enterprise Activity and Economic Development* (London: Macmillan, 2000).

Dovers, Stephen & Robin Connor. "Institutional Policy Change for Sustainability" in Benjamin Richardson & Stepan Wood, eds, *Environmental Law for Sustainability* (Oregon: Hart Publishing, 2006).

El-Khawas, Mohamed & JA Ndumbe. "The Chad-Cameroon Oil Pipeline: Hope for Poverty Reduction?" in Olufemi Wusu, ed, *Politics and Economy of Africa* (New York: Nova Science Publishers, Inc, 2007).

Ellis, Jaye & Stepan Wood. "International Environmental Law" in in Benjamin Richardson & Stepan Wood, eds, *Environmental Law for Sustainability* (Oregon: Hart Publishing, 2006).

Freedman, Milton. "The Social Responsibility of Business is to Increase its Profits" in W Michael Hoffman and Robert E Fredrick, eds, *Business Ethics, Readings and Cases in Corporate Morality* (New York: McGraw Hill, 1995).

Itsueli, PO. "Environmental Pollution in Nigeria: An Appraisal of Corporate Social Responsibility for Victims of Oil Pollution in Nigeria" in Festus Emiri and Gowon Deinduomo, eds, *Law and Petroleum Industry in Nigeria: Current Challenges* (Lagos: Malthouse Press Ltd, 2009).

Lovins, Amory B, Hunter Lovins & Paul Hawken. "A Road Map for Natural Capitalism" in Neil Gunningham, ed, *Corporate Environmental Responsibility* (Surrey, UK: Ashgate Publishing Limited, 2009).

Millon, David. "The Single Constituency Argument in the Economic Analysis of Business Law" in Dana L. Gold, ed, *Law & Economics: Towards Social Justice* (West Yorkshire, UK: Emerald Group Publishing Limited, 2007).

Nnadozie, Kent. "Environmental Regulation of Oil and Gas Industry in Nigeria" in Beatrice Claytor and Kevin R. Gray, eds, *International Environmental Law and Policy in Africa* (The Netherlands: Kluwer Academic Publisher, 2003).

Nollkaemper, Andre. “Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives” in Gerd Winter, *Multilevel Governance of Global Environmental Change: Perspective from Science, Sociology and the Law* (Cambridge: Cambridge University Press, 2006).

Omorogbe, Yinka. “The Legal Framework for Public Participation in Decision-Making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless” in Donald N Zillman, Alastair Lucas & George R Pring, eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002).

Oshionebo, Evaristus. “Fiscal Regimes for Natural Resource Extraction: Implications for Africa’s Development” in Francis Botchway, ed, *Natural Resource Investment and Africa’s Development* (Cheltenham, UK: Edward Elgar Publishing, 2011) 200 at 222.

Sayer, John. “Confrontation, Cooperation and Co-optation: NGO Advocacy and Corporations” in Barbara Rugendyke, ed, *NGOs as Advocates for Development in a Globalising World* (New York: Routledge, 2007).

_____ “Risk and Rewards: NGOs Engaging the Corporate Sector” in Barbara Rugendyke, ed, *NGOs as Advocates for Development in a Globalizing World* (New York: Routledge, 2007).

Schaefer, Anja & Brian Harvey. "Stage Models of Corporate 'Greening': A Critical Evaluation" in Neil Gunningham, ed, *Corporate Environmental Responsibility* (Surrey, UK: Ashgate Publishing Limited, 2009).

Vincent, Ken. "Undoing Oil's Curse?: An Examination of the Chad-Cameroon Pipeline Project" in Alusine Jalloh and Toyin Falola, eds, *The United States and West Africa: Interactions and Relations* (New York: University of Rochester Press, 2008).

Vogel, David. "Is There A Market for Virtue?: The Business Case for Corporate Social Responsibility" in Neil Gunningham, ed, Corporate Environmental Responsibility (Surrey, UK: Ashgate Publishing Limited, 2009).

Webb, Kernaghan. "Corporate Citizenship and Private Regulatory Regime: Understanding New Governance Role and Function" in KeIngo Pies and Peter Koslowski, eds, *Corporate Citizenship and New Governance: The Political Role of Corporations* (New York: Springer Science+Business Media BV, 2011).

Wilkins, Mira. "The History of the Multinational Enterprise*"* in Alan Rugman, ed, *The Oxford Handbook of International Business,* 2nd Ed (Oxford: Oxford University Press, 2009).

BOOKS

Adeh, Ignatius. *Corruption and Environmental Law* (Berlin: The Deutsche Nationalbibliothek, 2010).

