Articles

Corporations, CSR and Self Regulation: What Lessons from the Global Financial Crisis?

By Engobo Emeseh, Rhuks Ako, Patrick Okonmah, Obokoh Lawrence Ogechukwu [*]

Abstract

The current global financial crisis has necessitated a questioning of some of the fundamental theories and assumptions, particularly the free-market theory, on which regulation of business enterprises, including multinational corporations (MNCs), have been based. Specifically, in the area of corporate social responsibility (CSR), this paper explores two crucial issues. The first is the implication for our understanding of the obligations of corporations to CSR in light of the scale of impacts on ordinary citizens, and their role in bailing out failed banks which owed them no direct legal obligations. The second is the continued reliance on a voluntary framework for CSR. Just as the financial crisis resulted from the largely unregulated nature of global financial institutions, this paper demonstrates, through various country examples in the resources sector, that the unregulated nature of CSR obligations on MNCs has had dire effects, comparable to that of the financial crisis, on populations. If corporations have, through personal greed and irresponsibility, evidently failed to effectively regulate themselves even in their core areas of business necessary for their own survival, how much less do we expect of effective self-regulation in the area of CSR?

A. Introduction

The current crisis in the global financial markets has left consequences that transcend national boundaries. Rising defaults on sub-prime mortgages in the United States of America triggered a global financial crisis, resulting in the collapse of many of the world's leading investment banks.[1] Governments have been compelled to intervene to stem what

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[1] BBC News, 'Timeline: Global credit crunch' (20 October 2008), available at: http://news.bbc.co.uk/1/hi/business/7521250.stm.

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has been severally described as the 'worst financial crisis in decades.'[2] World leaders, particularly those from developed nations, have met several times in an attempt to harmonize methods to remedy the global financial predicament. The steps taken so far include interest rate cuts, capital injections, and lending guarantees to restore liquidity, revive the ailing banking system and rebuild investors' confidence in an effort to boost the financial markets.[3] While the governments of some countries have provided colossal amounts of money to bail out bad debts incurred by financial institutions, central banks in the US, Canada and some parts of Europe took the unprecedented step of co-ordinating cuts in interest rates in an effort to ease the crisis.[4] This paper posits that the impacts of the financial crisis on ordinary citizens reveal their vulnerability to issues they have no control over. More fundamentally, it questions the fundamental theories and assumptions, particularly the free-market theory, on which regulation of business enterprises, including multinational corporations (MNCs), have been based. Specifically, in the area of corporate social responsibility (CSR), it has crucial implications for our understanding of the obligations of corporations to CSR and the voluntary approach upon which it is based. This paper argues that just as the financial crisis resulted from the largely unregulated nature of global financial institutions, the unregulated nature of CSR obligations on MNCs has had dire effects on populations, especially those affected by the financial crisis, that ordinarily do not derive direct benefits from the MNCs.

In developing this argument, the paper will first give a brief background analysis of the implications of the current crisis on the theoretical basis for free-market economics upon which lax regulation of corporations has so far been based, noting the focus on domestic regulation. Thereafter, it demonstrates that this lax regulation transcends the financial

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[2] Anthony Faiola, *The End of American Capitalism?,* WASHINGTON POST (10 October 2008), available at: http://www.washingtonpost.com/wp-dyn/content/article/2008/10/09/AR2008100903425_pf.html; Finfacts Team, *IMF says Europe is facing worst financial crisis in decades; European states struggling to raise money in bond markets,* FINFACTS (22 October 2008), available at: http://www.finfacts.com/irishfinancenews/article_1015045.shtml; G Rayner, *UK facing worst financial crisis "in decades",* Daily Telegraph (19 March 2008), available at: http://www.telegraph.co.uk/finance/markets/2786520/UK-facing-worst-financial-crisis-'in-decades'.html.

[3] BBC News (note 1).

[4] The Bush administration in the US provided an initial US$700bn bail-out to buy up Wall Street's bad debts in return for a stake in the banks while the UK government announced it would make £400bn extra capital available to eight of the UK's largest banks and building societies in return for preference shares in them. These figures have since ballooned both in the US and the UK as banks write down more losses with some on the brink of collapse. The Obama administration has since proposed a further $825 billion 'stimulus' package which Congress passed with various amendments. The UK Government on its part provided not only further 'bail-out' funds for the banks, but took substantial stakes in notable high street banks such as Lloyds TSB, Royal Bank of Scotland and HBOS as well as 'reinsuring' all their 'toxic debts'. Similar steps have been taken by most of the other European and South East Asian countries, including China, which proposed a $585 Billion 'stimulus package'. The extent of this recession is yet to play itself out as more job losses are announced daily with more companies preparing for bankruptcies.

system by exploring the attempts at regulation of multinational corporations at international law, highlighting the invariably soft law approach. This is followed by evidence of the inefficacy of this approach, especially in light of weak national regulatory systems in developing countries and the difficulties associated with gaining access to foreign forums. This is highlighted with examples from one country each from sub-Saharan Africa, the Asian sub-continent and Latin America. The final section explores critically the core argument of the paper.

B. Theoretical Basis for Free-Market Economics and the Current Global Financial Crisis

Structuralism and neo-liberalism, which is an extension and redefinition of classical liberalism, previously the economic and political orthodoxy of most countries' business environments especially in Sub-Saharan Africa (SSA).[5] The structuralist thesis holds that governments have an important role to play in responding to market failures, which are a general feature of any economy with imperfect information and incomplete markets.[6] This is because market failures are pervasive and creating a fair and an enabling business environment is far more complex than providing the basic market institutions for business operation. The structuralists further posit that no effective competition or pro-poor outcomes can be achieved without government intervention in correcting possible causes of market failures.[7] Structuralism (neo-Keynesian consensus) started losing grounds to the current dominant neo-liberal orthodoxy in the 1970s as a result of the inflationary and other macroeconomic distortions in the industrial economies and the public's dissatisfaction with the neo-Keynesian policies at that time.[8] Besides, the elections of Margaret Thatcher in Britain (1979), Joe Clark in Canada (1980), Ronald Reagan in the United States (1980), and Helmut Kohl in Germany (1981), favoured the neo-liberal ideology. The failure of some centrally planned economies in the 1980s further gave the impetus for the dominance of neo-liberal ideology as the basis for the world's business environment. Subsequently, the two concepts of 'efficiency' and 'market forces' anchored on the new classical paradigm became the driving forces in the propagation of the free

[5] Sonny Nwankwo, *Assessing the Marketing Environment in Sub-Saharan Africa: Opportunities and Threats Analysis*, 18 MARKETING INTELLIGENCE AND PLANNING 3, 146 (2000); Sonny Nwankwo and Darlington Richards, *Institutional Paradigm and the Management of Transitions: A Sub-Sahara African Perspective*, 31 INTERNATIONAL JOURNAL OF SOCIAL ECONOMICS 1, 111-130 (2004).

[6] Joseph Stiglitz, *Sound Finance and Sustainable Development in Asia*, paper delivered at the Asia Development Forum held in Manila, 10-13 March 1998, 10.

[7] United Nations Industrial Development Organization (UNIDO), *Creating an Enabling Environment for Private Sector Development in Sub-Saharan Africa*, UNIDO and The Deutsche Gesellschaft für Technische Zusammenarbeit (2008).

[8] DAVID REED, STRUCTURAL ADJUSTMENT, THE ENVIRONMENT, AND SUSTAINABLE DEVELOPMENT (1995).

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market.[9] Similarly, while studies indicate that states differed in the extent to which "market forces" were relied on to coordinate corporate activities, with some market based economies being more strategically coordinated owing to historical and institutional factors (*e.g.* Germany)[10] it is now argued that in the age of globalization, and consequent liberalization, there is increasing convergence.[11]

The neo-liberals assume that factor markets work efficiently without government intervention if property rights and competition are guaranteed. They considered government interventions as less efficient than market-based solutions. The neo-liberal school stresses that government interventions hamper private sector development and that government should concentrate on improving the enabling business environment through deregulation.[12] Furthermore, the neo-liberal thought is based on the classical conditions of perfect market competition which seek to extricate government of its role in the control of economic activities that would allow market forces to function freely. It calls for the reduction of taxes, divestments in state-owned enterprises, greater primacy of the private sector in resource allocation, the deregulation of the labour markets and the reduction in the scope of social safety nets.[13] It was claimed that economies protected from international trade competition will have firms that operate at sub-optimal small scales in the domestic market and the only way to ensure efficiency is by the government pulling back its instrument of economic control.[14]

Based on the neo-liberal ideology, McKinnon and Shaw challenged the conventional structuralist orthodoxy of government intervention by highlighting the negative effects of "financial repression" on economic growth and development.[15] They refer financial

[9] Charles Soludo, *In Search of Alternative Analytical and Methodological Framework for an African Economic Development Model*, *in* AFRICAN VOICES ON STRUCTURAL ADJUSTMENT, A COMPANION TO OUR CONTINENT, OUR FUTURE (Thankida Mkandawire & Charles Soludo eds., 2003).

[10] See for instance, RICHARD WHITLEY, DIVERGENT CAPITALISMS: THE SOCIAL STRUCTURING AND CHANGE OF BUSINESS SYSTEMS (1999); PETER HALL AND DAVID SOSKICE, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (2001); BRUNO AMABLE, THE DIVERSITY OF MODERN CAPITALISM (2003).

[11] Chris Howell, *Varieties of Capitalism: And Then There Was One?,* 36 COMPARATIVE POLITICS 102-124 (2003); Peer Zumbansen, *Varieties of Capitalism and the Learning Firm: Corporate Governance and Labour in the Context of Contemporary Developments in European and German Company Law*, *in* PERSPECTIVES ON CORPORATE SOCIAL RESPONSIBILITY, 113, 117 (Nina Boeger, Rachel Murray & Charlotte Villiers, eds., 2008).

[12] UNIDO (note 7), 8, 10.

[13] REED (note 8); Nwankwo and Richards (note 5) 111-130; RICHARD LIPSEY and ALEC CHRYSTAL, ECONOMICS (2007).

[14] T Ademola Oyejide, *Trade Liberalization, Regional Integration, and African Development in the Context of Structural Adjustment*, *in* AFRICAN VOICES ON STRUCTURAL ADJUSTMENT, A COMPANION TO OUR CONTINENT, OUR FUTURE, 55 (Thankida Mkandawire & Charles Soludo eds., 2003).

[15] See, RONALD MCKINNON, MONEY AND CAPITAL IN ECONOMIC DEVELOPMENT (1973). See also, EDWARD SHAW, FINANCIAL DEEPENING IN ECONOMIC DEVELOPMENT (1973).

repression to be the set of government legal restrictions preventing financial intermediaries in the economy from functioning at their full capacity. The distortion of domestic financial markets through measures such as ceilings on interest rates and credit expansion, selective allocation of credit, and high reserve requirements have negative impact on economic growth. They suggested that positive real interest rates should be established on deposits and loans by eliminating interest rates and credit ceilings, removal of selective credit allocation and the lowering of reserve requirements for banks by allowing market forces to self-regulate the system. This has prompted many countries to implement liberalisation and deregulation of their financial markets on the recommendations of the World Bank and IMF.[16]

Therefore, the theory underlying self regulation and financial market governance, which also guide the activities of MNCs, is rooted in the neoliberal policy of deregulation, liberalisation and privatisation. This has resulted in the globalisation of the financial markets and the dismantling of the powers of the state to play an active role in financial market activities.[17] It is assumed that financial repression distorts market mechanism through rent-seeking behaviours because economic agents are able to manipulate the machinery of the government to impose restriction on market activities for their gains.[18] Proponents of free-markets not only support the new dawn of materialism and individualism, but tacitly encourage it as a way of inspiring economic development.[19] This theory thus gave corporations and MNCs free rein over their operations without effective regulations. In the current crisis, financial institutions and banks were able to indulge their excesses and greed by inventing derivatives and other financial instruments, which, as it turned out, they did not understand and were reckless as to their real purport. However, the underlying economic theory has influences beyond financial markets and encompasses the overall regulation of MNCs at international law. This is because deregulation, liberalisation and privatisation have helped create the modern global corporations in all spheres of business enterprise, with increasing consequences for the efficacy of the regulatory powers of the State. One pertinent area is the environmental, social and human

[16] See, Joseph Stiglitz, *Capital-Market Liberalization, Globalization, and the IMF*, 20 OXFORD REVIEW OF ECONOMIC POLICY (OREP) 1, 57-71 (2004); Pradeep Agrawal, *Interest Rates and Investment in East Asia: An Empirical Evaluation of Various Financial Liberalisation Hypotheses*, 40 JOURNAL OF DEVELOPMENT STUDIES 3, 142-173 (2004). See also, Xiaoke Zhang, *Financial Market Governance in Developing Countries: Getting Political Underpinnings Right,* 22 JOURNAL OF DEVELOPING SOCIETIES 2, 169 (2006).

[17] ZHANG (note 16), 172. See also, Eswar Prasad, Kenneth Rogoff, Shang-Jin Wei, and M Ayan Kose, *Effects of Financial Globalization on Developing Countries: Some Empirical Evidence*, MIMEOGRAPH, INTERNATIONAL MONETARY FUND (2003).

[18] O Felix Ayadi and Ladelle Hyman, *Financial Liberalisation and Price Rigidity in the Nigerian Banking System* 32 MANAGERIAL FINANCIAL 7, 557 (2006).

[19] See Kavaljit Singh, 'Corporate Accountability: Is Self Regulation the Answer? (2007), available at: http://www.countercurrents.org/singh240407.htm.

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rights impact of MNC activities. This is an area traditionally perceived by corporations to be outside the core of their business focus, and currently regulated by corporate social responsibility (CSR) principles within a framework of voluntarism. In essence, corporations have been relied on in the main to self-regulate in this critical aspect of business activities with devastating consequences for their immediate victims, comparable to the impacts of the financial crisis. This regulatory framework and the consequences are explored in the next two sections of this paper.

C. MNCs, CSR and Regulation at International Law

In exploring the current regulation of MNCs at international law, this section starts with a brief overview of the nature of MNCs and the consequent challenge of regulation. Thereafter, it explores various regulatory initiatives which have been developed at international law, highlighting the total reliance on voluntarism and the implications of this, especially in light of the current global crisis.

I. Nature of MNCs and the Evolution of CSR

The emergence of MNCs, described as 'powerful enough to set up their own rules and sidestep national regulations' is one of the most dramatic economic developments of the modern era.[20] With their huge financial power[21] and the diffused nature of their operations and decision-making process, they create a regulatory challenge for national governments. Generally, MNCs operate through independent local subsidiaries which in many countries are required to be registered and are regulated nationally.[22] According to Tugendhat, no matter how large their operations may be and however many of their

[20] PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 3 (2007).

[21] Anderson noted that MNCs rival nation-states as units of economic organisation since a comparison of corporate sales and country gross domestic product shows that of the 100 largest economies in the world, fifty-one are corporations and forty-nine are states. See Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?* 41 WASHBURN LAW JOURNAL, 400 (2002). See also, Charlotte Villiers, *Corporate Law, Corporate Power and Corporate Social Responsibility, in* PERSPECTIVES ON CORPORATE SOCIAL RESPONSIBILITY, 85 (Nina Boeger, Rachel Murray & Charlotte Villiers eds., 2008); MUCHLINSKI (note 20).

[22] See MUZAFFER EROGLU, MULTINATIONAL ENTERPRISES AND TORT LIABILITIES: AN INTERDISCIPLINARY AND COMPARATIVE EXAMINATION 70 (2008). For instance in Nigeria, under the first indigenous Companies Act of 1968, enacted after independence, foreign corporations are required to reincorporate as Nigerian companies before they are allowed to operate in Nigeria. This is still a requirement even under the new Companies and Allied Matters Act, Chapter C20 , Laws of the Federation of Nigeria, 2004, section 54 thereof. See generally Olufemi Amao, *Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States*, 52 JOURNAL OF AFRICAN LAW 1, 89 (2008). For a comprehensive treatment of Nigeria's foreign investment regime, see Khrushchev Ekwueme, *Nigeria's Principal Investment Laws in the Context of International Law and Practice*, 49 JOURNAL OF AFRICAN LAW 2, 177-206 (2005).

subsidiaries are scattered across the globe, all their operations are centrally coordinated. Despite frequent assertions to the contrary, the subsidiaries are not run as separate enterprises where each one has to stand on its own feet, but rather they work within a framework established by an overall group plan drawn up at headquarters and are judged not by their individual performance, but by the contribution they make to the group as a whole. [23] Although subsidiaries may be registered and regulated under the national laws of the different countries where they operate, major decisions are taken not by the subsidiaries themselves, but by the group. In other words, although subsidiaries are incorporated within several host states, they are subject to the overall direction of a 'parent' entity located within a home state,[24] which is outside the jurisdiction of the municipal laws under which they were registered and supposedly regulated.

In practice, this represents a serious challenge as MNCs can rely on their centralised decision making process to avoid liability under the municipal law where they are registered, and at other times, they rely on the fact of their municipal registration and regulation to avoid liability under other regimes such as when a suit is brought against them in their home countries.[25] This is a particularly effective tool in their operations in developing countries with weak national regulatory frameworks. This is particularly evident in the fact that such MNCs are actively courted for their foreign direct investments as part of efforts to grow national economies. Lower regulatory standards, it has been argued, is one of the measures adopted to attract such investments by MNCs.[26] Many of such investments in developing countries, especially those in the natural resources sector, have implications for the national revenue on one hand, and socio-economic and environmental impacts on the host communities, on the other. In the ensuing tensions between these conflicting consequences, and without adequate governance structures, endemic corruption, and the financial clout of MNCs to wear out potential litigants, the victims of the regulatory lacuna are the host communities in which MNCs operate. Thus, one of the major difficulties for regulating MNCs is determining how to bring these behemoths under an effective legal umbrella which creates minimum standards of obligations.

This contributed in no small measure to the development of the sustained interest in the concept of CSR which essentially seeks to expand the scope of corporate obligations beyond the traditional duty of care to their shareholders recognised by the law but also to

[23] CHRISTOPHER TUGENDHAT, THE MULTINATIONALS 31-32 (1971).

[24] STEPHEN TULLY, CORPORATIONS AND INTERNATIONAL LAWMAKING 2 (2007); EROGLU, (note 22), 72.

[25] In *Wiwa v. Shell,* 96 Civ 8386 (KMW) 2002 US Dist. LEXIS 3293 (SDNY 22 February 2002), the central plank of Shell's resistance was that Nigeria was the proper forum as SPDC was a wholly Nigerian company and the acts complained of had more significant connection with Nigeria than the United States.

[26] Alison Shinasato, *Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria*, 4 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 1, 186 (2005).

their workers and the community in which they operate.[27] In his book titled *Business in Contemporary Society: Framework and Issues,* Harold Johnson described a business with 'conventional wisdom' as "….one whose managerial staff balances a multiplicity of interests. Instead of striving only for larger profits for its stockholders, a responsible enterprise also takes into account employees, suppliers, dealers, local communities and the nation."[28] Proponents have argued that any company which fails to take the above interests into consideration fails to live up to its obligations as a good corporate citizen.