_____, *Corruption and Environmental Law: The Case of the Niger Delta* (Hamburg & London: LIT Verlag Münster, 2010).

Ake, Claude. *Democracy and Development in Africa* (Washington, DC: Brookings Institution, 1996).

Ako, Rhuks T. *Environmental Justice in Developing Countries: Perspectives from Africa and Asia Pacific* (New York: Routledge, 2013).

Amaetari, Michael. *The Coastal Niger-Delta: Environmental Development and Planning* (Indiana: Trafford Publishing, 2012).

Ariweriokuma, Soala. *The Political Economy of Oil and Gas in Africa: The Case of Nigeria* (Oxford: Routledge, 2009).

Barnet, Richard & Ronald Muller. *Global Reach: The Power of the Multinational Corporations* (London: Jonathan Cape, 1975).

Berle, Adolph A & Gardiner C Means. *The Modern Corporation and Private Property* (New York: Commerce Clearing House Inc, 1932).

Blanco, Elena & Jona Razzaque. *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham, UK: Edward Elgar Publishing Limited, 2011).

Braithwaite, John & Peter Drahos. *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

Cheremisinoff, Nicholas P. *Handbook of Air Pollution Prevention and Control* (Oxford: Butterworth-Heinemann, 2002).

Clapp, Jennifer. Toxic Exports: The Transfer of Hazardous Wastes from Rich to Poor Countries (New York: Cornell University Press, 2001).

de Jonge, Alice. *Transnational Corporation and International Law: Accountability in the Global Business Environment* (Cheltenham, UK: Edward Elgar, 2011).

Dine, Janet. *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005).

Dunning, John H, & Sarianna M. Lundan. *Multinationals and the Global Economy*, 2nd Ed (Cheltenham, UK: Edward Elgar Publishing Limited, 2008).

Ebrahim, A & E Weisband. *Global Accountabilities: Globalism, Pluralism and Public Ethics* (Cambridge: Cambridge University Press, 2007).

Effross, Walter A. *Corporate Governance: Principles and Practice* (New York: Aspen Publishers, 2010).

Enneking, Liesbeth FH. *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (The Hague, Netherlands: Eleven International Publishing, 2012).

Falola, Toyin & Adam Paddock. eds, *Environment and Economics in Nigeria* (New York: Routledge, 2011).

_____ & Matthew M Heaton, *A History of Nigeria* (New York: Cambridge University Press, 2008).

Farthing, Julia, Bridget Marshall and Peter Kellett. *Pollution Prevention and Control: The New Regime* (London: Tottel, 2003).

Fawcett, James. ed, *Declining Jurisdiction in Private International Law* (Gloucestershire, UK: Claredon Press, 1995).

Frynas, Jedrzej George. *Oil in Nigeria: Conflict and Litigation Between Oil Company and Village Communities* (Hamburg: LIT Verlag Münster, 2000).

Fung-Hung-gay, Sheryl A Law & Jot Yau. *Socially Responsible Investment in a Global Environment* (London: Edward Elgar Publishing, 2010).

Googins, Bradley K, Philip H. Mirvis & Steven A. Rochlin. *Beyond Good Company: Next Generation Corporate Citizenship* (Hampshire, UK: Palmgrave Macmillan, 2007).

Gunningham, Neil, Robert Allen Kagan & Dorothy Thornton. *Shades of Green: Business, Regulation and Environment* (California: Stanford University Press, 2003).

Haller, Tobias et al. eds, *Fossil Fuels, Oil Companies and Indigenous People: Strategies of Multinational Companies, States, and Ethnic Minorities Impacts on Environment, Livelihoods and Cultural Change* (The Netherlands: Lit Verlag, 2007).

Hastedt, Glenn P. ed, *Spies, Wiretap and Secret Operations* (California: ABC-CLIO LLC, 2011).

Hawkens, Paul, Amory B Lovins & Hunter Lovins. *Natural Capitalism: The Next Industrial Revolution*, 10th ed (Washington DC: Earthscan Limited, 2010).

Hoffman, Andrew J. *Competitive Environmental Strategy: A Guide To The Changing Business Landscape* (Washington, DC: Island Press, 2000).

_____ *From Heresy to Dogma: An Institutional History of Corporate Environmentalis*m (California: New Lexington Press, 1997)

_____ *Carbon Strategies: How Leading Companies Are Reducing their Climate Change* (Michigan: University of Michigan, 2007).

Hood, J. *The Heroic Enterprise: Business and the Common Good* (New York: Free Press, 1996).