However, one of the challenges of using the concept of CSR in effectively promoting corporate accountability so far has been the absence of a binding regulatory framework, especially at the international level. In some developed countries, there are laws that effectively regulate various aspects of corporate behaviour. However, as corporations by definition are creations of a national legal system and governed by that country's company or corporation law, the laws of one country cannot simply be extended to the domain of another sovereign country.[29] Recourse to the courts of the home state of MNCs is also quite problematic. International law, despite its limitations, thus appears to be the obvious vehicle through which this can be achieved. This is more so as classical theories and rules of international law which recognise only states as subjects of international law, appear now to be rooted in the past.[30] Other non-state actors now have greater prominence within the international community as international law is now shaped not only by States, but by individuals and non-state actors such as MNCs, NGOs and other multilateral institutions/organisations.[31] Yet, while there appears to be some consensus about the concept, with companies themselves adopting voluntary codes espousing their commitment to the core principles of CSR, there has, however, been a strong resistance to a binding regulatory code for the activities of MNCs. Thus at international law, companies

[27] Michael Blowfield and Jedrzej Frynas, *Setting New Agendas: Critical Perspectives on Corporate Social Responsibility In The Developing World,* 81 INTERNATIONAL AFFAIRS 3, 500-501 (2005). See also, Peter Utting and Kate Ives, *The Politics of Corporate Social Responsibility and the Oil Industry*, 2 STAIR 1, 11 (2006).

[28] Archie Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct,* 38 BUSINESS AND SOCIETY 271 (1999).

[29] MUCHLINSKI, (note 20), 90-114.

[30] For instance the ICJ decision in the *South West African Cases (*Ethiopia & Liberia v. South Africa*),* ICJ Reports 1966, para. 49; *Barcelona Traction, Light and Power Co. Case (*Belgium v. Spain*),* ICJ Reports 1970, 3, 37.

[31] See Climate Change Convention, which had considerable input from NGOs and other non-state actors. Even corporations and other corporate entities have contractual relationships with international organisations, including the UN for distribution of humanitarian aid and other international assistance. Both Agenda 21, Report on UN Conference on Environment and Development, UN Doc. A/CONF.151/26, Vol.2, Ch.27.1 & 27.6 (1992) which enjoins inter-governmental institutions to be included "at all levels from policymaking and decision-making to implementation", and Art.3(7) of the Aarhus Convention, 38 *ILM* 517 (1999) enjoins greater governmental efforts to increase access to information, public participation in decision-making as well as provide access to justice in the context of international environmental decision making.

are essentially allowed to self-regulate within a framework of soft laws and voluntary codes in this quite sensitive part of their operations, which they do not deem to form a core element of their regulatory obligations. We explore some of the soft law approaches to regulation in the next section, highlighting inherent weaknesses within those frameworks.

II. Attempts at International Regulation of MNCs

Some of the first tentative attempts to regulate MNCs originated in the 1970s when international organizations such as the International Labour Organisation (ILO, in 1977), the United Nations Commission on Transnational Corporations (UNCTC, in 1978) and the Organisation for Economic Co-operation and Development (OECD, in 1976) almost simultaneously tried to design codes of conduct.[32] Codes that were negotiated at this time include the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the United Nations Draft Code of Conduct on Transnational Corporations, the OECD Guidelines for Multinational Enterprises, and the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. While Getz noted that the draft codes of the ILO (the Tripartite Declaration of Principles concerning Multinational Enterprises) and the OECD (the Guidelines for Multinational Enterprises) performed an exemplary function,[33] the UNCTC's draft code was never finalized and adopted.[34] Even those that were concluded fell short of a binding regulatory regime for MNCs; they have no independent monitoring and do not provide adequate accountability mechanisms.

The ILO's Tripartite Declaration which was successfully adopted in November 1977 and further revised in 2000,[35] is the first universally applicable agreement on the regulation of MNC behavior. The drafting of the Declaration was informed by the tripartite body of representatives to the ILO, including governments, employers, and workers, as well as by the work of the OECD.[36] The core principles contained therein include those that aim to

[32] Ans Kolk and Rob van Tulder, *Setting New Global Rules? TNCs and Codes of Conduct,* 14 TRANSNATIONAL CORPORATIONS 3, 4-5 (2005).

[33] Kathleen Getz, *International Codes of Conduct: An Analysis of Ethical Reasoning,* 11 JOURNAL OF BUSINESS ETHICS, 915-920 (1990).

[34] Kolk and van Tulder, (note 32).

[35] International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Geneva, International Labour Office, (2001), available at: http://www.ilo.org/public/english/employment/multi/download/english.pdf.

[36] Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 1-57 (2003).

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promote MNCs to make positive contributions to the economic and social progress, and to minimize and resolve the difficulties to which their operations may give rise. Specifically, it requires companies to give due respect to the sovereign rights of states, obey national laws and regulations, respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly, and act in harmony with the development priorities and social aims of host countries.[37] Under the procedures of the Tripartite Declaration, complaints concerning a MNC's noncompliance with the code should first be raised with the corporation itself and the host government. If the dispute is not resolved at this first level, the host government or a labour union may invoke review by the ILO's Tripartite Subcommittee on Multinational Enterprises if the case satisfies the jurisdictional threshold.[38] While these were certainly positive steps to regulate MNCs, crucially, the ILO's Tripartite Declaration, are like all other ILO standards, 'ultimately aspirational'.[39] They lack any implementation mechanism, monitoring process, legal mandate, or even the ability of the ILO to expel egregious violators. As Rudolph pointed out, the Declaration relies on public pressure to motivate offending members to alter their behavior.[40]

The OECD Guidelines for Multinational Enterprises, on the other hand, are recommendations made by the Governments of OECD Member countries to ensure that the MNCs operate in harmony with the policies of the countries in which they operate. The Guidelines are part of the Declaration on international Investment and Multinational Enterprises which constitutes political commitments to facilitate direct investment among OECD Members. The Guidelines encourage companies to mitigate the adverse impacts of their operations and adhere to the same operating standards in home and host countries. This is a significant aspect of the Guidelines, particularly as a common criticism leveled against MNCs operating in developing countries is that their mode of operations are sub-standard compared with their home countries and other developed countries. The Guidelines, though an initiative of the OECD, aim to operate globally 'since the operations of multinational enterprises extend throughout the world'.[41] Strengths of the OECD Guidelines include its comprehensiveness, multilateral nature, unlimited geographic

[37] ILO (note 35).

[38] C Croxson, *The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labour Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions,* 17 DICK JOURNAL OF INTERNATIONAL LAW 469, 481 (1999).

[39] Phillip Rudolph, *Tripartite Declaration of Principles Concerning Multinational Enterprises, in* CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY, 219 (Ramon Mullerat ed., 2005).

[40] *Id.*

[41] Part 1, Section 1, Article 2 of the OECD Guidelines for Multinational Enterprises (2000), available at: http://www.oecd.org/dataoecd/56/36/1922428.pdf.

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coverage, supply chain responsibility and dispute resolution mechanism.[42] However, several weaknesses have been identified which question the efficacy of the Guidelines.[43] First, the Guidelines are voluntary.[44] Secondly, while businesses have criticized the Guidelines as too general to guide their day-to-day behaviour, NGOs have criticized it because it recommends 'minimal social and behavioural practices.'[45] Although there are some mechanisms by which to ensure compliance with the provisions of the Guidelines, in practice, this remains difficult due to the lack of a strong institutional structure to monitor and implement existing commitments. The Guidelines require Governments that adhere to its provisions to establish National Contact Points (NCPs) that promote the Guidelines and act as a forum for discussion of all matters relating to the Guidelines.[46] There are several shortcomings of the role of NCPs which include that these NCPs are not well-known and in fact, some NCPs themselves are unaware that they fill this role.[47] Other hindrances to the performance of NCPs include their lack of investigative power,[48] unequal treatment of NGOs,[49] absence of a timeframe within which to determine cases,[50] and, the existence of

[42] Ran Goel, *Guide To Instruments Of Corporate Responsibility: An Overview of 16 Key Tools for Labour Fund Trustees* (2005), available at: http://www.pensionsatwork.ca/english/pdfs/conference_2005/goel_guide_to_instruments.pdf.

[43] *Summary Critique of Standards Relevant to Extractive Industries*, a report prepared by the Canadian Civil Society for the National Roundtables on Corporate Social Responsibility and the Extractive Sector in Developing Countries, available at: http://www.dd-rd.ca/site/_PDF/other/compendium-final-06-09.pdf.

[44] See, *supra,* note 41.

[45] World Business Council for Sustainable Development, Issue Management Tool, Accountability (2004), available at: http://www.wbcsd.org/web/publications/accountability-codes.pdf.

[46] OECD Guidelines (note 41), Part 1, Section 1, Article 10. See also Part 2 titled 'Implementation Procedures of the OECD Guidelines for Multinational Enterprises'.

[47] Friends of the Earth (England, Wales and Northern Ireland), *A History of Attempts to Regulate the Activities of Transnational Corporations: What Lessons Can Be Learned?,* Discussion Paper for Working Group II of the 'Toward a Progressive International Economy' Conference, Washington, DC November 1998. Ethical Corporation, 'By Invitation: The OECD Guidelines for Multinational Enterprises: A modest proposal', 07 August 2007, available at: http://www.ethicalcorp.com/content.asp?ContentID=5299.

[48] In *UK, DRC and Canadian NGOs v. Anvil Mining* (06/05), Anvil was alleged to have provided logistical help to Congolese military in massacre in Kilwa that left 100 killed. Avril denied the allegations. The Canadian NCP rejected the case claiming its role was to mediate and was unable to investigate into the activities of the company.

[49] In *Swedish NGOs v. Sandvik* (06/05), Sandvik was alleged to have supplied gold mining equipment to Ashanti Goldfields Company, which violated human rights and environment. The Swedish NCP conducted fact-finding mission but refused to meet with Ghanaian NGOs.