IUCN. *Oil Exploration in the Tropics: Guidelines for Environmental Protection* (Cambridge: The Burlington Press, 1991).

Jess, David T. *Good Green Jobs in a Global Economy: Making and Keeping New Industries in the United States* (Massachusetts: MIT Press, 2012).

Klein, Naomi. *No logo: Taking Aim at the Brand Bullies* (London: Radon House LLC, 2000).

_____ *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Picardo, 2010).

Lasch, Christopher. *The Revolt of the Elites and the Betrayal of Democracy* (New York: WW Norton, 1995).

Laszlo, Chris. *Sustainable Value: How the World's Leading Companies are Doing Well by Doing Good* (Sheffield: Greenleaf Publishing, 2008).

LeRoy, Paddock et al, eds. *Compliance and Enforcement in Environmental Law: Towards More Effective Implementation* (London: Edward Edgar, 2012).

Low, Nicholas et al, eds. *Consuming Cities: The Urban Environment in the Global Economy After Rio* (London: Routledge, 2012).

Macartan, Humphreys, Jeffry Sachs and Joseph Stiglitz. *Escaping the Resource Curse* (New York: Columbia University Press, 2007).

Martin de Castro, Gregorio et al. *Environmental Innovation and Firm Performance: A Natural Resource Based View* (Hampshire, UK: Palgrave McMillan, 2013).

Muchlinski, Peter. *Multinational Enterprise and the Law*, 2nd ed (New York: Oxford University Press, 2007).

Mujih, Edwin. *The Regulation of Multinational Companies Operating in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Oxon: Ashgate Publishing Group, 2012).

Muldoon, Paul et al. *An Introduction to Environmental Law and Policy in Canada* (Toronto: Emond Montgomery Publications Limited, 2009).

OECD, ed. *Environment and the OECD Guidelines for Multinational Enterprises: Corporate Tools and Approaches* (Paris: OECD Publishing, 2005).

Okonkwo, Cyprian & Michael E Naish. *Okonkwo and Naish on Criminal Law in Nigeria* (Ibadan, Nigeria: Spectrum Books Limited, 2010).

Omeje, Kenneth. *High Stakes and Stakeholders: Oil Conflict and Security in Nigeria* (Hampshire: Ashgate Publishing Limited, 2006).

Omorogbe, Yinka. *Oil and Gas Law in Nigeria: Simplified* (Michigan: Malthouse Press Ltd, 2003).

Osamor, Bob. *Fundamentals of Criminal Procedure in Nigeria* (Abuja: Dee-Sage Nigeria, 2004).

Oshionebo, Evaristus. *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press Incorporated, 2009).

Rasche, Andreas & Georg Kell. *The United Nations Global Compact: Achievements, Trends and Challenges* (Cambridge: Cambridge University Press, 2010).

Ronald A Brand & Scott Jablonski. *Forum Non Conveniens: History, Global Practice and the Future under the Hague Convention on Choice of Court Agreement* (New York: Oxford University Press, 2007).

Salzmann, Olive. *Corporate Sustainability Management in The Energy Sector* (Wiesbaden: Gabler, 2008).

Schmidheiny, Stephan & World Business Council for Sustainable Development. *Changing Course: A Global Business Perspective on Development and the Environment* (Massachusetts: MIT Press, 1992).

Sornarajah, M. *The International Law on Foreign Investment* (New York: Cambridge University Press, 2010).

Swamy, Dalip. *Multinational Corporation and the World Economy* (New Delhi: Alps Publisher, 1980).

Tugendhat, C. *The Multinationals* (London: Eyre & Spottiswoode, 1971).

Vernon, Raymond. *Sovereignty at Bay: the Multinational Spread of US Enterprise* (New York: Basic Books, 1971).

Vogel, David. *The Market for Virtue: The Potentials and Limits of Corporate Social Responsibility* (Washington, DC: The Brookings Institution, 2006).

Wali, Amina Laraba. *Oil Wealth and Local Poverty: Exploitation and Neglect in the Niger-Delta* (New York: ProQuest LLC, 2008).

Winter, Gerd. *Multilevel Governance of Global Environmental Change*: *Perspective from Science, Sociology and the Law* (Cambridge: Cambridge University Press, 2006).

Wold, Chris, David Hunter & Melissa Powers. *Climate Change and the Law* (New Jersey: LexisNexis Matthew Bender, 2009).