[50] The Guidelines does not provide a timelines for NCPs to evaluate cases. For instance, *RAID v. Anglo American* a case involving the unfair resettlement related to mining in Zambia filed 02/02 is still pending.

parallel legal proceedings.[51] John Ruggie, the UN Special Representative on business and human rights, noted with regards to NCP activities that the performance of NCPs is very uneven, especially when it comes to human rights. In his opinion, more uniform practices and greater public accountability would enhance the NCPs' currently modest contribution. This observation seems to be general among stakeholders including representatives from the OECD, the European Commission, and European Parliament, United Nations, NGOs, trade unions and individual businesses that gathered at the OECD Watch multi-stakeholder roundtable event held in Brussels on 15June 2007 to develop a Model NCP.[52] The aims of the Model NCP include making every effort to resolve questions of fact, equal treatment of all parties and the development of clear-cut procedures and timelines. Model NCPs expectedly will not assume that parallel legal proceedings take precedence and will not apply the 'lack of investment nexus' as a pretext to exclude a specific instance.[53]

Several attempts made under the auspices of the United Nations since the creation of the United Nations Commission on Transnational Corporations (UNCTC) by the United Nations General Assembly in 1974 has not proved any more successful in creating binding regulation of MNCs. This is in spite of the fact that one of the UNCTC's goals is the preparation of studies in support of efforts to negotiate a code of conduct on transnational corporations.[54] Negotiations which began on the Code (which included provisions on environmental conduct and outlined rights and responsibilities of TNCs) launched by the UNCTC in 1977 were never finalized or adopted before the UNCTC was dismantled and its activities taken over by the United Nations Commission on Trade and Development (UNCTAD).[55] The critical area of disagreement was over the Code's relationship to international law and the United Nations' role in administering it. The succeeding organization, UNCTAD, abandoned the UNCTC binding Code and promoted a voluntary initiative interestingly developed by corporations themselves.[56]

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[51] In *Belgian & UK NGOs v. Cogecom* (11/04), Cogecom was alleged to have financed rebel movements. The Belgian NCP rejected the case because there were on-going legal proceedings.

[52] See*, supra*, note 47.

[53] 'OECD Watch Regional Roundtable: Toward a Model European National Contact Point', Dialogue with Eastern European NCPs and stakeholders Bratislava, Slovakia, 24 May(2007)**,** available at: http://www.fes.sk/files/2007_National%20contact%20points.ppt.

[54] UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS (UNCTC), WORK BY THE UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS IN SERVICES AND TRANSBORDER DATA FLOWS iv (1990).

[55] Friends of the Earth (FOE) England, Wales and Northern Ireland, *A History of Attempts to Regulate the Activities of Transnational Corporations: What Lessons Can Be Learned?* (1998), available at: http://www.corporate-accountability.org/docs/FoE-US-paper-history_TNC-Regulation.doc.

[56] Jennifer Clapp, Transnational Corporations and Global Environmental Governance, available at: www.trentu.ca/tipec/3**clapp**4.pdf.

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The more recent UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights for business 2003 is also not binding, although they enjoy a higher status than voluntary codes as they embody moral and political commitments of governments and corporations and represent standards of law in development (or soft law). This instrument was drafted by an expert body of the the UN Sub-Commission on the Promotion and Protection of Human Rights. It is trite to note, however, that the UN Norms do not create new responsibilities for companies but reaffirm and rationalize the relevance of existing international obligations to companies' global operations. [57] The Norms which contain both positive and negative obligations are a comprehensive list of succinct statements on the human rights obligations of companies that aim to set minimum global standards of acceptable corporate behaviour.[58] No doubt, various benefits can derive from this set of Norms. As minimum standards, responsible companies are expected not to perform below the requirements of the Norms, thereby creating a level playing field for corporations irrespective of their home or host nations.[59] They also set standards that business can measure itself against, and a useful benchmark against which national legislation can be judged (to determine if governments are living up to their obligations to protect rights by ensuring that appropriate regulatory frameworks are in place).[60] The Norms set out three modes of monitoring companies' compliance. The first is essentially based on self regulation which relies on the companies' creation of a more human rights oriented culture. Secondly, the application of the Norms could be assessed through external monitoring and verification by bodies such as unions, NGOs and industry groups through use of the Norms as the basis for monitoring, dialogue, lobbying and campaigning activities with businesses.[61] Thirdly, the Norms may be enforced through state institutions. This includes publicizing the UN Norms, using them as a model for business activities, and the model for strengthening and enforcing laws and regulations implementing them.[62]

Clearly, the Norms are more authoritative than the many Codes of Conduct adopted by companies, and are a significant improvement over other existing standards. Unlike Codes of Conduct, the UN Norms result from a formal, UN-authorized and consultative process. The process leading to the UN Norms is similar to that resulting in other 'soft law'

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[57] AMNESTY INTERNATIONAL, THE UN HUMAN RIGHTS NORMS FOR BUSINESS: TOWARDS LEGAL ACCOUNTABILITY 8-11 (2004).

[58] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), available at: http://www1.umn.edu/humanrts/links/norms-Aug2003.html.

[59] *Id.*

[60] AMNESTY INTERNATIONAL (note 57), 5.

[61] AMNESTY INTERNATIONAL (note 57), 12.

[62] *Id.*

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standards, some of which are now seen as part of customary international law. Nevertheless, the recourse to non-binding legal instruments rather than the binding Code that was first envisaged by the UN, means that for the Norms to achieve its potential, companies have to buy into it, NGOs and other bodies have to be strong enough to effectively monitor corporate activities, and national regimes have to be prepared to implement standards under municipal law. Thus the problem of weaknesses in national institutions and poor governance in developing countries which has contributed to the environmental and human rights problems in developing countries has not been effectively addressed within this regime. The global financial crisis also puts in doubt the reliance on companies to effectively self-regulate. Effective access to international remedies may also be far-fetched since customary international law takes a long time to evolve, and access to foreign forums may not be easy. In the next section, we explore the impact of resource development in three different regions of the world even in the face of these soft law instruments.

D. National Regulation and CSR

The previous section examined some international attempts at regulating corporate behaviour, highlighting the recourse to voluntary and soft law initiatives. Thus, MNCs remain legally regulated by national laws of the countries they operate in. This section demonstrates the inefficacy of national legal frameworks in regulating MNCs by examining the impacts of their activities or (mis)behaviour on the local population without any legal consequences. This is done through the examination of three case studies; Nigeria, Papua New Guinea and India, all developing countries where the regulatory and enforcement frameworks are characteristically weak. As a possible alternative to domestic laws and institutions, recourse has increasingly been sought to foreign jurisdictions. However, from the decisions, the hurdles that have to be overcome in such foreign litigation suggest that the approach is not as effective as it was initially thought to be. Thus, the reality remains that there is inadequate regulation of MNCs under both 'local' and 'foreign' law.

I. Oil Multinational Corporations (OMNCs) in Nigeria

The Niger Delta region of Nigeria is rich in mineral wealth, with petroleum and natural gas being the country's major exports and income earner. The devastating environmental and human rights implications of oil development activities in the region are now well documented.[63] The indigenes of the Niger Delta have become impoverished as oil operations have adversely affected their aquatic and land resources which together form

[63] Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1999).

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the traditional basis of their economic subsistence. Constant oil spills and incessant gas flaring have also taken a toll on the environment and contributed to health problems and physical disorders.[64] Community agitation against these and other oil-related issues have led to government crackdown on oil producing communities. In the process of several (government and oil company sponsored) military operations, the human rights of the inhabitants of the oil-rich region and human rights and environmental activists have been abused.[65] The origins of the ongoing violent crisis in the region are traceable in large part to the environmental pollution and the government's lack of effective response.

A major cause of concern in the region is that the oil companies apply lower operational standards in Nigeria compared with their operations in developed countries. The oil companies, however, aver that their operations are legal as they adhere with local laws which prescribe the minimum legal standards that regulate their activities. While it is impossible in a paper of this nature to explore all the relevant laws,[66] at the crux of this is the conflict between lower standards in specific regulations on the oil industry, and the more broad provision in the Petroleum Act[67] which requires oil companies to adhere to international standards; particularly the standards applicable in America and the United Kingdom. The Petroleum Act, which is the primary law that regulates Nigeria's oil industry, provides that oil companies' operations must be conducted in accordance with 'good oil field practice'. The phrase 'good oil field practice' is not expressly defined. However, the Nigerian Minerals Oil (Safety) Regulations, made pursuant to the powers of the Petroleum Minister under section 9 of the Petroleum Act, sheds light on the interpretation of the phrase. Section 7 of provides that:

Where no specific provision is made by these Regulations in respect thereof, all drilling, production and other operations necessary for production and subsequent handling of the crude oil and natural gas shall conform with good oil field practice, which for the purpose of these regulations shall be considered to be adequately covered by the appropriate

[64] See generally, Environmental Rights Action/Friends of the Earth Nigeria, *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity* (2005).

[65] In other cases most have been executed as a result of their environmental and human rights activities. See Patrick Okonmah, *Judicial Murder of Human Rights and Environmental Activities in the Niger Delta and its Implications for the Enjoyment of Human Rights in Nigeria,* 7 TILBURG FOREIGN LAW REVIEW 4, 393-428 (1998).

[66] For an exhaustive discussion of relevant laws see, Adewole Adedeji and Rhuks Ako, *Legal Response to the Control and Management of Oil Pollution in Nigeria, in* CURRENT PERSPECTIVES IN LAW, JUSTICE AND DEVELOPMENT, 915-949 (Adedotun Onibokun and Ademola Popoola eds., (2007); Engobo Emeseh, *The Impact of the Oil Industry on Water in Nigeria: How Adequate is the Law and its Enforcement?,* 1 BENIN JOURNAL OF PUBLIC LAW 88-112 (2003); and, Rhuks Ako, Adewole Adedeji, and Sunday Coker, *Resolving Legislative Lapses through Contemporary Environmental protection Paradigms: A Case Study of Nigeria's Niger Delta Region,* 47 THE INDIAN JOURNAL OF INTERNATIONAL LAW, 432-450 (2007).

[67] Chapter P10 of the Laws of the Federation of Nigeria 2004.

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current Institute of Petroleum Safety Codes, the American Petroleum Institute's Codes or the American Society of Mechanical Engineers Codes.[68]

The above provision expressly refers to the current oil-industry standards in the UK and USA as the standard to be adhered to by companies that operate in Nigeria. However, some regulations including the (now repealed) Federal Environmental Protection Agency (FEPA) Act[69] and the Department of Petroleum Resources' (DPR) Environment Guidelines and Standards for the Petroleum Industry in Nigeria (2001) expressly prescribed standards that are lower than that envisaged by the Nigerian Minerals Oil (Safety) Regulations. It is such laws that the oil companies argue they have adhered to while ignoring the provisions of the Nigerian Minerals Oil (Safety) Regulations that are more stringent. Nevertheless, the mere fact that such a glaring inconsistency has existed in the laws for so many years highlights the glaring inability of governments in developing countries to effectively regulate powerful OMNCs operating in a very technically biased industry upon which the nation is economically reliant. Other laws such as the Land Use Act[70] and the Associated Gas Flaring Act[71] have reduced the legal obligations of OMNCs to be responsible to the host communities. While the Land Use Act reduces the social obligations of OMNCs to the traditional occupiers of land in the oil-rich region,[72] the Gas Flaring Act permits the continued flaring of gas[73] despite a subsisting court ruling that declared gas flaring illegal.[74]

There is also the further problem of lack of enforcement of even the existing laws. Despite the glaring presence of oil pollution, there is yet to be any enforcement action by any of the regulatory agencies. A typical example in this regard is the commencement of several oil-related projects without appropriate environmental impact assessment (EIA) surveys despite the enactment of the Environmental Impact Assessment (EIA) Act in 1992. While the government has turned a blind eye at such occurrences, a private action by an

[68] Section 7 of the Nigerian Minerals Oil (Safety) Regulations.

[69] The FEPA Act was novel because it created explicit national environmental standards that regulated the oil industry for the first time, but these standards did not apply directly to the oil industry. The FEPA Act has now been replaced by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007. A new Agency, the National Oil Spill Detection and Response Agency (Establishment) Act, 2006 has now been created specifically for the oil industry. Whether or not this arrangement will improve matters is yet to be seen as the Agency is not only new, but its impact is yet to be felt by victims of oil industry pollution in the Nigerian Delta.

[70] Chapter L5, Laws of the Federation of Nigeria 2004.

[71] Chapter A25, Laws of the Federation of Nigeria 2004.

[72] For a discussion on the peculiar impacts of the Land Use Act on the Niger Delta region, refer to R Ako, *Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice,* 53 JOURNAL OF AFRICAN LAW 2, 289–304 (2009).

[73] See, *supra*, note 61.

[74] *Gbemre v. Shell,* Suit No. FHC/B/C/153/05 delivered on 14 November, 2005.

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environmental activist against one such project was thrown out of court as the court decided he lacked *locus standi*.[75] The factors that contribute to the inefficiency in enforcing relevant laws include the lack of the government's political will to enforce them, ineffective governance systems, and the lack of well trained and equipped regulatory agencies as well as the requisite technical expertise.[76] In the absence of local remedies, recourse has been made to foreign litigation. The two high profile cases of *Wiwa v. Shell* and *Bowoto v. Chevron*[77] which originated from occurrences in the Niger Delta region sought to use the Alien Torts Claim Act (ATCA) to hold the responsible MNCs liable for their actions. Although the *Wiwa* case is still raging, there is concern that it may go the way of the recently concluded *Bowoto* case where the court was not persuaded that a case falling within the interpretation of the ACTA rules has been made out.

II. The PNG Case Study

The PNG case study highlights the relationship between the Kamoro and Amungme indigenous groups of Papua, the Indonesian government and Louisiana-based Freeport-McMoRan Copper & Gold Inc. Freeport operates one of the world's largest copper and gold mining enterprises located in traditional Kamoro and Amungme territories that span tropical rainforest, coastal lowlands, glacial mountains, and river valleys.[78] The Contract of Work (COW),[79] the legal document that regulated Freeport's operations, granted the company extensive powers over the local population and their resources. For instance, Article 2(d) granted the company the right to take land and other property and to resettle indigenous inhabitants while providing 'reasonable compensation' only for dwellings and other permanent improvements. Article 2(e) gave Freeport the right 'to take and use,' on a tax-free basis, water, timber, soil, and other natural materials in the project area and from other parts of the territory. The 1991 COW grants the Indonesian government the right to be flexible in enforcing environmental protection laws and regulations against Freeport. This provision is in consideration for the 'added burdens and expenses to be borne by the Company and the additional service to be performed by the Company as a result of the

[75] *Oronto Douglas v. Shell Petroleum Development Company Ltd. and Ors,* Federal High Court of Lagos Suit no. FHC/L/CS/573/96, which ruling was delivered on the 17th of February 1997.

[76] Engobo Emeseh, *The Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria* 24 JOURNAL OF ENERGY AND NATURAL RESOURCES LAW 4, 574-606 (2006) .

[77] *Wiwa v. Shell, supra,* note 25. *Bowoto v. Chevron* F. Supp. 2d 1229 (N.D. Cal. 2004).

[78] Abigail Walton, *Mining a Sacred Land,* 2 HUMAN RIGHTS DIALOGUE 11, 24-25 (2004).

[79] Contract of Work Dated 7 April 1967 Between Indonesia and Freeport Indonesia, Incorporated: Decision of the Cabinet Presidium, No. 82/E/KEP/4/1967 (Jakarta: Direktorat Pembinaan Pengusahaan Pertambangan, 1967).

location of its activities in a difficult environment'.[80] By the same token, the Indonesian government 'recognizes that appropriate arrangements may be required to minimize the adverse economic and operational costs resulting from the administration of the laws and regulations of the Government from time to time in effect, and in construing the Company's obligations to comply with such laws and regulations'.[81] In effect, Freeport may be exempted from the normal operation of regulations that would otherwise regulate their operations that have adverse effects on the environment.

The lopsided legal framework and other interrelated dynamics contribute to consequences which include environmental and human rights dimensions similar to those experienced in the Niger Delta of Nigeria. Abrash identifies these dynamics to include: (1) the flawed integration of Papua into the Republic of Indonesia and subsequent Papuan resistance to Indonesian sovereignty; (2) the top-down, paternalistic, and non-participatory economic and social development policies and practices of the Indonesian government; (3) the counter-insurgency operations of the Indonesian military which have been carried out in order to defend Freeport's mining operations and other investment projects externally imposed upon local indigenous communities; (4) the corrupt governance practices of the Suharto regime and overall lack of the rule of law in Indonesia; (5) and Freeport management's willingness to operate within such a framework as well as to introduce or allow particular terms in the company's COW.[82] The communities have experienced incidences of persistent and sporadic assaults on individuals, rape, extrajudicial killings, violation of subsistence rights, restrictions on freedom of movement, interference with access to legal representation, forced resettlement of communities and killings perpetuated by the Indonesian military supported by Freeport.[83] As in the case with injured inhabitants of Nigeria's Delta region, the Amungme community has instituted proceedings in foreign courts. This is more so as Indonesia's national laws do not comply with international standards and the government's regard of opposition to 'economic development' as a crime of subversion, makes getting justice an arduous task.

Two civil lawsuits were brought against Freeport in the United States in 1996 - one in US federal court, the other in the state court of Louisiana where the company is headquartered. While *Beanal v Freeport-McMoRan Copper & Gold Inc.*; a $6 billion lawsuit, was filed in US Federal District Court on 29 April 1996, *Alomang v Freeport-McMoRan*

[80] Article 18 (8) of the Contract of Work between the Government of the Republik of Indonesia and PT. Freeport Indonesia Company (1991).

[81] *Id.*

[82] Abigail Abrash, 'Development Aggression: Observations on Human Rights Conditions in the PT Freeport Indonesia Contract of Work Areas with Recommendations' (2002), available at: http://westpapuaaction.buz.org/Development-Aggression.htm#_ftnref7.

[83] Abigail Abrash, *Mining a Sacred Land*, 2 HUMAN RIGHTS DIALOGUE 11, 24 (2004).

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Copper & Gold Inc. was filed in the Louisiana state court system on 19 June 1996.[84] Beenal was not successful at the federal court but the Louisiana State Supreme Court upheld the right of Ms. Alomang to sue Freeport in Louisiana state court. The suit was however dismissed on 21 March 2000 because the plaintiff did not prove that PT Freeport Indonesia is the 'legal alter ego' of Freeport-McMoRan Copper & Gold Inc. The difficulties involved in proving liability under the ATCA are discussed in the next section to reveal how and why cases such as those that have originated from the Niger Delta and Papua have not been successful.

III. The Bhopal Gas Leak in India

The Bhopal gas leak in India occurred on 3 December, 1984, when large quantities of Methyl Isocyanate (MIC) escaped from one of the plants of Union Carbide India Limited, a subsidiary of the American TNC, Union Carbide Corporation.[85] Apart from the initial design defect of the plant and the cost-cutting measures which further rendered the plant unsafe, this chemical plant was situated in the densely populated city of Bhopal with a population of one million people, half of whom were exposed to the gas leak on that fateful day. The number of deaths resulting from the leak ranged between 2,500 and 10,000 people with about 40,000 permanently disabled, maimed or likely to suffer grave illnesses in the future while about 200,000 sustained minor injuries. The long term effect of this incident on those who survived the carnage as well as damage to the natural environment is incalculable. In spite of such devastating consequences, effective enforcement has been elusive with victims still campaigning for justice over twenty years after. As an indictment of the weak regulatory framework, the first recourse for civil remedy was to a foreign forum- the US. However, as with the examples above, this was unsuccessful. Recourse to the Indian legal system was fraught with difficulties and the Supreme Court eventually entered into a settlement on terms that were so poor that the share price of the parent company soared on the day this judgment was given. The criminal aspect of the enforcement fared even worse. As a result of the seriousness of the matter, the Central Bureau of Investigation (CBI) took over the investigation but failed to file any charges until three years later, when charges of culpable homicide were preferred against certain individual officials of the company under the Indian Penal Code.[86] These criminal charges were not pursued after the Supreme Court in the civil action filed by the Indian Government on behalf of the victims of the incident absolved the defendants of any

[84] 969 F.Supp. 362 (E.D.La. 1997); No. 96-1474 (E.D. La. filed Apr. 29, 1996).