Worika, Ibibia. "Energy Development and Utilization in Africa" in Adrian J Bradbrook et al, eds, *The Law of Energy for Sustainable Development* (New York: Cambridge University Press, 2005).

Zack, Jennifer A. *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006).

Zadek, Simon. *The Civil Corporation* (London: Earthscan, 2006).

Zarky, Lyuba, ed. *Human Rights and the Environment: Conflicts and Norms in a Globalizing World* (London: Earthscan, 2002).

Zerk, Jennifer. *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006).

MONOGRAPHS AND REPORTS

Amnesty International. "Contracting out of Human Rights: The Chad-Cameroon Pipeline Project" (London: Amnesty International UK, 2005).

Norwegian Organization for Development Cooperation, Good Governance in Nigeria: A Study in Political Economy and Donor Support by Dr. Inge Amundsen, ed (Oslo: Chr Michelsen Institute, 2010).

Simmons, PJ. "Learning to Live" *Foreign Policy* 112 (1 May 1998).

US Catholic Bishops. *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the US Economy* (Washington, D.C: United States Conference of Catholic Bishops, 1986).

NEWS ARTICLES

Ameh, John. "Reps Query $5.6 Billion Pipelines Protection Contract", *The Punch* (28 March 2013) online: The Punch http://www.punchng.com/news/reps-query-n5-6bn-nnpc-pipelines-protection-contracts/ (accessed 19 February 2014).

BBC. "Shell in Nigeria: Dutch Court to Rule in Pollution Case" 30 January 2013 online at: http://www.bbc.co.uk/news/world-africa-21254890 (accessed 22 November 2013).

Bello, Olusola. "Nigeria Losses N99 BN to Gas Flaring in 6 Months", *Business Day* (04 October 2012) online: Business Day <http://businessdayonline.com/NG/index.php/news/76-hot-topic/45404-nigeria-loses-n99bn-to-gas-flare-in-6-months> (accessed 23 February 2013).

Brock, Joe & Emma Farge. "Exxon Warning Adds to Nigeria Oil Output Problems", *The Globe and Mail* (21 November 2012) online: The Globe and Mail <http://www.theglobeandmail.com/report-on-business/international-business/african-and-mideast-business/exxon-warning-adds-to-nigeria-oil-output-problems/article5531449/> (accessed 22 March 2012).

Brown, Paul. "Chad Oil Pipeline under Attack for Harming the Poor", *The Guardian* (27 September 2002) online: http://www.theguardian.com/environment/2002/sep/27/internationalnews (accessed 14 November 2013).

Business Day. "PIB and threats to Nigeria's Oil Industry" *Business Day* (15 October 2013) online: Business Day http://businessdayonline.com/2013/10/pib-and-threats-to-nigerias-oil-industry/ (accessed 06 February 2014)

Cocks, Tim. "Nigeria Oil Minister Urges Majors to Accept Higher Tax", *The Globe and Mail* (04 December 2012) online: The Globe and Mail

<http://www.theglobeandmail.com/report-on-business/international-business/african-and-mideast-business/nigeria-oil-minister-urges-majors-to-accept-higher-tax/article5977306/> (accessed 25 March 2013).

Dale, Reginald. "An African Answer for US Oil Woes", *International Herald Tribune,* 1 February 2001.

Eboh, Michael. "Nigeria: Shell Faults NIMASA, NOSDRA on N1.84 Trillion Fine", *Vanguard* (05 February 2014) online: All Africa http://allafrica.com/stories/201402050282.html (accessed 10 February 2014).

Eze, Johnson. "PIB: Why Nigeria Must Act Fast" *This Day* (17 December 2013) online: This Day Live http://www.thisdaylive.com/articles/pib-why-nigeria-must-act-fast/166756/ (accessed 06 February 2014).

Ezeah, Nnena. "Nigeria's Crude Production Peaks at About 2.68M bpd", *The Vanguard* (27 February 2012) online: Vanguard News: <http://www.vanguardngr.com/2012/02/nigerias-crude-production-peaks-at-about-2-68m-bpd/ (accessed 25 March 2013).

Friedman, Milton. "The Social Responsibility of Business Is To Increase Its Profits", *NY Times* (13 September 1970).

Greenhouse, Steven. "Nike Shoe Plant in Vietnam is Called Unsafe for Workers", *NY Times* (08 November 1997) online: New York Times http://www.nytimes.com/1997/11/08/business/nike-shoe-plant-in-vietnam-is-called-unsafe-for-workers.html?pagewanted=all&src=pm (accessed 04 December 2013).

Kalejaye, Kunle. "Nigeria's Oil Reserves Stands at 36.2BN barrels", *The Vanguard* (06 November 2012) online: Vanguard News <http://www.vanguardngr.com/2012/11/nigerias-oil-reserves-stands-at-36-2-bn-barrels/> (accessed 4 March 2013).

Nash, Nathaniel. "Oil Companies Face Boycott Over Sinking of Rig", *NY Times* (17 June 1995) online: New York Times http://www.nytimes.com/1995/06/17/world/oil-companies-face-boycott-over-sinking-of-rig.html (accessed 18 February 2014).

Nisen, Max. "How NIKE Solved Its Sweatshop Problem", *Business Insider* (09 May 2013) online Business Insider: http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5 (accessed 04 December 2013).

Nossiter, Adam. "Half of the World from the Gulf, A Spillage Scourge 5 Years Old", *NY Times* (17 June 2010) A1.

Obia, Vincent. "Police/NSCDC Clash: Between Jurisdiction and Accountability" *This Day* (07 April 2013) online: This Day http://www.thisdaylive.com/articles/police-nscdc-clash-between-jurisdiction-and-accountability/144226/ (accessed 19 February 2013).

Rice, Xan. "World Bank Cancels Pipeline Deals with Chad after Revenue Misspent", *The Guardian* (12 September 2008) online: The Guardian http://www.theguardian.com/world/2008/sep/12/worldbank.oil (accessed 12 February 2014).

Sekularac, Ivana and Anthony Deutsch. "Dutch Court Says Shell Responsible for Nigeria Spill", *The Reuters* (30 January 2013) online: The Reuters http://www.reuters.com/article/2013/01/30/us-shell-nigeria-lawsuit-idUSBRE90S16X20130130 (accessed 06 February 2013).

Shell Nigeria. "Oil Spill Data" online: Shell Nigeria <http://www.shell.com.ng/environment-society/environment-tpkg/oil-spills.html> (accessed 27 March 2013).

The Telegraph. "Shell Oil Spill Off Nigeria Likely the Worst in Decade", *The Telegraph* (22 December, 2011) online: The Telegraph http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8974141/Shell-oil-spill-off-Nigeria-likely-worst-in-a-decade.html (accessed 08 February 2014).

This Day. "Who Takes the Blame for Oil Pollution in the Niger Delta", *This Day* (05 February 2013) online: This Day Live http://www.thisdaylive.com/articles/who-takes-the-blame-for-oil-pollution-in-the-niger-delta-/138470/ (accessed 22 March 2013).

Vanguard. "Nigeria Ranked High in Implementation of Environmental Agreements", *Vanguard* (02 September 2013) online: http://www.vanguardngr.com/2013/09/nigeria-ranked-high-on-implementation-of-environmental-agreements/ (accessed 19 February 2014).

_____ "Oil Spills: Bodo Residents Reject Shell Settlement" *Vanguard* (14 September 2013) online: Vanguard Nigeria

http://www.vanguardngr.com/2013/09/oil-spills-bodo-residents-reject-shell-settlement/ (accessed 5 March 2014).

ONLINE PUBLICATION

Asuni, Judith B. "Blood Oil in the Niger Delta", Special Report, United States Institute of Peace online: http://www.usip.org/sites/default/files/blood_oil_nigerdelta.pdf (accessed 06 December 2013).

Barry, Norman. "The Theory of Corporation" *Ideas on Liberty* (March 2013) online: Foundation for Economic Education http://www.fee.org/files/docLib/feat5.pdf (accessed 21 December 2013).

Ernst & Young. *African Oil and Gas: A Continent on the Move* online: Ernst & Young http://www.ey.com/GL/en/Industries/Oil---Gas/Africa-oil-and-gas--a-continent-on-the-move---The-African-oil-and-gas-landscape (accessed 05 March 2014).

Jamison, Alison et al. "Defining Corporate Environmental Responsibility: Canadian ENGO Perspective" The Pembina Institute and Pollution Probe (August 2005) online: http://environment.alberta.ca/documents/Defining_Corporate_Environmental_Responsibility.pdf (accessed 06 February 2014).

KPMG. *Oil and Gas in Africa: Africa's Reserves, Potentials and Prospects,* online: KPMG [Africa] https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-

Publications/Documents/Oil%20and%20Gas%20in%20Africa.pdf (accessed 17 February 2013)

Millon, David. "The Ambiguous Significance of Corporate Personhood", online: (2001) Stanford Agora: An Online Journal of Legal Perspectives http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264141 (accessed 12 February 2014).