[85] For an in-depth analysis of the Bhopal Gas Leak, see generally Engobo Emeseh, *Challenges to Enforcement of Criminal Liability for Environmental Damage in Developing Countries with Particular Reference to the Bhopal Gas Leak Disaster*, 1 OIL, GAS AND ENERGY LAW INTELLIGENCE 5, 1-28 (2003).

[86] The Indian Penal Code, Act No.45, 1860.

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further liability both civil and criminal and all pending actions were ordered to stop. However, in a subsequent review after several criticisms, the Supreme Court allowed the criminal proceedings to resume. Arrest warrants were issued for Warren Anderson, the then Chairman of the parent company, at a time when he had returned to the United States, and all attempts to extradite him for trial in India came to nothing.[87] Arraignment and trial of other officers resident in India have also not yielded any conclusive outcome.

Three major challenges to enforcement of criminal liability in India have been identified.[88] These include the legal, institutional framework for enforcement as well as extra-legal factors. Part of the extra-legal factors includes the lack of political will to enforce criminal liability for breach of environmental laws against MNCs. This was exemplified in the failure of the Indian Government to seek the extradition of Mr. Anderson immediately after he had left the jurisdiction, (although their subsequent attempt was denied by the State Department) as well as the compromise agreement which was reflected in the Supreme Court's order absolving the defendants of any liability whatsoever, whether civil or criminal, in a disaster of that magnitude. Also incriminated were economic and social factors which enjoin a softly-softly approach, especially in a developing country like India which relies on MNCs in the exploitation of the country's natural resources. On the other hand, the institutional lapses include the lack of adequate training and material for monitoring environmental practices as well as enforcement of existing laws. And finally, legal factors include the inelegantly drafted laws leading to vague and/or ambiguous provisions or outright lacunae in laws, lack of specific environmental standards as well as very high standards for culpability leading to problems of proof and inadequate penalties.[89] The horrors of the Bhopal gas leak are still raging although the Indian Government recently set up a Commission to assist victims, while the New York Court has reinstated a civil action against Union Carbide in the US under the ATCA.[90]

IV. Recourse to Foreign Jurisdictions- The ATCA

As noted previously, victims of abuse caused by MNC operations in developing countries have sought recourse to foreign forums with stronger justice systems in the face of weak national regulatory frameworks. The US Alien Tort Claims Act has been the main forum

[87] See, Tetsuya Morimoto, *Growing Industrialisation and our Damaged Planet: The Extraterritorial Application of Developed Countries' Domestic Environmental Laws to Transnational Corporations Abroad*, 1 UTRECHT LAW REVIEW 2, 139 (2005).

[88] Emeseh, (note 76), 1-28.

[89] Emeseh, (note 76), 21-23.

[90] See, Indian Environmental Portal, 'Knowledge for Change', available at: http://www.indianenvironmentalportal.org.in/taxonomy/item/2544.

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through which such victims have attempted to attain justice. The ATCA simply is a law that allows non-citizens to sue in U.S. Federal Courts for violations of the law of nations - which is generally equated with customary international law - or a US treaty.[91] It provides that 'the district courts shall have original jurisdiction of 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.'[92] While CSR issues are not, strictly speaking, legally binding as the UN Norms reveal, inherent human rights concerns are recognized in international agreements as binding international obligations and thus enforceable. It is within this context that CSR obligations are indirectly enforceable through international judicial forums such as the ATCA. However, the utilization of the ATCA is fraught with several preconditions that limit its suitability as an avenue to remedy harms caused by MNC operations in foreign jurisdictions. These limitations are highlighted below.

The first precondition to be satisfied before the ATCA can be utilized is that the issue at stake must fall within the jurisdiction of the district courts.[93] Secondly, the plaintiff must be an alien[94] while the defendant must be subject to service in the US court system but not necessarily a resident of the United States.[95] Thirdly, the cause of action brought before the court must be a 'tort only'.[96] While the definition of a tort is clear, the emphasis 'tort

[91] Hari M Osofsky, Environmental Rights Enforcement in U.S. Courts, 2 HUMAN RIGHTS DIALOGUE 11, 30 (2004).

[92] 28 U.S.C. § 1350 (1999).

[93] For instance, in *International Labour Rights Education & Research Fund v. Bush* 954 F.2d 745, 747-748 (D.C. Cir. 1992) the plaintiffs sought an injunction against the [then] President Bush to enforce the labour provisions of the Generalized System of Preferences (GSP). The court denied jurisdiction, holding that the Court of International Trade was the proper forum to address the issues raised.

[94] *Kadic v. Karadzic* 70 F. 3d 232, 236-237 (2d Cir. 1995).

[95] *Filartiga v Pena-Irala* 630 F.2d 876 (2d Cir. 1980). See also, *Wiwa v. Royal Dutch Petroleum Co*. 226 F.3d 88 (2d Cir. 2000). Where the defendant is foreign, the courts exercise their discretion to assume jurisdiction on a case-by-case basis subject to some general guidelines, including whether the defendant does business in the forum state, has otherwise consented to jurisdiction, or has visited the state. See generally, Richard Herz, *Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment*, 40 VIRGINIA JOURNAL OF INTERNATIONAL LAW 566 (2000). See also, Lisa Lambert, *At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc. Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in US Courts*, 10 JOURNAL TRANSNATIONAL LAW AND POLICY 118 (2000). Where both parties are aliens but the 'law of nations' has allegedly been violated, the courts will uphold ATCA jurisdiction. For instance, in *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980), though both parties were aliens, the alleged acts of torture that led to the death of the plaintiff's child was held to be deliberate torture perpetrated under colour of official authority which violated universally accepted norms of the international law of human rights, regardless of the nationality of the parties.

[96] Roque Romero, *Using the US Alien Tort Claims Act for Environmental Torts: The Problem of Definability of the Right to a Healthy Environment*, 16 CEPMLP INTERNET JOURNAL 7 (2005), available at: http://www.dundee.ac.uk/cepmlp/journal/html/Vol16/Vol16_7.pdf. See also, A Bernstein, *Conjoining International Human Rights Law with Enterprise Liability for Accidents*, 40 WASHBURN LAW JOURNAL 397 (2001), available at: http://washburnlaw.edu/wlj/40-3/articles/bern.pdf.

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only' in the ATCA generates some confusion; there is a consensus among scholars that the ATCA imposes no limitations on contemporary judicial interpretation.[97] The courts have held that human rights abuses committed abroad qualify within this context. Specifically, in *Wiwa v Royal Dutch Petroleum Co.*[98] the US Court of Appeal for the Second Circuit stated that 'whatever the intent of the original legislators...the text of the (ATCA) seems to reach claims for international human rights abuses occurring abroad.' The fourth condition to be satisfied is that the 'tort only' must be committed in 'violation of the Law of Nations or a treaty of the United States'. The law of nations refers to 'the system of law regulating the interrelationship of sovereign states and their rights and duties with regard to one another. In addition, certain international organizations (such as the United Nations), companies, and sometimes individuals (*e.g.* in the sphere of human rights) may have rights or duties under international law.'[99] Case law suggests that the ATCA provides a cause of action to allegations or actions allegedly against international norms that are 'specific, universal, and obligatory'.[100] While specific norms are defined as those that are readily discernable from treaties or the law of nations, universal norms have been variously interpreted and obligatory norms require that duties must be readily ascertainable from treaties and law of nations.[101] The fulfilment of these latter requirements create difficulties for ATCA plaintiffs against resource-exploiting companies as CSR violations alleged often have elements of environmental and cultural rights that are not yet recognised by the courts as universal and obligatory practice.[102]

The application of the ATCA in cases is also limited in instances involving alleged human rights wrongs following a US Supreme Court's decision in *Sosa v Alvarez-Machain*[103] which diminishes the ability to hold corporations liable for their actions or omissions that

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[97] Anita Bernstein (note 96), 397. For example, in *Adra v. Clift,* 195 F. Supp. 857 (D. Md 1961) the court decided that wrongful withholding of custody of a child constituted an actionable tort; while in *Nguyen Da Yen v. Kissinger,* 528 F.2d 1194 (9th Cir. 1975*)* the court noted that injuries that accrued to alleged illegal evacuation of children from Vietnam by the US Immigration and Naturalization Service could be addressed pursuant to the ATCA.

[98] 226 F. 3d 88, 104 n. 10 (2d Cir 2000).

[99] OXFORD DICTIONARY OF LAW, 3RD EDITION, 207-208 (E Martin ed., 2002).

[100] *Alvarez-Machain v. United States*, 331 F.3d 604, 613 (9th Cir. 2003); *John Doe v. Unocal Corp*, 2002 U.S. App. LEXIS 19263 (9th Cir. 2002), citing *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002).

[101] Lucien Dhooge, *The Alien Torts Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 48, 70-71 (2003). See, *Estate of Rodriquez v. Drummond Co*., 256 F. Supp. 2d 1250, 1262-1264 (N.D. Ala. 2003); *Sarei v. Rio Tinto plc* 221 F. Supp 2dat 1160, 1162; and *Abdullahi v. Pfizer, Inc*., No. 01 Civ 8118, 2002 US Dist. LEXIS 17436 (SDNY Sept 16, 2002).

[102] See generally, *Beenal v. Freeport McMoran Inc.*, 197 F.3d 161, 164 (5th Cir. 1999).

[103] 504 US 655 (1992).

contribute to human rights violations.[104] However, it appears that the courts will allow cases where the alleged human rights abuses are considered to be 'grave' and thus fall into a category of human right abuses it considers to be 'specific, universal, and obligatory'.[105] The courts also consider the applicability of the doctrines of international comity and *forum non conveniens* before considering whether the ATCA is the proper forum to determine the case. The doctrine of international comity is defined as 'the practice of deference to the acts, laws and jurisdictions of foreign countries. Essentially, it is respect for another's sovereignty.'[106] Under the doctrine of *forum non conveniens*, the courts examine whether there is a more adequate forum to determine the extant case. If the US Courts decide that there exists a better forum, they have to decline jurisdiction under this doctrine.[107]

Two other considerations that act to limit the efficacy of the ATCA to foreign litigators are the time and cost of proceedings. *Wiwa* and *Bowoto* are two cases that highlight the long winded process that litigation under the ATCA may go through. The substantive issues in *Bowoto's case* which began in 1999 were finally determined in December 2008 while *Wiwa*, first instituted in 1996, is still on-going.[108] Corollaries of long-winded litigation are the associated costs which are way beyond the affordability of the plaintiffs and are often

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[104] Centre for Constitutional Rights, *Sosa v. Alvarez-Machain* (amicus), available at: http://ccrjustice.org/ourcases/past-cases/sosa-v.-alvarez-machain-(amicus).