Rea, Michael H. "The International Code of Ethics for Canadian Business: An Audit Format Compliance Review", *Corporate Knight Magazine* (5 May 2003) 1, online: http://www2.ohchr.org/english/issues/globalization/business/docs/nexen1.pdf (accessed 04 December 2013).

Spence, Adam. "In Search of the Benefit Corporation" (25 November 2010) online: MaRS Centre for Impact Investing http://www.marsdd.com/2010/11/25/in-search-of-the-benefit-corporation/ (accessed 06 February 2013).

van de Wiel, Han. "Oil Pollution in Nigeria: Sabotage or Rust", *Down To Earth Magazine* (February 2013), online: Down To Earth Magazine <http://www.milieudefensie.nl/publicaties/down-to-earth-magazine/artikelen/oil-pollution-in-nigeria.-sabotage-or-rust> (accessed 4 April 2013).

Vines, Alex et al. "Thirst for African Oil", Chatam House online: http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SU004/vines.pdf (accessed 07 February 2014).

GOVERNMENT DOCUMENTS/INDEPENDENT DOCUMENTS

CED, FOCARFE & RELUFA. Press Release, "Another Oil Leak on the Marine Terminal of the Chad-Cameroon Oil Pipeline" (27 April 2010) online: RELUFA http://www.relufa.org/documents/Pressreleaseoilspillapril2010.pdf (accessed 19 February 2014).

Commission for Environmental Impact Assessment. "Advisory Review of the Environmental Assessment of the Chad Export Project in Chad and Cameroon" (Utrecht: Commission for Environmental Impact Assessment, 1999).

Environmental Defense Fund. "African Pipeline Would Threaten People and Rainforest", *EDF Letter* (November 2009) online: EDF http://www.edf.org/sites/default/files/170_Nov99.pdf (accessed 14 November 2013).

Guerin, Jacques & Celine Houdin. "Chad, The Challenge of Development: Policy Implication of the Chad - Cameroon Pipeline Project", North – South Institute Working Paper (23 December 2010) at 12 online: http://www.nsi-ins.ca/wp-content/uploads/2012/10/2010-Chad-The-Challenge-of-Development-Policy-Implications-of-the-Chad-Cameroon-Petroleum-Project.pdf (accessed 17 February 2014).

Horta, Korinna. "Development Effectiveness and Lessons Learned: The Chad-Cameroon Oil Development & Pipeline Project" (Statement delivered before the US Senate Foreign Relations Committee, 12 July 2006) [unpublished].

Memorandum from, Ann Perrault, Senior Attorney of the Centre for International Environmental Law and endorsed by 94 NGOs and civil societies (11 March 2010) at 2 online: http://bankwatch.org/documents/CSOsubmissionIFC_11Mar2010.pdf (accessed 12 February 2014).

United States House of Representative Subcommittee on Africa of the Committee on International Relations House of Representatives, Votes and Proceeding, 117 Leg, 2nd Sess, No 107-75 (18 April 2002) online: http://commdocs.house.gov/committees/intlrel/hfa78803.000/hfa78803_0.htm (accessed 15 November 2013)

Walsh, Kenneth. "World Bank Funding of Chad/Cameroon Oil Project Summary" (17 March 1997) online: http://www.erdoel-tschad.de/contao/tl_files/Portal/edf-Kenneth-Walsh-WB-funding%20of%20TC.pdf (accessed 14 November 2013).

INTERNATIONAL DOCUMENTS

African Development Bank and African Union. *Oil and Gas in Africa - Supplement to the African Development Report*, AfDBOR 978–0–19–956578–8 (2009) online: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf (accessed 07 February 2014).

D'Appolonia S.p.A. "Report of the External Monitoring Compliance Group - Chad Export Project", Site Visit (November – December 2012).

Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003).

International Finance Corporation. "IFC Performance Standards on Environmental and Social Sustainability" (01 January 2012) online: http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES (accessed 06 February 2014).

_____, "International Finance Corporation Played a Leading Role in Facilitating the Oil Pipeline between Chad and Cameroon" IFC online: International Finance Corporation http://www.ifc.org/wps/wcm/connect/6f271e00487e8e09844ced51e3a7223f/ChadCamProjectOverview.pdf?MOD=AJPERES (accessed 06 February 2014).

Kell, Georg. "After the Signature: A Guide to Engagement in the United Nations Global Compact" (2012) The Global Compact (UN, Global Compact Office).

OECD, ed. *Environment and the OECD Guidelines for Multinational Enterprises: Corporate Tools and Approaches* (Paris: OECD Publishing, 2005).

_____, *OECD Guidelines for Multinational Enterprise*, Doc No 00 2008 4C 1 P – No. 89095 2008 (Paris: OECD Publishing, 2008).

Pachuri, RK & A. Reisinger, eds. *Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Switzerland: IPCC, 2007).

Report of the World Commission and Environment and Development : Our Common Future, WCED, 4th year, Annex, Agenda Item 1, UN Doc A/42/427 (1987).

Rio Declaration on Environment and Development. UNCED, 10th year, Annex Agenda, Item 1, UN Doc A/CONF 151/26 (1992).

Rome Statute of International Criminal Court. 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

Ruggie, John. *Clarifying the Concepts of 'Sphere of Influence' and 'Complicity': Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNHRCOR, 2008, UN Doc A/HRC/8/16 1.

_____, *Interim Report of the Special Representative of the Secretary General in Business and Human Right*, UNSRSGOR, 2006 UN Doc E/CN. 4/2006/97.

The World Bank. *Data*, online: WBG http://data.worldbank.org/indicator/SP.POP.TOTL?cid=GPD_1 (accessed 3 March 2013).

The World Bank. *Implementation Completion and Result Report (IDA 3372) on a Credit in the Amount of SDR 3.4 Million ($5.9 Million Equivalent) to the Republic of Cameroon for a Petroleum Enhancement Capacity Enhancement Project*, World Bank Inspection Panel, ICR0000416 (2008) at 1 online: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/08/06/00

0333038_20080806023917/Rendered/PDF/ICR4160ICR0P041closed0August040 2008.pdf (accessed 18 February 2014).

The World Bank. Media Release, "Accidental Oil Spill in Kribi, Cameroon" (23 January 2007) online: WBG http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,, contentMDK:21191471~pagePK:146736~piPK:146830~theSitePK:258644,00.ht ml (accessed 19 February 2014).

United Nations Conference on Trade and Development. *World Investment Report: Transnational Corporations, Agricultural Production and Development*, UNCTADOR, 2009, UNCTAD/WIR/2009.

_____ *World Investment Report: Transnational Corporation and the Infrastructural Challenge*, UNCTADOR, 2008, UNCTAD/WIR/2008.

_____ *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (New Delhi: United Nations Publication, 2008).

United Nations Environment Programme. Environmental Assessment of Ogoniland (Nairobi: United Nations Environment Programme, 2011).

United Stated Environmental Protection Agency (US EPA). "Moving Towards Collaborative Problem Solving: Business and Industry Perspectives on Environmental Justice", Report No. EPA/300-R-03-003, US EPA, Cincinnati, OH, online: <www.epa.gov/compliance/resources/publications/ej/annual_project-

reports/study-industry-perspective-ej-permitting.pdf> (accessed 23 November 2012).

World Bank and International Finance Corporation. *Chad-Cameroon Petroleum Development and Pipeline Project: Overview*, WBGOR, Report No 36569 – TD, (2006) online: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/09/19/000020953_20070919092837/Rendered/PDF/36569.pdf (accessed 14 November 2013).

World Bank Group and International Finance Corporation. "Chad-Cameroon Pipeline Development and Pipeline Project: Overview" (2006) online: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/09/19/000020953_20070919092837/Rendered/PDF/36569.pdf (accessed on 11 November 2013).

World Bank Group, *Chad-Cameroon Petroleum Development and Pipeline*. WBGOR, Report No PID 5209, (1999) online: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/07/29/000094946_99031911045693/Rendered/PDF/multi0page.pdf (accessed 14 November 2013).

World Bank Group. *World Bank Operation Directives (OD) 4.01 on Environmental Assessment.*

NEWS RELEASES

BC Social Innovation Council. “Action Plan Recommendations to Maximize Social Innovations in British Columbia" (March 2012) online: Government of British Columbia http://www.innovatebc.ca/documents/Social_InnovationBC_C.pdf (accessed 6 February 2014).

British Columbia Ministry of Finance. News Release, 2012 FIN0011-000240, "BC Introduces Act Allowing Social Enterprise Companies" (5 March 2012) online: Government of British Columbia http://www2.news.gov.bc.ca/news_releases_2009-2013/2012FIN0011-000240.htm (accessed 6 February 2014).

Environmental Defence. Media Release, “Statement by Rick Smith, Executive Director of Environmental Defence, in response to President Obama’s decision to reject TransCanada’s Proposed XL Keystone Tar Sands Pipeline” (18 January 2012) online: Environmental Defence < http://environmentaldefence.ca/articles/statement-rick-smith-executive-director-environmental-defence-in-response-president-obama%E2%80%99s> (accessed 12 December 2012).