[105] For instance in the *Wiwa* case, the plaintiffs alleged through their survivors that they had been imprisoned, tortured and executed by the Nigerian government for their opposition to the defendants' oil exploration activities. They claimed that these human rights violations were instigated, orchestrated, planned, and facilitated by Shell Nigeria under the direction of the defendants. Shell, the defendant in the case, successfully challenged the validity of the plaintiffs' summary execution, forced exile and right to life, liberty and personal assembly claims. The court allowed the claims for aiding and abetting liability in general, as well as the claims for crimes against humanity, torture and prolonged arbitrary detention. Both the plaintiffs and defendants petitioned the Second Circuit for appeal. See generally, Roque Romero, *Using the US Alien Tort Claims Act for Environmental Torts: The Problem of Definability of the Right to a Healthy Environment*, (2005), available at: http://www.dundee.ac.uk/cepmlp/journal/html/Vol16/Vol16_7.pdf.

[106] Lambert (note 95), 128.

[107] B Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARVARD HUMAN RIGHTS JOURNAL 175 (2004). See also, Centre for Constitutional Rights, *Bowoto v. Chevron*, available at: http://ccrjustice.org/ourcases/current-cases/bowoto-v.-chevron.

[108] *U.S. court clears Chevron of charges in Nigeria clash*, THE GUARDIAN NEWSPAPERS (03 December 2008). See also, Constance Ikokwu, *Shell to Face Trial in US over Saro-Wiwa*, THISDAY NEWSPAPERS (10 September, 2008). For a timeline on these cases, generally, Centre for Constitutional Rights, *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson* and *Wiwa v. Shell Petroleum Development Company*, available at: http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum%2C-wiwa-v.-anderson-and-wiwa-v.-shell-petroleum-d. Also, Centre for Constitutional Rights, B*owoto v. Chevron,* available at: http://ccrjustice.org/ourcases/current-cases/bowoto-v.-chevron.

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borne by NGOs[109] that have limited funds to commit to such endeavours. These costs, in addition to regular litigation costs, include expenses and other logistics arrangements that are peculiar to foreign litigation. These include the transportation and accommodation of plaintiffs, their interpreters, key witnesses and experts as well as local-based lawyers involved in the case as well as evidence to the US. These costs are ordinarily beyond the purse of the plaintiffs, are usually borne by NGOs and interest groups that prosecute the cases on their behalf. These NGOs have limited funding thus have to prioritize their activities. Consequently, in Nigeria for example, there are only these two cases heard under the ATCA even though there are several similar instances in existence. In a nutshell, though the ATCA may prove to offer some respite in the absence of a global legal framework to regulate the conduct of OMNCs, the interpretation of its provisions by the courts limits its efficacy as a medium for redressing injuries inflicted by MNCs in developing countries. The length of time these cases take to come to trial and the costs are such as would deter prospective litigants. It is obvious therefore, that the ATCA is no panacea for a more defined and internationally accepted regime for regulating the activities of MNCs.

E. The Financial Crisis, Self Regulation and CSR- An Analysis

Criticisms of the neo-liberal orthodoxy had been rife even before the current global financial crisis particularly following the financial crises in Asia, Russia, Latin America, and sub-Saharan Africa.[110] Such criticisms have however increased significantly in the face of the current global financial crisis, with proponents of 'free market' policies having a rethink the viability of such a model. Much of this has focused on the implications of lack of regulation of the process. Leaders of the developed economies such as President Barrack Obama of the US and Prime Minister Gordon Brown of the UK have been at the forefront of calls for more regulation. Outside government, respected economists such as Stigltz have also blamed the absence of a regulatory framework to oversee the market as a

[109] For instance, the plaintiffs in the *Wiwa* case are represented by New York-based Centre for Constitutional Rights (CCR), Washington, D.C.-based EarthRights International, Seattle University law professor Julie Shapiro, and Paul Hoffman.

[110] See generally, Dani Rodrik, *Who Needs Capital Account Convertibility?, in* SHOULD THE IMF PURSUE CAPITAL-ACCOUNT CONVERTIBILITY? PRINCETON ESSAYS IN INTERNATIONAL FINANCE NO. 207, 55-65 (Stanley Fischer *et al* eds., (1998); Joseph Stiglitz, *Capital Market Liberalisation and Exchange Rates Regimes: Risk without Reward*, 579 THE ANNALS OF THE AMERICAN ACADEMY 219- 248 (2002); Ajit Singh, 'Capital Account Liberalization, free Long-Term Capital Flows, Financial Crises and Economic Development' *ESRC Centre for Business Research –Working Paper,* 245, ESRC Centre for Business Research (2002). See also, Andrew Charlton and Joseph Stiglitz, 'Capital Market Liberalisation and Poverty' (2004) *Initiative for Policy Dialogue Working Paper* 118; Pierre-Richard Agénor, *Does Globalisation Hurt the Poor,* 1 INTERNATIONAL ECONOMICS AND ECONOMIC POLICY 1-31 (2004) and Xiaoke Zhang, *Financial Market Governance in Developing Countries: Getting Political Underpinnings Right*, 22 JOURNAL OF DEVELOPING SOCIETIES 2, 175 (2006).

fundamental contributory cause of the crisis.[111] Interestingly, calls for measures to be adopted to fix this regulatory failure have not been to focus merely on domestic regulation but on a global regulatory framework.[112] This is no doubt in recognizing the complex operations of modern global financial institutions whose operations and the consequent impacts transcend national borders.[113] Nicolas Sarkozy, the French president, led European leaders in the call for broad new international codes to impose scrutiny on global finance, the International Monetary Fund (IMF) charged with the responsibility of promoting free markets overseas suggested that 'the crisis comes from an important regulatory and supervisory failure in advanced countries . . . and a failure in market discipline mechanisms'.[114] At the recently completed G20 Summit in London, it was agreed that there is a need to establish 'the much greater consistency and systematic cooperation between countries, and the framework of internationally agreed high standards, that a global financial system requires.'[115]

The cause of the crisis and the steps taken to rectify the problem makes a rethinking of the current assumptions about CSR pertinent. First is whether regulatory and supervisory failures as well as failure in market discipline mechanisms occur only in the financial sector? The simple answer to this is in the negative. While the current global financial crisis is a grim reflection of the consequences of non-regulation of financial institutions, the crisis brings to the fore the broader problem of lack of effective regulation of MNCs whose activities have considerable impacts on people in different countries around the world.[116] That this is a problem of ineffective regulation is borne out by the fact that the most egregious of these impacts are particularly evident in developing countries which have

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[111] Joseph Stiglitz, *Capital-Market Liberalisation, Globalisation, and the IMF*, 20 OXFORD REVIEW OF ECONOMIC POLICY 1, 57-71 (2004).

[112] Joseph Stiglitz, 'Towards A New Global Economic Compact: Principles for Addressing the Current Global Crisis and Beyond', speech delivered to the United Nations General Assembly convened Causes and Solutions to the Global Financial Crisis meeting, 30 October, 2008, available at: http://www.un.org/ga/president/63/interactive/gfc/joseph_p.pdf. Dominique Strauss-Kahn, *A global solution is needed for financial crisis*, THE TELEGRAPH (08 October 2008), available at: http://www.telegraph.co.uk/comment/personal-view/3562686/A-global-solution-is-needed-for-financial-crisis.html.

[113] Stiglitz (note 112).

[114] Faiola (note 2). Also, Stiglitz (note 112) and 'Global plan for recovery and reform (02/04/2009)', G20 Summit (The London Summit 2009), available at: http://www.londonsummit.gov.uk/resources/en/news/15766232/communique-020409.

[115] 'Global plan for recovery and reform' (note 114).

[116] Jernej Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises,* 4 HANSE LAW REVIEW 1, 71 (2008).

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weak legal frameworks and institutions.[117] Just like in the financial sector, self-regulation through the various international soft laws and company's own voluntary codes has not stopped these companies from behaving 'badly'.[118] This is, however, not surprising in the face of the current crisis. If in the absence of strict regulations, corporations have failed to act responsibly in the area of their core business and in their obligations to their primary constituents (shareholders), how can they be expected to be any more altruistic in their CSR obligations which some consider to be secondary or outside of the core of corporate business?[119] Similarly, if national laws in developed countries with more efficient regulatory systems are unable to efficiently rein in activities of global companies, how do we expect more from weaker national systems in developing countries? Yet, within the current CSR framework based on self-regulation, we are expected to believe the interests of the ordinary citizen are adequately protected.[120]

The second question is whether CSR issues are sufficiently serious enough to warrant a global regulatory response? This paper has demonstrated from the emphasis on the resources industry that the impacts which range from socio-economic to environmental and cultural rights impacts are real, imminent and severe.[121] The cumulative negative impacts these industries have on the affected populations is at least comparable to (or, arguably even outweighs) the direct impacts of the on-going global financial crisis on citizens since their very lives and not just livelihoods are at stake. In the case of these affected populations, their core human rights as recognized and purportedly protected by the international community are violated without easily accessible remedies.[122] While

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[117] David Mepham, *Beyond Corporate Social Responsibility - Rethinking the International Business Agenda*, 3.2 PROGRESSIVE POLITICS 74-75 (2004). See also, Amy. Sinden, *Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs, in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW, 501-503 (Doreen McBarnet *et al* eds., 2007).