Manitoba Clean Environment Commission. Media Release, “Hearings” (November 2012) online: Manitoba Clean Environment Commission http://www.cecmanitoba.ca/hearings/index.cfm?hearingid=39 (accessed 13 December 2012).

Service Nova Scotia and Municipal Relations. "New Opportunities for Social Entrepreneurs" (28 November 2012) online: Province of Nova Scotia http://novascotia.ca/news/release/?id=20121128010 (accessed 6 February 2014).

UN News Centre. *Cleaning up Nigerian Oil Pollution Could Take 30 Years and Cost Billions*, (04 August 2011) online : UN News Centre< http://www.un.org/apps/news/story.asp?NewsID=39232&Cr=pollution#.UWgyi7W-kUw> (accessed 7 April 2013).

United Nations Environmental Programme. News Release, "UNEP Ogoniland Oil Assessment Reveals Extent of Environmental Contamination and Threat to Human Life" (04 August 2011) online: http://www.unep.org/newscentre/default.aspx?ArticleID=8827&DocumentID=2649 (accessed 19 February 2014).

ELECTRONIC SOURCES

Allen & Overy. "The Shell Nigeria Cases: An Important Precedent for Transnational Liability Claims", (07 February 2013) online at: http://www.allenovery.com/publications/en-gb/Pages/The-Shell-Nigeria-cases----an-important-precedent-for-transnational-liability-claims.aspx (accessed 04 December 2013).

Badgeley, Christiane. “Oil Spill Near Kribi, Cameroon”, (01 May 2010) online: Pipeline Dreams http://www.pipelinedreams.org/2010/05/oil-spill/ (accessed 19 February 2014).

Central Intelligence Agency. *The World Factbook* online: CIA <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (accessed 3 March 2013).

Centre for Energy Economics. Jackson School of Geosciences, *Chad-Cameroon Oil Pipeline*, online: University of Texas at Austin <http://www.beg.utexas.edu/energyecon/new-era/case_studies/Chad_Cameroon_Pipeline.pdf> (accessed 14 November 2013).

Leigh Day. *11,000 Nigerians Sue Shell in London Courts*, online: Leigh Day http://www.leighday.co.uk/News/2012/March-2012/11,000-Nigerians-sue-Shell-in-London-Courts (accessed 5 March 2014).

Milieudefensie. “Friends of the Earth Netherlands: Nigerian and Milieudefensie Appeal in Shell Case”, (02 May 2013) online: Friends of the Earth http://www.foei.org/en/blog/2013/05/02/friends-of-the-earth-netherlands-nigerians-and-milieudefensie-appeal-in-shell-case (accessed 04 December 2013).

Nigerian National Petroleum Corporation. *History of the Nigerian Petroleum Industry*, online: NNPC http://www.nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx (accessed 3 March 2013).

Revenue Watch Institute. *Oil vs. the World*, online: Revenue Watch Institute http://www.revenuewatch.org/issues/dodd-frank/oilvsworld (accessed 7th November 2013).

Shell Nigeria. "Shell Interest in Nigeria" (April 2012), online: Shell Nigeria <http://s06.static-shell.com/content/dam/shell/static/nga/downloads/pdfs/briefing-notes/shell-interests-2012.pdf> (accessed 27 February 2012).

Transparency International. Corruption Perception Index (2013) online: http://cpi.transparency.org/cpi2013/results/ (accessed 28 March 2014).

UN Office for the Coordination of Humanitarian Affairs. "Nigeria: Gas Flares Still: A Burning Issue in the Niger Delta", Humanitarian News and Analysis, (08 March 2012) online: IRIN Africa http://www.irinnews.org/report/95034/NIGERIA-Gas-flares-still-a-burning-issue-in-the-Niger-Delta (accessed 23 March 2013).

US EIA. *International Energy Statistics*, online: US Energy Information Administration http://www.eia.gov/countries/data.cfm (accessed 05 March 2014).

US Energy Information Agency. "Nigeria - Analysis" (16 October 2012), online: US EIA <http://www.eia.gov/countries/analysisbriefs/Nigeria/nigeria.pdf> (accessed 19 March 2013).

THESIS

Oshionebo, Evaristus. 'Introduction' in Enhancing CSR in Nigeria's Oil and Gas Producing Communities: A Contextual Analysis (LLM Thesis, University of Alberta, 2002) [unpublished].