[118] See generally, Christian Aid, *Behind the Mask: The Real Face of Corporate Social Responsibility*, (2004). See also, Cernic (note 116), 99. It is important to note in this regards that the London G20 Summit made particular reference to the FSF's tough new principles on the corporate social responsibility of all firms, Note particularly, London Summit Communiqué (note 114), Article 14.

[119] Milton Friedman, *The social responsibility of business to increase its profits*, THE NEW YORK TIMES MAGAZINE (13 September 1970), available at: http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html. See also, Radu Mares, THE DYNAMICS OF CORPORATE SOCIAL RESPONSIBILITIES 1 (2008). *The Good Company – A Sceptical Look at Corporate Social Responsibility*, THE ECONOMIST (22 January 2005).

[120] Susan Margaret Hart, *Self-regulation, Corporate Social Responsibility, and the Business Case: Do they Work in Achieving Workplace Equality and Safety?,* JOURNAL OF BUSINESS ETHICS (2009).

[121] Refer to section D above where the case studies reveal the arduous task involved in local communities obtaining justice against wrongs perceived to be done by, or with, the involvement of multinationals corporations.

[122] Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?,* 19 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 4 (2003).

sceptics may argue that the impacts are localised, evidence suggests that such local occurrences have global repercussions on the concerned corporation.[123] Indeed, the repercussions may extend beyond the concerned corporate concern to people around the globe. A point that comes to mind is how the restiveness in the Niger delta region, linked to the irresponsible social attitude of the OMNCs (in tandem with the Federal Government) contributed to the instability in global oil prices.[124] Furthermore, the continuous gas flaring in the region during oil exploitation, which Friends of the Earth noted is the highest in the world in 'absolute and proportionate terms', contributes to the green house and climate change which is arguably one the world's most significant problems.[125] The responses to the CSR crisis reveal that not much attention is paid to the impacts of corporate actions on local communities despite their global consequences. Unlike the global financial crisis where governments have rallied support to the failed (and failing) financial institutions and are attempting to put global mechanisms in place to prevent future recurrences, this is not the case with governments in developing countries where their citizens are primary victims of 'irresponsible' corporate behaviour. Rather, these governments, especially those in resource-rich countries whose national economies rely significantly, if not entirely, on the given resource, have apparently acted in collaboration with the MNCs.[126] In indicting these governments, one must recognize the enormous economic powers MNCs wield over those countries in which they operate, and indeed, internationally.[127] This is demonstrated even in the current financial crisis where despite the irresponsible behaviour of financial institutions, governments in the most powerful countries have been unable to simply allow them go bust as a result of the implications it will have on national economies and the citizenry.[128] Thus, while recognising that factors such as corruption play a role in the inaction of governments in developing countries over MNC activities, it cannot be denied that in some ways, this is a struggle for most economies reliant on foreign investments for development of their national resources since their national economies are tied to the continuing operation of that

[123] Rhys Jenkins, *Globalization, Corporate Social Responsibility and Poverty*, 81 INTERNATIONAL AFFAIRS 3, 527-528 (2005).

[124] Adeola Yusuf, *Unrest in Niger Delta pushes oil price above$73*, DAILY INDEPENDENT NEWSPAPER (01 July, 2009).

[125] *Gas Flaring in Nigeria* (note 64), 13.

[126] George Akpan, *Environmental and Human Rights Problems in Natural Resources Development - Implications for Investment in Petroleum and Mineral Resources Sectors,* 6 CEPMLP INTERNET JOURNAL 6-5a (2000), available at: www.dundee.ac.uk/cepmlp/journal/html/vol6/article6-5a.html.

[127] MUCHLINSKI (note 20), 3; Villers, *Corporate Law, Corporate Power and Corporate Social Responsibility* (note 21); and, EROGLU (note 22).

[128] Ironically, some of these bailed-out companies have, in the face of public and government outcry, paid out huge bonuses to their executives without any legal repercussions.

particular industry.[129] This further demonstrates the need for a global effort at effective regulation, similar to the response to the financial crisis.

Thirdly, and finally, what are the implications of the impacts of the current crisis and the steps taken to address perceptions of the obligations of the modern corporation? Do they not support more the much broader approach espoused by proponents of CSR that corporations owe a responsibility to promote the well-being of society in general,[130] rather than the narrow conventional approach predicated on the free markets theory, which focuses on the promotion of the economic interests of their shareholders?[131] While shareholders have no doubt been seriously affected financially by the crisis, society as a whole has borne its brunt. Such is the power and reach of the modern corporation that, nations and individuals, no matter how remotely removed, have been singed. Even more crucially, it is the ordinary tax-payers who have been responsible for funding the huge bail-out plans. If the lives of ordinary citizens are thus intricately tied to modern corporations, is it not then questionable that these corporations do not owe legal obligations to these individuals? It may be argued that the current crisis was unique in that it was the financial institutions which were affected and therefore one cannot draw generalisations about corporations in general. While there may be some merit in this argument, it is not entirely correct. In the modern day, corporations, irrespective of the industry, are the lifeblood of any economy. At different times, governments have always intervened through various measures to try to save companies that are central to the economic life of the nation or any one of its regions. The only difference is in the scale of the involvement. Moreover, even where companies are financially successful, as demonstrated from our case studies, members of society have had to bear any negative impacts from the operations that increase the wealth of the companies and their shareholders. If individuals bear these externalities, then it can only be right that there should be some obligation borne by the corporation when it is in profit.

Consequently, global attempts to regulate MNCs must not be restricted to the financial aspect, they must includethe broad range of their activities. The grim realities and impacts of the financial crisis is a reminder of the imminent dangers that non-regulation of MNCs portend for millions of people, particularly in developing countries where, as revealed in the case studies highlighted in this paper, corporate regulation and supervision remains

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[129] Halina Ward, *Governing Multinationals: The Role of Foreign Direct Liability*, The Royal Institute of International Affairs Energy and Environment Programme Briefing Paper New Series No. 18, 1 (2001).

[130] Halina Ward, *Corporate Social Responsibility in Law and Policy, in* PERSPECTIVES ON CORPORATE SOCIAL RESPONSIBILITY, (Nina Boeger, Rachel Murray & Charlotte Villiers eds., 2008); FREEMAN EDWARD, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984); Thomas Donaldson and Lee Preston, *The Stakeholder Theory of the Modern Corporation: Concepts, Evidence and Implications*, 20 ACADEMY OF MANAGEMENT REVIEW 65-91 (1995).

[131] Adolfe Berle, *Corporate Powers as Powers in Trust*, 44 HAVARD LAW REVIEW 1049-1074 (1931). See also, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962).

low. While MNCs signing up to various voluntary Codes of Conduct must be commended, the grim fact remains that they owe no legal obligations to anyone when they fail to abide with particular provisions of such Codes, or choose to extricate themselves totally from its provisions. This paper posits that the inconveniences of global corporate regulation do not outweigh the attendant risks of non-regulation. It is not the intent of this paper to articulate a detailed global framework to regulate MNCs as this is a subject that requires further intense discussion.[132] Rather, it highlights the core concerns that such regulation must seek to address based on the problems that non-regulation creates as articulated in section 4 above.

A multifaceted approach, at both international and transnational levels, to the regulation of MNCs promises to provide the most effective method. At the global level, international regulation should be formulated by a collaboration of international stakeholders including the UN, regional organizations, MNCs and NGOs to create binding minimum standards of operations for corporations generally. The UN Norms have undergone this collaborative process and can potentially be elevated to binding status.[133] Such an international regulation could then be adopted and thus made enforceable at national levels. This is not to prejudice the case for the establishment of an international adjudicative forum. Subsidiary regulations at regional levels could be made to focus on the peculiarities of regional development and industrial/sectoral practices.

Regarding the challenges of litigating MNCs in domestic courts of host states; especially in developing countries, there is need for transnational regulation of MNCs by the home state similar to the ATCA. Two key subjects that need to be addressed within this context are the concept of separate legal entity and jurisdictional access.

The concept of separate legal entity in company law, particularly the legal relationship between holding companies and their subsidiaries, must be re-assessed *vis-à-vis* contemporary corporate practices. The concept of the 'corporate veil' is commonly invoked by holding companies to escape liability for offences done by their subsidiaries that are often able to escape liability in the local forum.[134] Invariably, the plaintiffs in such cases are left without legal remedies despite apparent harm suffered.

Jurisdictional access, that is, granting access to aggrieved persons to legal processes in a parent companies' host country should also be of fundamental concern. Without prejudice to the sovereignty of nations and their right to formulate their own laws, blocking access to courts and other judicial institutions to access remedies for legal wrongs done by their

[132] EROGLU (note 22), 247-264.

[133] Amnesty International, *The UN Human Rights Norms For Business: Towards Legal Accountability* 6-7 (2004).

[134] Refer to section D above where the inabilities of local regulations to hold MNCs liable were highlighted.

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corporate citizens gives an indication that the system protects wrong doers as long as the victims are foreign. While rules should exist to ensure that genuine cases are heard and the judicial system is not clogged by foreign litigation, such rules should not be seen to be either explicitly or tacitly to make such litigation unusually onerous.

F. Conclusion

While the global financial crisis is a grim reflection of the consequences of non-regulation of financial institutions, it is argued that the non-regulation of multinational corporations (MNCs) regarding their social and environmental responsibility has portended serious consequences, albeit on the more powerless and voiceless sections of the global community. Thus, in trying to fashion a new coordinated and stricter global regulation of financial institutions to avoid future crisis, there is also a need to broaden the scope of global regulation to include the activities of MNCs more generally at international law. If corporations, in this case the financial institutions, have through personal greed and irresponsibility so evidently failed to regulate themselves even in their core areas of business necessary for their own survival, how much do we expect of effective self regulation in the area of corporate social responsibility, which is currently purely under a regime of voluntarism? The global financial crisis has thus brought to the fore the urgent need to pursue even more decisively the calls for binding global minimum standards for MNCs at international law which have so far proved elusive. The starting point for such global regulation will include a critical re-assessment of some basic legal principles and concepts including those related to separate legal entity, lifting the corporate veil, and jurisdictional access to foreign legal processes to mention a few.